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Court of Appeal Efficiency

Assembly Committee on Judiciary

Assembly Committee on Criminal Justice

ASSEMBLY JUDICIARY AND CRIMINAL JUSTICE COMMITTEES

COURT OF APPEAL EFFICIENCY

Hearing of October 15, 1981

County Administration Building
Room 310
1600 Pacific Highway
San Diego, California

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82-11-46

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October 15, 1981

CHAIRMAN ELIHU M. HARRIS: The subject of today's joint hearing of the Assembly Judiciary and Criminal Justice Committees is Appellate Court Efficiency.

We hope to identify whatever problems may exist in appellate court structure, administration and practices and to hear proposals for improving appellate court efficiency.

For a number of reasons, the caseload of California's appellate courts has increased dramatically in recent years. We are interested in examining programs, such as the prehearing settlement conference, which have been instituted to deal with the increased caseload as well as other proposals for dealing with the problems facing our state's appellate court.

We will hear today from appellate court justices, civil and criminal appellate practitioners and other experts in appellate practice. Our first witness is the Honorable David Staniforth, Justice of the Court of Appeal for the Fourth District. I'd like to introduce the Vice Chairman of the Committee, Mr. Imbrecht, as well as Larry Stirling, Assemblyman from San Diego and a member of the Committee. Other Committee members should be coming in as the morning progresses, from the Criminal Justice Committee in particular. Justice Staniforth.

JUSTICE ROBERT OLIVER STANIFORTH: My name is Robert Oliver Staniforth and I'm Justice of the Fourth District Court of Appeal here located in San Diego, Division 1.

I understand we're to discuss the causes and cures for appellate court congestion. I gather that's the nature of the hearing. Mr. Chairman, I've always had this problem. I'm sort of a soft spoken judge. I can put people in jail very readily but it's just as effective softly as in a harsh tone. I feel that in attempting to look to the cures and remedies for the problem of congestion, you first have to look and see what the causes are at least briefly and I think you get some insight into what can be done about.it. There's a lot of talk over the state about what causes congestion in the trial courts and appellate courts. But I'd like to and I have here with me today, Exhibit 1. It's on the front page of the Los Angeles Times, the San Diego County Section, and if you're looking for the cause of congestion in the appellate courts, all you have to do is look at the population, things that have happened to Southern California in the last ten years, from 1970 to 1980. It's right there and it indicates that we are just literally being drowned in the sense of population growth. This is translated into court needs in a most dramatic manner. Let me give you some figures. These

are dull sort of things but I think they sort of set the problem in perspective if you're looking for why we have problems of congestion.

When I came here to practice in San Diego in 1946 we had three appellate justices for the Fourth District. The Fourth District encompasses all of Southern California excepting Los Angeles County and to the North, as well as Inyo County. We encompass Inyo County. We then had three appellate justices for this District Court of Appeals, as it was then called. We had at that time a total of 18 trial judges in all of the six counties which are encompassed within the Fourth Appellate District. Now that was in 1946. Three appellate judges, 16 superior court judges. Today, 1981, we have in the Fourth Appellate District ten justices of the Court of Appeal. Five in the first, five in the second district. We have a total of 122 superior court judges in these six counties now. So that means that in 1946 for each appellate judge there were six superior courts making errors and making business for us, if that's what they do. Now today we have 12.2 superior court judges per appellate court judge in this district. This is productive of business. If you look at the matter of lawyers, in San Diego County, in 1946, there were 250 some members of the county bar association. In the first year I came to be an appellate court justice, I swore in 289 new lawyers in San Diego County. This is done twice a year, swearing in close to 300 lawyers. There are today more than 3600 lawyers practicing and the ratio of lawyers to judges and appellate court judges has just increased in the same ratio that it has between superior court judges and appellate court judges. I think the population in this district tells you what has happened. It is not just population, it's the nature of population which has increased our filings. We have had this enormous increase of people coming in -- old people -- we've had a whole variety of different ethnic groups which have come into Southern California, into San Diego, Imperial, Orange County, and the result is just an enormous increase in the productivity of a whole variety of cases. This is a fact you just can't get around, the fact that we are associated so closely to the border. It's just a natural production place for various types of nefarious criminal activities. This means business for the Southern California courts and the Fourth District in particular. So if you are looking for causes, great and small, for the increase in the business of the courts, all you have to do is just look at what's happened to us in the last 20 years and you've got reason enough. Well, among the lesser causes for this are things which I'm sorry to say you have done to us and also things we have done to ourselves, the judiciary has done to itself. When the Legislature in its wisdom passed the determinate sentencing law, it just produced an enormous amount of business for the trial courts and appellate courts. I'm not saying anything about the wisdom of it.

When you put it in effect in 1977, it just produced a flurry of trying to find out exactly how you wanted the law enforced and I don't know how many cases I wrote myself in response to this whole problem of sentencing under this law. There was a flurry of case writing all over this State and every time there are substantial changes in the Penal Code, ;you'll find that there is a response in the court system. So in that sense, you do it to us. Sometimes, you don't do it to us and that causes business. The whole problem of contributory negligence has been on the back burner and it's a real heavy political issue and I can see why the Legislature would not want to get involved in such a thing. Some states have resolved the problem legislatively, but our Supreme Court finally took it on as a matter of a judicial thing and that has been enormously productive of trial and appellate court cases. If you would be kind enough to take it off our back we would appreciate it. But the political exposure in getting into an area of that sort is enormous and I don't blame you at all.

CHAIRMAN HARRIS: How do we take you off the hook?

JUSTICE STANIFORTH: If you did as some of the states in the East have done, to take this on legislatively rather than to have the Supreme Court to determine it. There is not just a question of contributory neglect as an issue, but I think they have defined at least 30 some or more subsidiary issues which remain yet to be resolved in this area. And we're trying to resolve them by judicial case, case by case. But some jurisdiction, I believe it's Wisconsin, has taken it on and done it as a legislative task. But there's enormous political problems involved and that's because you have some strong minded people who have differing views about this question of negligence and assignment of responsibility for negligence. Well, so in other words, we, the courts on occasion create our own problems by -- it's a species of judicial activism and it's brought on... I don't think we really would prefer -- at least I don't -- I feel that it we can avoid judicial activism, let the Legislature take on the brunt of the burden.

I'm totally in favor of it, but when it's put to the courts just straight where you have to make a decision on it, you do it and so it's by this process that we have come to the point where we are sort of sinking in a sea of paces, excepting in the Fourth Appellate District. Here I have a second exhibit and that's the report from the Judicial Council as of July 31st... perhaps someone from the Judicial Council will have a later, but this is the last one I have in hand... in the case of filings and dispositions, which would indicate that for the most part, we have a fair backlog. The Fourth District does not have a great backlog of cases.

Within my own First Division, we are waiting for cases now for assignment for hearing. As soon as a case is ready for

assignment, that is, the briefs are in the -- the reply brief has come in, then the case will be assigned to a judge and be assigned to a timed court hearing. So we are current in that sense. This is true both of criminal and of civil cases. We have come to the place where we made a request through our presiding judge to the chief justice for assigning of cases from districts that are having less success in handling the overload than we are. And we have within the last month taken on approximately 50 cases from one of the other districts in the State.

And this to me, if you are looking for one of the remedies that's available, this matter of the power within the chairperson of the Judicial Council to assign the workload around the State is one of the remedies that can be used. Different areas have different divisions which have different quantities of production. There's just no question about it. There's a whole variety of reasons for that, but I think by the process, well, it's perhaps in the technique that's used. For example, each of us in the appellate court system have had one what we call a elbow clerk. This is a research attorney who is assigned to us and worked for the year or, since they're professionals, they stay on beyond a year's time.

The Chief Justice asked for an additional elbow clerk for each justice over the State. I think instead of 50, she got nine. And she -- the Chief Justice Bird then assigned, fortunately, I don't know -- she must like this district because she assigned five of those elbow clerks to the First Division of the Fourth District, my division, so I have an extra -- now I have two research attorneys to help me. Well, the first thing our presiding judge did was increase our workload, he increased it from what we had been at six, he immediately increased it to eight cases per month that we are assigned as the principal author. I believe that this technique of additional elbow clerks has been used in other districts, perhaps not with as great a success as I hope we will have. And it's a question of how you use them. It's the technique I for example -- each judge does it differently but you can assign a case to a research attorney and one or two months later you get back a law review article. Well, at the Supreme Court level, I think that's proper. They need to take the very broadest view at the Supreme Court level. But at the intermediate appellate court, I feel that we're not in the business of writing law review articles, with the result that it's an inefficient use of help of the clerk to simply assign and expect to get back in a month or two some very large wonderful law reviews. What my own technique is, the one used I think by Justice Gardner, who is the fastest gun in the West, up in the Second Division of this court and that is that I, myself, and some of the other judges go through the cases first ourselves, and dictate or prepare an original memo directing which direction it is going to go, the broad outlines of the thinking on it, the reasoning process involved in it, and then after that's done,

then assign it to a lawyer, one of your research attorneys to go and research out the dark ends and go see that your premises are correct, to go through the trench. These are just techniques which do I think expedite. In this fashion, you can accomplish I think a great deal more than just simply assigning a case and expecting some month in the future to hear from them.

ASSEMBLYMAN CHARLES IMBRECHT: Mr. Justice, do you think that it would be useful for those kinds of techniques to be shared? Should you have an opportunity to work with other justices within your district?

JUSTICE STANIFORTH: I think it would be enormously helpful and it is done at our seminars. We do discuss this technique of opinion writing and we do discuss this technique of use of the staff, of our elbow clerks, but the thing is all men aren't angels. Each has a different quantity to contribute and I'm not saying at all that the writing of the lengthy full blown scholarly type almost Supreme Court type opinion isn't proper. I like to do it myself and I'm accused of doing it sometimes but I think as an Appellate Court justice we have a more specific job. We aim at a specific problem. We should get in and get out.

ASSEMBLYMAN IMBRECHT: Let me try to rephrase that. I guess I was trying to lead the witness in a sense but I have some concern about static divisions within districts where you clearly have some divisions that are not even minimally approaching the productivity of other divisions elsewhere in the State and I have some concern about leaving those divisions intact in effect in perpetuity until there is a change in a clear professional sense of one of those justices. I wonder if you could comment. I've heard some legislation in this area in terms of providing for a periodic, infrequent rotation if you will or change in the membership of divisions within a given district.

JUSTICE STANIFORTH: I think that a sort of cross pollination is extremely important. I keep urging it almost on a daily basis. For example, we have been assigned these 50 cases out of another district in the First District. We are working on them. I have worked on seven of them thus far in the month since we received them. I feel that it would be much more helpful than to have the people, the lawyers who are going to argue these cases, to come to San Diego. If we could go up and sit for a day or two or three and work with the people in the San Francisco courts so that we could see their techniques and they could see ours. I have discussed this with one of the presiding justices in the First District and he's most anxious to come down and see just how the San Diego technique works. There are all sorts of techniques for expediting that we have. For example, when I came on the court five years ago, we had what was called a wall. This was a wall that had over 300 cases that were there waiting to be tried, waiting to be heard, but we had no judges to hear the cases. We had not had an appointment to the court for more than

a year so when I got there, I said to Justice Brown, when we get through with our assigned cases, we were then doing five and we went to six and when I got there, I said we have to go to the wall. We've got to get rid of them. And through the willingness to, after you've completed your assigned work for the month, to go the wall and take those off -- we just got rid of -- we are out of the wall. We do not have it anymore.

CHAIRMAN HARRIS: Our concern, at least my concern, and I certainly will not attempt to speak for my colleagues, is a reality. Some of it is fiscal. That is, that we're not going to be able to simply respond to the increased caseload by adding more justices. We went through a lot of changes this year adding the number that we did and there was a great reluctance or reticence if you will, in the Legislature to creating more judgeships. These cost untold hundreds of thousands of dollars in terms of staff and other attendant costs. So it seems to me that what we're really going to have to do is come up with some very specific recommendations as to how we can either change the scope of appellate review or how we can in fact deal with the review of those matters that are perhaps frivolous, specious arguments at best, that is whether or not we ought to relook at the question of automatic appeal. Should that be something that we should constrain to some extent, because our trial courts are becoming more professional in making fewer errors. They are becoming a little better at what they're doing. I mean, what can we do to maintain the structure, the numbers of appellate justices, we now have approximately 84, according to the new legislation. I don't think we're going to have many more than that, even if your caseload goes up tremendously. Now that's my opinion. Do you have any comment on that?

JUSTICE STANIFORTH: Well, it was between a rock and a hard place. The Judicial Council has these figures for every so many people/population you need another judge.

CHAIRMAN HARRIS: We understand that, but you ought to understand the legislative reality, and that is this: That your caseload is going to continue to be backlogged, unless you make some very hard decisions that I have not seen the judiciary willing to make to this point and that is, make some recommendations the way we have to decide between evils, so to speak. We'd like to do X, Y, or Z, but now you have a situation where you've got to say if we have anything to do with it, we would rather do the following as opposed to something else. That's what I'm really asking. Are there specific things that you might recommend even if it's with reluctance, even though you say it's not a good way to go, but if you have to go to...

JUSTICE STANIFORTH: Very good. First, what I feel is not appropriate, the matter of cutting off the right to at least a single appeal is just fraught with all sorts of problems. Not only constitutional problems, you've got the whole problem of

chopping a person off. It's a problem of due process. Just what does due process mean? This is a real hard problem. I just have some questions in my own mind about the cutting off totally of the right to appeal on a person. I have constitutional worries about any such approach to the resolution of the problem.

CHAIRMAN HARRIS: I share those concerns.

JUSTICE STANIFORTH: Secondly, it's basically not fair. That's the problem. A person has the need to perhaps to get at least one thing. I agree that beyond that it isn't necessary.

CHAIRMAN HARRIS: But I'm saying that it seems to me that there ought to be the possibility of a cursory review if in fact there are no material errors, if in fact there is no basis...

JUSTICE STANIFORTH: We do that right now. We do it under the present law and that's perhaps one of the secrets of the Fourth District. You look at the statistics on the number of what we term "by the court opinions." I think the figures might indicate we are one of the worst offenders or the best, however you look at it, in the whole State in the use of "by the courts." These are staff prepared. These are theoretically limited to cases in which there are no great judgmental factors involved, things which generally result in affirmance of a trial court decision. If that's so, and it's controlled by precedent, that no change in precedent to control it.

These are ones which can be prepared by staff, and we use it, but there's a negative aspect to that type of approach and that is that the Bar and the litigants generally don't like it quite as well as they like it where a judge will sign on. They don't like this "faceless decision", as they are spoken of. And I can see why. If I were a litigant and I had a serious matter, I'd like to know there's three judicial minds. Well, we do our best. I think the "BC" approach is excellent and it responds directly to the questions you have. We should get rid of them that way. We have another problem and that is that there is a constitutional requirement that we set forth the reasons. But the question is how lengthy must you be? I know Judge Puglia apparently got too short in one of them here recently up there in the Third District and it got sent back because apparently it didn't fulfill the constitutional requirements.

But we do have to say a few words over this. I agree with you that we don't have to write lengthy opinions on most of the cases in order to dispose of them. This is one of the secrets of the Fourth District in becoming current. Secondly, another area which you can help us is in this matter of the use of staff. I don't know about increased use of the permanent staff, but I can see enormous possibilities in making use of the two lawyers I have just, well, we jumped from six to eight just

on the assignment of these second counsel. This is $20,000 a year instead of $100,000 you are going to have to pay for a judge. So I think it's a real good investment.

ASSEMBLYMAN LARRY STIRLING: If I could Mr. Justice, first of all, I want you to know that I've admired your work from a distance for a number of years and I have great respect for you. The thing that struck me during the time that I was Chairman and Vice Chairman of the Regional Criminal Justice Planning Board here in this county was that the court system of all the institutions in the criminal justice system was the only one that did not have institutionalized internally some analytical analysis, some requirement to evaluate the practices. Obviously the problem is that we need to insulate the judiciary from the rigors of blackmail, corporate, governmental and otherwise but in doing that, we also insulate them from the scrutiny of administrative efficiency and have proven that regard.

I'm wondering if I'm wrong in that assessment or if there is indeed somewhere in the judiciary system an analytical element other than the good faith or the initiative of a specific justice or the initiative of some staff. Is there an analytical element -- do you have an analyst available to you? Have you automated, have you gone to word processing, have you automated your caseload? Do you annually update and iterate among your colleagues statewide improved techniques and is there some way the public can see that iterate process without threatening the judicial insulation?

JUSTICE STANIFORTH: Each thing that you have mentioned we have done. We have automated for example. We got the word processors and it just has an enormous effect on productivity. I can produce, or my girl at least can produce, four times what she was able to produce on the mechanical typewriter.

ASSEMBLYMAN STIRLING: Is that true statewide?

JUSTICE STANIFORTH: I don't know what's happened in the other areas but it's most -- I'm a very picky type of writer. I just write and rewrite and if the young woman has to rewrite 20 pages every time I change a page, that's tough.

ASSEMBLYMAN STIRLING: How about the legal research? Is that automated yet?

JUSTICE STANIFORTH: We have, for example, the Lexis. We have that and it's becoming more used, some of us old people aren't quite yet accustomed to it. But we are all learning. We have all had the course.

ASSEMBLYMAN STIRLING: Is that statewide?

JUSTICE STANIFORTH: Each of the districts has it. We are going in our library to the microfiche type of thing for the centralization of library and data retrieval. We are coming into the 20th Century in this process. The Judicial Council watches us fairly carefully and periodically they do hire some of these professional groups to come in and study us.

ASSEMBLYMAN STIRLING: But there is not institutionalized any internal mechanism such as, for example, the city or the state has. We have the Legislative Analyst, or we have the annual budgetary process where there is competition for resources and theoretically if you've got good management and good leadership, some reform and efficiency mechanisms must be faced. In the case of the judiciary, though, you simply send us the tab and if we don't like it, tell us to go to hell, that we've got to pay it anyway.

JUSTICE STANIFORTH: No, we've never said that to you.

ASSEMBLYMAN STIRLING: No, of course not. I think you're telling me that there is indeed not institutionalized within judiciary some crucial heartrending annual...

JUSTICE STANIFORTH: The question should be put to the Judicial Council. I am so busy grinding my nose on cases and rolling them out that I expect that the Judicial Council performs such a function.

ASSEMBLYMAN STIRLING: You suspect it?

JUSTICE STANIFORTH: I'm on the front line in the trenches and I just don't have time to see what they are doing at that level.

ASSEMBLYMAN STIRLING: What percentage of your total workload would you characterize as indigent criminal appeals?

JUSTICE STANIFORTH: I would suspect about half.

ASSEMBLYMAN STIRLING: About half. I would be interested if you have any thoughts about, one of the concerns I've got... and I've certainly want to assure you and anyone listening that I very much believe in affording full opportunities and protection of the law to every citizen. I do have some concern, though, that there is at least some balancing disincentive to pursue an appeal that has a very, very, slight likelihood of success, that that doesn't really exist where the indigent dependent who has been convicted, but continues to have full public resources at his disposal, to pursue an appeal even if there are no merits for such an effort. And I think that is a problem that we somehow have got to try to address. And you tell me 50 percent of your total workload stems from that area, which certainly cannot represent 50 percent of the total convictions, I wouldn't think.

JUSTICE STANIFORTH: No, it doesn't. It's a small percentage.

ASSEMBLYMAN STIRLING: Do you have any suggestions about how we might balance...

JUSTICE STANIFORTH: Many of these cases that you have reference to are disposed of by this "BC" process. They are rather quickly, summarily disposed of because they just don't present any substantial legal question or warrant any great flurry of effort on the part of the appellate courts. Second, we have a need for expediting and cutting down the cost on the cost of appeal. There are several areas which -- you fellows take it on -- you're politicians -- you take on the reporters, the greatest single cost for delay...

ASSEMBLYMAN STIRLING: Only some of us take on reporters.

JUSTICE STANIFORTH: I don't mean newspaper reporters. I mean the court reporters, because the greatest single cost for delay in the appellate court is the reporter's transcript. We are waiting now, we are told we will have to wait two years for a transcript on one of the lengthy cases, the poor defendant might be dead by the time we get the transcript. There are techniques, now, available -- these modern techniques which are presently available for the expediting of the transcripts, they've been used in the Third District, I believe, and have begun to be used here in our District. We need desperately to expedite that process. This is why we sit and wait to hear the appeals because we haven't got the transcript yet on which the lawyers can write their briefs. And so a little investment in money in seeing that we get the reporters into the 20th Century, I think would be a big help.

ASSEMBLYMAN IMBRECHT: The electronic recorder?

JUSTICE STANIFORTH: Yes, electronic. I shouldn't say that, because the reporters, they will picket us.

ASSEMBLYMAN IMBRECHT: You are free to say it, they can't vote against you.

JUSTICE STANIFORTH: I've got 10 years to go yet, so I'm safe. I will say that we do have electronic reporting.

ASSEMBLYMAN IMBRECHT: If you have electronic reporting, would you still have to have a full written transcript?

JUSTICE STANIFORTH: Well, if we had a system, I understand that the technique is available, so that the lawyers could point us, give us the particular point in time -- if that...

ASSEMBLYMAN IMBRECHT: You wouldn't need all the written transcripts, you could just listen to that part of the hearing.

JUSTICE STANIFORTH: Now, we need to look in this matter of video type of thing, because then you can get the full flavor of the whole process and can get it very quickly, but the present level of techniques as they are using in the Third District, would expedite our hearings enormously.

ASSEMBLYMAN IMBRECHT: Mr. Justice, if we could get you to summarize your testimony so we can move along, we would appreciate it. We tried not to interrupt your...

JUSTICE STANIFORTH: I think that our techniques are the expediting of the judicial process, that is giving us more help, giving us the tools we talked about to do it. I think if we have that, we can do it without the increase in judges. It is my own feeling, and a lot of people disagree with me, I don't feel that you have to have more judges in order to increase the production. I had all sorts of other suggestions about the matter of...

CHAIRMAN HARRIS: Well, I hope that you will submit them to us, and we will keep the record open and any specific recommendations that you might have, we would like to add it as an extension of your remarks.

JUSTICE STANIFORTH: I certainly appreciate telling you my troubles and hope that you can give us some help.

CHAIRMAN HARRIS: Well, we will, but in particular, we would like to have your input in whatever we do. We may find ourselves in a reactionary posture and so some things without your input in this we get your advice, your recommendations, your practical experience as a jurist, because we don't really know, all we know is you've got an economic situation that we have to balance out as opposed to our philosophical leanings and, as Chuck indicated, our desire is to see that everyone is afforded a chance for equal justice under the law. But, we have to do that within the economic constraints we find ourselves in. I went to the Ways and Means Committee to get the money for the justices -- the increased justices -- the argument is, why are we going to create more justices when I've got to do it at the expense of poor people; I've got to do it at the expense of senior citizens, so and so forth; is giving me those kinds of hard decisions. And we are going to be making them with or without your input; but I appreciate your expertise and time that you took...

JUSTICE STANIFORTH: I agree with you. I'm not saying that we need more justices. I think we need more clerks; I think we need more mechanical devices...

CHAIRMAN HARRIS: We are going to look into all of them. Yes. Mr. Stirling. One more question.

ASSEMBLYMAN STIRLING: Mr. Justice, in your opinion, does a great deal of the productivity of the various divisions simply depend on the initiative and the perspicacity of the individual justices?

JUSTICE STANIFORTH: You hit the problem right on the head.

ASSEMBLYMAN STIRLING: Thank you.

JUSTICE STANIFORTH: All you have to do is look at your fellow legislators. Everyone has a different measure of production. I don't criticize the fellow who does it differently. Thank you.

CHAIRMAN HARRIS: Mr. Davies and Mr. Gampell as well, from the Judicial Council, we certainly want to hear from you. I'd like Mr. Gampell to come forward.

MR. RALPH GAMPELL: Mr. Chairman, do you want questions or do...

CHAIRMAN HARRIS: I've tried to lay out to Justice Staniforth our concerns. We would like to come up with specific recommendations. We have the report of the Chief Justice's special committee on appellate practices and procedures for the First Appellate District...

MR. GAMPELL: ...The recommendations I think that are applicable to all the justices as well...

Let me just pick up, if I could on Mr. Stirling's question to Justice Staniforth. The answer is, yes, there is centralized budgeting. It is not done in each court and the budgeting for next year has already started. It is centralized through the Judicial Council and there is a great deal of tugging and hauling and one budget goes up from the Judicial Council to the Legislature on behalf of the Appellate Courts, the whole appellate system of the state.

ASSEMBLYMAN RICHARD ROBINSON: Mr. Gampell, how much of that budget is given scrutiny by the State Department of Finance?

MR. GAMPELL: Every line of it. And every line of it...

ASSEMBLYMAN ROBINSON: ...and you undergo the same budget hearings with the Department of Finance in November and December that any other state department would undergo.

MR. GAMPELL: Yes. And Leg Analyst...

ASSEMBLYMAN ROBINSON: Well, I certainly know the Leg Analyst does but I wonder to what degree the State Department of

Finance and their management experts have any input in your budget process.

MR. GAMPELL: Well, I know the budget people of our staff are in constant negotiation with the budget people of the Department of Finance. I don't know the extent to which what they do -- the amount...

ASSEMBLYMAN ROBINSON: The reason I ask that as sitting as a member of the Subcommittee on Ways and Means that has your budget, as you hold the Judicial Council's budget, constantly we hear your representatives saying, "Well we can absorb this cost, we can absorb that cost", if it happens to philosophically agree with the Chief or you. But yet, there are other costs, they say, "no, no, there is no way we can absorb that", which tells me that there is some fat in that budget and I'm not sure that it is getting the proper scrutiny...

MR. GAMPELL: I think, Assemblyman Robinson, it is not that it is fat, but it has to be heavy budgeting against contingencies that nobody can predict. Such as budgeting for assigned judges; those judicial vacancies that are not filled, that we have to fund and nobody knows as the year goes on how big that fund is going to be. So it is appropriated and if it isn't used, it's turned back.

ASSEMBLYMAN ROBINSON: Did the Governor's recent executive order of two percent cutback affect your budget?

MR. GAMPELL: We propose to go along with that, but I think our situation is the same as the Legislature's. We are a separate branch of government; we are going to go along with it. But the executive order to the executive branch obviously doesn't affect the courts any more than it does the Legislature. But we do propose to turn back two percent.

ASSEMBLYMAN ROBINSON: Well, if you turn back two percent and with the new justices that were created in Mr. Harris' bill, you are going to have some difficulty if they are all appointed.

MR. GAMPELL: We are going to have a great deal of difficulty. If I could go back again to a question of Mr. Stirling's, and that is about the modern age. Yes, it's being brought on line, there is statewide data processing; docketing of the whole appellate system; that has been obtained and the last bits of the program are being put in. And that was obtained through the administrative office. Every justice of the appellate system has a word processor and appropriate backup. We have made an attempt in the last two years to bring the appellate system up, at least mechanically, into the 20th Century.

We had a proposal from the two main suppliers, Westlaw and Lexis and we were able to lease Lexis on very favorable terms and we have Lexis now in each of the appellate courts and in the supreme court. We asked the justices at the presiding justices meeting on Saturday, how they liked it. And the response was good.

ASSEMBLYMAN STIRLING: Nearly every state agency in the State of California has attorneys and do research in one regard or another. Some of those have gone to computer automated research and some have not. If you have now leased out with a provider, it may have been cheaper in the long run for the state to simply develop its own service bureau. I'm wondering if that had been contemplated at all.

MR. GAMPELL: Well, it isn't the problem about -- just the mechanical technique -- it's the data base. And I think there are only two data bases in the United States, and Lexis has a much bigger data base than Westlaw, but the data base within the state, the biggest one I know, is in Leg Counsel's office and it in no way encompasses the data base that an appellate court would want.

ASSEMBLYMAN STIRLING: But the system you have now, are you tied into -- who did you say, Westlaw?

MR. GAMPELL: Lexis.

ASSEMBLYMAN STIRLING: And so forever now, the state judiciary is going to be paying for service bureau charges and access charges to them as opposed to maintaining our own system, which we could have leased out to somebody else. To local city attorneys and local smaller cities that have the same dilemma that we do.

MR. GAMPELL: Yes, but remember we are still very much in the experimental stage. We're leasing, I think, on six-month increments, because to begin with, we didn't know what the receptivity would be from the judges and their law clerks. We didn't want to get into any big capital outlay. Among other things, we didn't have the capital. But we've got very favorable lease terms, I think we are getting a deal which encompasses the state public defender and some more people. It's very favorable, indeed, so...

ASSEMBLYMAN STIRLING: Are we still in the experimental stage?

MR. GAMPELL: Yes...

ASSEMBLYMAN STIRLING: This is 1981 and we're still in the experimental stage?

MR. GAMPELL: Well, we've only had it in for six months.

ASSEMBLYMAN STIRLING: That goes back to the original question I asked you. You answered by saying, "Well, there is statewide budgeting now." But the excruciating, agonizing reappraisal each year of all of our techniques, I hear you saying, as I expected you to say, that you were doing a pretty good job, there, and we are always looking for better, and that's fine. But as the years pass, and if we are more concerned about how a bunch of nice old judges are going to react to the reforms, rather than the excruciating pain of the Legislature or the city councils, or supervisors are going through, the exigency should control and not the comfort of the judges.

MR. GAMPELL: In the years when this state was fat, the Judicial Council of the past wasn't doing it, statewide data processing, I've only got in within the last two years. When things were timed, and automated legal research which has been around for a bunch of years, I've got one in in the last six or nine months.

ASSEMBLYMAN STIRLING: Well, I congratulate you for that, and, again, it brings up my point. Under the existing system that you have, it really depends on the initiative of an individual. Of the leadership of an individual, either the Chief Justice, yourself, or Justice Staniforth, or someone like that. As opposed to an institutional relationship where there is an annual reevaluation of that with some political -- judicial political blessing -- the terms are now reform and improvement, technologically and don't give me all this nonsense about your comfort zone and you only want to do two cases a year,...

MR. GAMPELL: There's another flip...

CHAIRMAN HARRIS: Does the Judicial Council have any control or any role in all of this?

MR. GAMPELL: The Judicial Council?

CHAIRMAN HARRIS: Yes.

MR. GAMPELL: A role in what I've just been saying? It mustn't be forgotten that every appellate judge is an independently elected public official, just as a member of the Legislature.

ASSEMBLYMAN ROBINSON: Independently elected is stretching the terms, Mr. Gampell, you are a very good lawyer, and know they are not elected, they are confirmed. They are confirmed by the people, they are not elected.

MR. GAMPELL: I say the language -- shall so and so be elected...

ASSEMBLYMAN ROBINSON: ...No, shall so and so be confirmed.

ASSEMBLYMAN STIRLING: I think though you have raised an excellent point. Whatever it is, the fact is...

ASSEMBLYMAN ROBINSON: They are appointed by the Governor. If they were elected, then the people would be free to put an opponent up against them and defeat them. They can only be removed by the public. They may not be elected by the public.

ASSEMBLYMAN STIRLING: Your basic underlying truth is still there. They are a bunch of independent political islands out there, and if you get them all to agree to something -- whatever the word is, the question I'm trying to get to, and I think you are answering it very nicely, is that it is pretty tough to get the old boys to reform.

MR. GAMPELL: Well,...

ASSEMBLYMAN STIRLING: There is no institution in the judicial system that has the authority to have them heave-to and reform.

MR. GAMPELL: A great deal of it, you know, is by -- the kind of thing you were asking Justice Staniforth == is the word spread? This chief has instituted a regular meeting of the presiding justices of each division which allows a certain amount of collegiality, a certain amount of sharing. It meets every two or three months. All the justices meet once a year at an appellate institute. There is also another appellate institute run by the judicial education system. But, in the last analysis, if Judge X of a court said I am not about to do that; for example: One justice said, "I will not have my secretary use word processing." That's it.

CHAIRMAN HARRIS: Yes. Well, that's one of the things we have some responsibility for and we have not exercised; that is, we found, for example, individual justices or individual divisions of our state court of appeals coming in with specific requests of the Legislature. I wouldn't disapprove of that, but by the same token, you've got to get by this piecemeal approach whereby there is no centralized decision-making where there is no process by which there is some consistency, some reason to conform, some encouragement to utilize efficiency or to be penalized.

MR. GAMPELL: Assemblyman Harris, as far as budgeting is concerned, budgeting is central. We put in one budget. The fact that Justice X feels he has muscle with policy or fiscal committees and is able to get something more out of the pot, that is something over which we manifestly can have no control. But as far as trying to bring pressure to bear on a particular court,

to operate in a certain way, all it can be is friendly persuasion. There is no way...

ASSEMBLYMAN ROBINSON: Mr. Gampell, let me give you an example. Existing law, I believe, provides that a justice or a judge who sits on his derriere and doesn't render an opinion within an appropriate period of time, his salary can be withheld. He certifies at the time he puts in his salary claim. That type of carrot and stick approach can be expanded to include such things as automation to be an encouragement to be a little bit less loquacious and more effective. There are all kinds of ways that could be expanded, probably within the constitutional limits.

MR. GAMPELL: We have never accepted the proposition in this state at any level that the system is like New Jersey with the Chief Justice sitting at the apex of a pyramid, this level below this, this level below that, and this level below that; I think, all I can give you is an example of why that wouldn't work in California. I think...

ASSEMBLYMAN ROBINSON: Let me give you an example. Doesn't the Chief Justice have the ability or the Supreme Court have the ability to stop the publication of so many decisions coming out of various DCA divisions and...

MR. GAMPELL: Through de-publication, yes.

ASSEMBLYMAN ROBINSON: Is that exercised very often?

MR. GAMPELL: I think more than the appellate justices would like.

ASSEMBLYMAN ROBINSON: But maybe that becomes a good peer pressure to use. It's been my experience that certain justices render a great deal more decisions, whether they are upheld on appeal or not, that would have to be waived. But they begin to render more decisions in a more effective and within more reasonable time limits than other justices who have to put 50 pages of dialogue together to simply render a two sentence decision. Now if the Chief decided to exercise her constitutional and statutory ability to not publish some of this stuff,...

MR. GAMPELL: That has to be a court decision, it's...

ASSEMBLYMAN ROBINSON: If the court decided to exercise that then, there would be less incentive for an individual justice to think that he is rewriting the entire collection of statutes of this world at the time he is rendering a decision, which would encourage him to be more efficient.

MR. GAMPELL: I hear you, but I think there would be blood in the streets.

ASSEMBLYMAN IMBRECHT: Does it make sense to you to leave four demonstrably less productive justices together in the same division in perpetuity?

MR. GAMPELL: No, I would not care to answer that in my institutional capacity. In my personal capacity, I've often wondered why there was not some remixing at stated intervals, maybe a couple of years...

ASSEMBLYMAN IMBRECHT: Los Angeles for example has five divisions. You have demonstrably huge disparities in the productivity of the various divisions, and aside from a whole variety of other, I think, positive reasons, there ought to be an occasional mixture -- not so frequently that it's going to destroy continuity and all of those other sorts of things -- perhaps annually or biannually.

MR. GAMPELL: Yes.

ASSEMBLYMAN IMBRECHT: Obviously, I think it makes a great deal of sense. I think there is a real question about whether or not people get very comfortable with one another and with a very low productivity within their division, and that's an accepted peer circumstance.

MR. GAMPELL: Well, a model by which that might be done, and I must stress again, please, this is entirely a personal thought, not institutional, is that you might leave the PJ in place and you pick three or four members of the panel at random. I don't like the approach where every case has a new panel. I don't know how you would ever talk to your colleagues -- I want to talk to you about Smith versus Jones and I want to talk to you about Jones versus Cline. But, the idea of a panel changing every couple of years at random, certainly does have some...

ASSEMBLYMAN IMBRECHT: In terms of the discussions that you had and the periodic conferences that were held with the appellate justices, could you also explain to me how it is tolerated after such a long period of time that the five divisions in Los Angeles all have issued separate rules of practice. It is bad enough that there is no uniformity in terms of rules of practice amongst these districts in the state, but it is much worse that within the same district, you have entirely different rules of practice for separate divisions. How has that been allowed to continue?

MR. GAMPELL: Mr. Robinson will forgive my misuse of the process, I come back to independently elected public officials. That is the way they want to do business.

We do not have a monolithic, hierarchical court system in California and that means a group of judges are going to carry on their business the way they believe to be the most expeditious. It may not be the way their colleagues down the hall think is most expeditious.

CHAIRMAN HARRIS: Let me interrupt you. We want to move along. I want to ask this: We would like the Judicial Council to come up with some specific recommendations. Now I think there is some way we ought to be able to force that, because either I think you are going to come back with some recommendations on how to get a little better accountability whether it is a carrot approach or a stick approach as it relates to the inconsistency among the so-called independently elected officials, either we come in with a new review process which I think is fine, we ought to have the Judicial Performance Commission periodically review all the justices and get some type of objective standard, even if it is not used for anything other than to see whether or not they are in fact performing reasonably well in terms of the number of opinions. If they are appellate justices, how many of their opinions have been reversed at the Supreme Court? To look at really whether or not they are doing the job they have been selected to do. Because, you know, where as we do not have appointment for life, it damn near comes down to that.

MR. GAMPELL: To show the enormity of that task, this state, we've been fooling around, now, for what, 15 or 20 years, on a much simpler process. Should we unify the superior and muni courts? Now that is a very simple up or down...

CHAIRMAN HARRIS: Don't mention that. Mr. Stirling might go...

MR. GAMPELL: I mean, that's a simple question. And you can't get any kind of consensus. And what you're asking, is that we in some way, without power, proceed to take over the appellate court.

CHAIRMAN HARRIS: We have some power, within constitutional limits, to do it. And what I'm suggesting is this: If our staff collectively comes up with a list of things we would like the Judicial Council to answer in terms of what the possibilities are, the problems that might exist with centralized rule making, for example, so that we have some kind of consistent process of rules. What are the limits? What flexibility should we allow while still having something consistent. What can we do for example, in the report of the Chief Justice's committee from the First Appellate District, there were a number of specific recommendations. Maybe we ought to have one judge who would have the responsibility for passing on recommendations to the appellate court as to which appeals seem to be frivolous, sort of a pre-screening thing. Maybe we ought to look into those kind of things. We could come up with a list of those kinds of

recommendations and the Judicial Council would respond to those with some degree of concise thoughtfulness and what amount of time if, in fact, they can respond...

MR. GAMPELL: Well depending -- the answer to your first question is: Yes. To any...

CHAIRMAN HARRIS: Do you have resources to do that?

MR. GAMPELL: It will take a lot of staff resources and it will not be...

CHAIRMAN HARRIS: It's critical. You are going to be caught up in a situation very shortly that is going to take all of your staff or reduce it, or do something to it that we may not be able to control.

MR. GAMPELL: I recognize that too. All I can pledge to you is that we will do our best to respond to questions that come in from this committee. Some of that we will be dealing with are very edgy constitutional issues, and to that extent it may take time. But it will be given our best shot.

CHAIRMAN HARRIS: I'm going to work with the members of this committee and try to come up with an appellate bill that will take a very strong look at the way our appellate courts are operating in California and it's going to be -- if it can be put together it will be a bipartisan bill -- it will be a bill that will be with or without the input of the judiciary. They may be critical. They may come in and they may defeat it. I'm not arguing that. But I'm saying that we have got to do something and I'm not going to carry anymore of these bills creating more judgeships as being a panacea to the problem, when you know we got economic limitations that are going to prevent that from being the solution.

MR. GAMPELL: Well, I only hope, Mr. Chairman, that in putting such a proposal together, that you will recognize that some parts of the system are, as Justice Staniforth said, really working quite well.

CHAIRMAN HARRIS: They are. We understand that. We want to take those positive examples and see that they are emulated throughout the system. We want to accentuate the positive and eliminate the negative. Maybe the court can't do it because it can't discipline itself, but that's why you have three branches of government.

MR. GAMPELL: Well, let me give you a for instance, Mr. Chairman. You heard Justice Staniforth talk about the great advantage he got out of the second elbow clerk. And what a saving it is -- it is a saving of money. We went to the mat on that before the Legislature this time and...

CHAIRMAN HARRIS: Why don't you get to the mike, so that the record reflects your answers.

MR. GAMPELL: Right after 13, there was a proposal which the judicial council brought up again for state funding. Because of a tremendous ground swell on the judiciary, statewide, that was couched in terms of state funding with local control. I'm not sure I know what that means, but it was quite clear that it didn't mean that it was to be centralized control. Now, there is nothing in the Constitution which would allow for centralized control. The Chief Justice has said that she certainly doesn't look to it, doesn't want it. The idea -- the Judicial Council -- the administrative office has to be responsible for how they run a court, in the East Los Angeles muni -- it would entail a vast bureaucracy. It would entail some constitutional changes.

ASSEMBLYMAN ROBINSON: Okay. Well, let's take those elected judges out and just talk about the appellate system and how that's revamped to make it more economically sound, whether it's uniform standards of practice like the federal circuits have, or from that to changing the whole makeup of the judicial council so it's given more authority and it can be held more to a budgetary test by this Legislature who has, notwithstanding a recent decision of the state Supreme Court, the sole authority to appropriate funds.

MR. GAMPELL: You don't want me to comment on that, do you.

ASSEMBLYMAN ROBINSON: I'm not asking you to; that was editorializing.

MR. GAMPELL: You're telling me...

ASSEMBLYMAN ROBINSON: I'm just alerting you that there is some feeling in the Legislature that maybe that if the court is going to award some of these outrageous legal fees without benefit of statutory authorization and what not, that it ought to come out of their own budget, so that at least they are taking the money out of their own wallets when they give it away without regard to the state's fiscal problems.

MR. GAMPELL: You still don't want me to comment, do you?

ASSEMBLYMAN IMBRECHT: Right. What do you consider unconstitutional, or what do you consider would be edgy on a constitutional...

MR. GAMPELL: I think any attempt to impose on appellate judges the way in which they are to carry out their elected tasks, would be edgy...

ASSEMBLYMAN ROBINSON: You insist on using that word elected...

MR. GAMPELL: I think the best way I could answer, if I could, Assemblyman, is to say this: If specific proposals come down from the committee, I would be hopeful that the AOC staff and the Judicial Council would be given an opportunity to give it reflective thought and our best answer. I don't think I can deal with a hypothetical...

ASSEMBLYMAN ROBINSON: We are not arguing with the fact that a certain amount of power rests with this committee and through this committee, the Legislature, to modify and otherwise make more efficient, the appellate process within the state. We are not constitutionally impaired from doing so. That would be one interpretation of your original statement and that's why I keep -- I'm not trying to pressure you, Ralph, I like you, believe it or not, you are fun to argue with.

MR. GAMPELL: You are making my original statement -- I have to be aware of our tripartite system of government. The judicial branch is the third branch. Now, I know that you have the power of the purse, but equally well, it is a third branch of government. And each one has to be solicitous of the powers of the others. And that's not meant to be a cop-out. The judicial branch is a separate branch of government.

CHAIRMAN HARRIS: Thank you. Mr. Davies, would you like to add anything?

MR. JOHN W. DAVIES: In response to your inquiry regarding the balance between civil appeals and criminal appeals, in years 1979 and '80, figures show that there were 4,249 civil appeals and 4,586 criminal appeals, about 50-50.

CHAIRMAN HARRIS: And are 50 percent of the criminal appeals in the indigent category?

MR. DAVIES: Yes, that was the response that was given, and I believe that's correct. This represents, over the last ten years, about a seven percent increase on both sides -- seven percent annual increase on both the civil and the criminal side, annual increase, and that, interestingly enough, is very similar to what's been happening at the federal level in the Ninth Circuit. They've had a 6.5 percent increase. Interestingly enough, in '79-'80, the jump there was 16 percent on the civil side and only 7.2 percent on the criminal side. So, the civil is growing at the same rate, and in that case, at a greater rate.

ASSEMBLYMAN ROBINSON: How much staff does the Judicial Council have?

MR. GAMPELL: I'm going to have to defer to...

ASSEMBLYMAN ROBINSON: Just in round numbers. Five, fifty, one hundred...

MR. GAMPELL: In terms of employees? Secretarial included? In terms of analysts, we probably have I'd say, six to eight.

CHAIRMAN HARRIS: What's the total staff, Mr. Gampell? What's your centralized staff, how many people work in your offices?

MR. GAMPELL: Just about sixty.

CHAIRMAN HARRIS: Sixty?

MR. GAMPELL: Yes. But that includes budget people, statisticians who do statistics for the whole of the system...

ASSEMBLYMAN ROBINSON: Well, that's the kind of people I'm looking at. If the Legislature created an institution or gave the Chief Justice a separate institution called the Judicial Office or Judicial Analysts Office, or something to that effect, and tasks them specifically with annually analyzing the administrative efficiency of the system and reporting to the Legislature on efficiency measures that have been proposed and adopted, is that something that would be physically feasible for your staff to do?

MR. GAMPELL: You're looking...

ASSEMBLYMAN ROBINSON: Say yes.

MR. GAMPELL: If you're talking about judicial impacts, or something like that, that is absolutely an horrendous problem. Leg Analyst has only taken it on for a nine-month study,...

ASSEMBLYMAN ROBINSON: It's only a horrendous problem because the source justice doesn't fill out his little management information reports and ship it up to your...

MR. GAMPELL: No, it isn't that easy, I'm afraid. Take a simple example; if you institute a new -- let me give you the simplest. Everybody asked why the Judicial Council was in opposition to Assemblywoman Moorhead's bill on the new drunk driving penalty? And the answer is, we were opposed for a narrow reason. We believe that it will cause more jury trials, there will be a need for more judges than the judges warranted in the bill. The money for those additional judges wasn't in the bill. But now, that's a very simple construct, indeed; but others, have horrendous implications. So, judicial impact is an easy thing to say and not an easy thing to do. But the answer is, we will cooperate in any which way we can; provided, and I think those of you who know me, know I run a tight shop, that if we need more

help, we are going to get it. Because I could double the size of my statistics unit; I could treble the size of a thing called the court management unit that goes into trial courts to assist them in their non-judicial side...

ASSEMBLYMAN STIRLING: Will that ultimately save us money?

MR. GAMPELL: The answer is yes. I think it would, particularly in court management.

ASSEMBLYMAN STIRLING: I think it needs to be done. The thing that I am struggling with is that internally you are running the good 'ole boys club, and eventually, the good 'ole girls club probably, as opposed to having institutionally a Leg Analyst role directly under the Chief Justice, who says, "By God, you guys aren't producing," or, "You ladies aren't producing."

MR. GAMPELL: And then what do you do?

ASSEMBLYMAN STIRLING: Then you take corrective action. If you need legislative help to do that, then we will give it to you.

MR. GAMPELL: That's the critical thing. We demonstrate, we put out the figures per year as to what the various courts are doing. It's the next stage.

ASSEMBLYMAN STIRLING: By and large, as I've heard your testimony, and your staff's testimony, in Sacramento, has been we have problems with our productivity and I say, "Why don't you can some of the judges," and they say, "We don't do that sort of thing." The whole argument against the judges retirement, letting the old boys hang on for awhile was that if they were over a certain age, they are obviously incompetent, and the other side if they are over a certain age, they are better like wine, as opposed to evaluating irrespective of age or sex, based on their productivity. You simply don't want to do that. As an institution, you don't want to do that. And that's bad. You let everybody hang on, it's like moss under a rock. And unless you let the sunshine in, it's just going to continue to be moss.

MR. GAMPELL: I don't want to take the time of the Committee. You've raised a very interesting problem and one very difficult to handle to be fair. Let me give you a for instance: Do it in a trial court. You publish the figures that Judge Cramer has only done two jury trials in three years. What's the guy doing? The answer is that he has been on law and motion. He's not seen a jury case, but there is no way you can explain that. Or, this judge, Judge Stirling, has not done any cases, not at all. The reason being, he's the settlement guy, and he only settles cases. It's those kind of productivity figures which can be so deceiving, or an appellate justice who's really had some very tough cases...

ASSEMBLYMAN STIRLING: That's really, as the Chairman, I think is about to say, you can develop reflective data. I mean, we evaluate baseball teams and football teams on all sorts of things that the public now understands and I still don't know what an earned run average is. But the public understands and evaluates professional athletes that way. We don't even evaluate our cops, as something that is so important, and we sure as hell don't evaluate our judges and you talk about the constitutional limitations, let the public decide. Simply publish those evaluations in a fair manner, and I assume you have competent staff that could get over those hurdles and reflect things in a fair manner and let the profession decide. Let the Bar Association and let the public decide. Let the sun shine in.

MR. GAMPELL: I think it would be an interesting topic, though I'm not sure it's one that's capable of any easy analysis, how you determine what productivity is.

ASSEMBLYMAN STIRLING: The message that you ought to take back to the Chief, and to the Council, is that at no time has the judiciary been held in such low esteem by the people, and believe me, that's reflected in the Legislature. You look at the number of constitutional amendments that were carried just this year, to restructure the confirmation process, to restructure the entire process for obvious political motivations, but at the same time, the reason there was a political motivation for an individual to carry a bill that drastically rewrites the way we handle our appellate courts in the state, was because the public was eating it, and loving it. Because they are very frustrated with the system as we currently see it operate. I mean, you just can't constantly bury your head in the sand and say, "Well, you know, we are independently elected and we will do what we damn well please, irrespective of budget constraints, irrespective of the people's will."

MR. GAMPELL: I'd like to answer you in two halves. As far as substantive law, which is part of the big push, it would be totally improper for me to discuss whether we are...

ASSEMBLYMAN STIRLING: No, no. I'm pointing to that as evidence, that you are in deep manure, if you will, in this Legislature, which means you're in pretty deep with the people. Look, because there are all kinds of formats whether we are going to confirm them in different process, whether we are going to have joint house confirmation, or whether or maybe another outrageous example, instead of having the people every twelve years, why don't we bring the justices back to the Legislature for reconfirmation every twelve years before they go back on the ballot.

MR. GAMPELL: That would even politicize the process even more, wouldn't it?

CHAIRMAN HARRIS: No joke. He's simply saying that that's a possibility, Mr. Gampell. He's saying, don't take it lightly because people are talking.

MR. GAMPELL: Yes, I recognize that. But your baseline question is how could we increase productivity? We are constantly inundated with proposals. One ex-justice was parading the halls in the last days of this last Legislature. You don't need 105, you can get out 200. I think my answer is, you can get out 300, if you don't want to read the briefs. It depends what you regard as a basic element of procedural and substantive...

ASSEMBLYMAN ROBINSON: That is true. If you don't read the briefs you can do 300, but you have to admit that there are justices that only put out 20 to 30 opinions and they are not very complicated cases. They are cases where either the justice has fallen in love with the case, and he writes 50 pages as the example I used earlier, or there are cases where the justice is just flat lazy. Those people exist, too. You are no different, that collection of people is no different than this Legislature. Some of our colleagues are less productive than others, or than any other aspect of public or private service in this county. But, you sit on your pedestal saying we have a perfect system and don't tamper with it because the Constitution impairs you from that.

MR. GAMPELL: I didn't say that. I said that the hierarchical system does not exist in California which would allow tampering from above, to use your word.

CHAIRMAN HARRIS: Thank you. Our next witness is the Honorable Winslow Christian, Justice of the Court of Appeal for the First District. Justice Christian, welcome.

JUSTICE WINSLOW CHRISTIAN: Thank you. I've been observing and participating in the appellate scene and in the legislative attention to appellate problems for a good many years, now, and this hearing today is the first instance that I recall of a body of legislators starting to look at the overall institutional problems of our appellate system in any coherent way. And I think that the state that we are in now, the very difficult state that the appellate system is in at present, reflects the fact that there has never been a comprehensive reevaluation in recent years of what we are doing in these courts.

I listened carefully to what Justice Staniforth had to say and agreed wholeheartedly with everything he said on the policy side of this with one exception having to do with the court reporter problem and if there are questions about that later on, I'll be happy to respond. But I don't see that as one of the central issues, and I'll just pass that by and base my remarks, if I may, on the platform of what Justice Staniforth and

Mr. Gampell have said and bring you perhaps some additional perspective and some very specific proposals as to things that can be done with this caseload problem that we have.

First, the difference in perspective. The American legal system is, I suppose, the second cousin now of the legal system of present day Britain and the relationships are still close enough so that comparisons have some validity. It's striking to me that the United Kingdom, England, Scotland, Wales and Northern Ireland, with the population of approximately twice that of California, has at the present day, seven, that is seven, not 70, Lord Justices of Appeal. Those seven judges, with the participation of a good many trial judges on assignment in handling the criminal side of the court's business, perform the function of an intermediate appellate court, which in California occupies the time of ten times as many judges. Seventy judges do the same work here.

Of course, there are differences. Our societies are different, the expectations of the people are different, our people are more litigious, but I think it does bring a perspective to this problem to see that over the years, the willingness of the Legislature to add judicial positions has given us, at the present day, by far the largest appellate judiciary of any state in the United States. We just added 18 more, or are about to add 18 more under legislation just passed. But I'd like to assure the members of the Committee that unless really fundamental efforts are made to change the structure of our system, and to effect the way cases come to us, that the state will soon be asking for an appellate judiciary exceeding 100 in order to keep track of the intake of these cases. The situation has gotten so bad that the backlog in some of the Districts, and here I'll tell you what's happening in the First District where I work, the intake of criminal appeals has continued gradually each year to creep up. Those appeals are of course by statute entitled to priority, and that's a priority that I think is sound. It should not be changed. But the effect of this gradual increase has been to crowd the civil appeals off of our calendar so that when the court got together some three months ago to talk about this problem, and to realize the emergency that we were in, we were virtually ceasing to hear any civil appeals at all. A few priority civil cases were squeezed on calendar from time to time, but basically we were hearing criminal cases only, and a civil appeal when it was finally briefed, would according to the trend then existing, simply lie there forever and never be heard.

Our backlog had already reached the state of in excess of two years in some of the divisions. I work now with the emergency effort with the cooperation of the Chief Justice; eight visiting judges have been signed in; each of our divisions is split into two hearing panels. The judges are taking five regular cases instead of four; our central staff...

CHAIRMAN HARRIS: Are the eight justices from other divisions?

JUSTICE CHRISTIAN: They are either trial judges or retired judges of our court...

CHAIRMAN HARRIS: Just sitting temporarily?

JUSTICE CHRISTIAN: Yes. So there are eight judges visiting with the sixteen permanent, with the result that we are able to have two hearing panels in each division and we are hoping to dig ourselves out of this hole and be able to get back on top of the civil side of our caseload. The Chief Justice is also exercising delegated authority from the Supreme Court. She transferred cases to the Second District and to Justice Staniforth's court and we appreciate that help very much. But I must tell you that this urgent effort that we are making gives us no real prospect of getting on top of this situation. It will get us back in business, to some extent, but we have a situation that drastically needs a major institutional reform.

I want to get to specifics with some suggestions. The suggestions that I have are, I think, rather clear cut. They may sound simple. They are not easy. Everyone of them involves a difficult political choice, but that's what the Legislature has to do for us here, to make choices as to whether this state will attempt to continue to deal with appellate workload by continuing to increase the number of judges or whether some more fundamental changes are possible.

Here, it's necessary, I think, to distinguish between the civil and the criminal side of our caseload, because the policy considerations that are involved are quite different. On the civil side, and here there is nothing particularly new in one form or another, these suggestions are already in the Feinberg and Seligson report which the Committee has. It seems to be important, however, that in the criminal appeals... but first let me back off just a moment to exclude, if I may, a number of possible remedies that have been talked about for years that seem to me unacceptable for good policy reasons. The New York appellate courts and the Florida appellate courts are far more productive than ours. I visited in both states and looked at their cases and looked at their work. The reason that they are far more productive is that there is no constitutional requirement that a case be decided by written opinion, giving reasons. Of course, if we got rid of that constitutional requirement, our courts could be made more productive. I do not propose that. I would oppose that vigorously. I think that our state is not so poor that we need to remove this guarantee of quality and protection of regularity and reviewability of appellate decisions. So I'm not proposing that that be done.

Another possibility that is talked about from time to time, is going through a criminal appeal that is an appeal by leave. Two American states have that system now -- Virginia and West Virginia. The procedure, as it is followed in those courts, is that an appellant on the criminal side is dissatisfied with the judgment, applies first to a single judge with a written application and then there may be a single judge hearing at which counsel can appear for the purpose of determining whether or not an appeal is going to be heard. In neither of those states is there an intermediate appellate court, so this is being done in the Supreme Court.

In Virginia, in fact, I was responsible for placing a staff demonstration project in that court some years ago. And I came to a conclusion very regretfully, which I could not state while I was there, and that is that the quality of attention to these cases was not what would be considered acceptable in our state. You would have a single judge who is basically unfriendly to the idea of criminal appeals and he could stop review at that point on a rather arbitrary and personal basis without any effective possibility of review. And so from my own set of values, it seems to me that there ought to be one appeal available as a matter of right from every judgment in the Superior Court in criminal cases.

Now, where I would come from, in making these next suggestions, is to try to change, both on the civil side and on the criminal side, the motivations of the parties. It seems to me that that's more in keeping with our ideas of freedom, that the party himself should be allowed and expected to make a responsible, knowledgeable decision, about whether there is going to be an appeal, and then if it is decided that there is going to be an appeal, then the court should hear it and deal with it according to due process of law.

Now it's here that I would propose to divide the civil from the criminal side because the problems are very different. On the civil side, we are presently, in effect, creating an economic incentive to appeal against a money judgment. Now this is the obvious factor of the low rate of interest on the judgment at present. You get a judgment of a million dollars against a financial institution or against an insured litigant in a casualty case, and the state with its low interest rate on the judgment, is, in effect, hiring the defendant to take an appeal. Will you please take an appeal, we say, because while the appeal is pending, you will be able to use this money and have the advantage of the difference between the low rate of interest that the statute allows, and the actual economic value of money at that given time. This is now a very substantial factor. It's a situation that can be changed by legislation. I simply urge that it must be done without further delay. To take away this incentive that we have created, of urging people to take appeals for money judgments. I conduct settlement conferences all the

time in the First District. And I can smell in a given case where there is a big money judgment that the insurance company doesn't want to pay because they have the difference between our statutory rate and the 20 to 22 percent value of money at the present time. It simply should be changed.

CHAIRMAN HARRIS: Mr. Cramer has a question.

ASSEMBLYMAN JIM CRAMER: Mr. Justice, I was just wondering, aside from changing the interest penalties or changing the interest associated with that, if there was a frivolous appeal, would it be useful for the appellate court to identify that and attach a penalty with that?

JUSTICE CHRISTIAN: Yes. As you know, there is a statute presently, and also a rule of court, that authorizes the court to impose a penalty which is taxable as costs, where the appeal is taken "solely for the purpose of delay." However, this provision is very little used. We quit using it because the Supreme Court would so frequently knock it out. Recently, when some -- I'm not going to use names, but I'll tell you actually what happened, and there were some new people who came on the Supreme Court and in conversation, one of them said to me, "Why don't you ever use this penalty provision. Are you aware of that?" And so I said we gave it up because it wouldn't hold up, so the new judge said, "You might try it again sometime. There might be a new spirit." So about a month later, I saw such a case and reported the conversation to my colleagues, and we assessed a $1500 penalty, with an opinion giving reasons to why we thought it was appropriate. There was a vote of three judges on the Supreme Court to grant a hearing, obviously on that issue. Since that time, in other of the cases, not in our division, a hearing has been granted. Obviously on that issue. So there is simply no reality to this as the court isn't going to exercise its muscle over this kind of a thing when...

ASSEMBLYMAN CRAMER: Excuse me, Mr. Justice, do you think that budgetary realities may force a rethinking?

JUSTICE CHRISTIAN: Possibly.

CHAIRMAN HARRIS: In other words, we are, I think, of a mind that perhaps economic realities would have the same effect on you that it has had on us, that you find yourself constrained, that you are going to make some critical decisions that otherwise you wouldn't make.

JUSTICE CHRISTIAN: The trouble is, I don't see the link being made in the minds of the people who have that decision to make.

CHAIRMAN HARRIS: If they find that they can't get as much paper as they used to get, they may complain about it and they may quit the bench.

JUSTICE CHRISTIAN: Let me suggest something that is also in the Seligson and Feinberg report. It seems to have much greater potential, and that is the idea of a modified scheme of indemnity costs. Now here again the American and the British traditions are totally at variance. The British tradition is that the prevailing party receives indemnity for his costs, including attorneys' fees at every level. The American tradition is exactly to the contrary. The prevailing party does not receive attorneys' fees as costs unless there is a special provision in the statutes or in a contract that is being sued on.

Now what I'm proposing here is that there should be, by statute, a provision, either directly making allowance for indemnity costs on a modified basis, or perhaps authorization for the Judicial Council to do this by rule. My own preference would not be for the... I think the Seligson report speaks of $500 to $1500 dollars going to the prevailing party. I don't think that approaches it correctly, in my own view I would propose that the prevailing party on an appeal should recover as costs, to be fixed along with his other costs on appeal, his real attorneys' fees, which may be a good deal more than that, in every case, unless the appellate court, in its opinion, withholds operation of this by certifying that the appeal is one that should have been taken or should have been resisted on some probable cause standard.

Now, if you had an institutional defendant who is now taking an appeal in order to avoid paying a judgment, realizing that unless a good case is made on this appeal, if it loses, it is going to pay big attorneys fees, then you will motivate that party to evaluate the appeal more carefully. This I think would be a much bigger factor than the little one of penalties on frivolous appeals.

CHAIRMAN HARRIS: Mr. Robinson has a question.

JUSTICE CHRISTIAN: Okay.

ASSEMBLYMAN ROBINSON: Mr. Justice, are you suggesting that we lift the statutory cap on post-judgment interests? Or both post and pre-judgment interests?

JUSTICE CHRISTIAN: No. I would say post-judgment interest only.

ASSEMBLYMAN ROBINSON: And would you lift the cap totally in other words, perhaps tying it to the prime rate?

JUSTICE CHRISTIAN: My own proposal would be that that should be delegated to a Judicial Council rule with the direction that the interest rate should reflect the value of money. So you wouldn't have to go the the Legislature every time the prime rate changes. A rule could say that this year interest on the

judgment is 20 percent because that's what the prime rate is. Next year, it might be 18.

ASSEMBLYMAN ROBINSON: Well there would be some reluctance, I think, to that concept of total delegation. I think some parameters should be set out for the Judicial Council to set that rule. The prime for example is a very debatable thing. No one really calls money at the prime rate. It's either borrowed at prime, plus two, or they borrow at something below prime.

JUSTICE CHRISTIAN: I don't have a specific answer, but I favor that kind of approach...

ASSEMBLYMAN ROBINSON: In other words, total flexibility. Okay. Thank you.

CHAIRMAN HARRIS: Let me ask a couple of pointed questions if I might. One: Is there a way, in your estimation, that we can do what you suggest as it relates to written opinions as they currently are performed in our court of appeals? But at the same time, given a little more cursory review, a little quicker review, perhaps with the process of, particularly in larger counties, designating a judge to preclear, to look for error, trying to cite whether or not he sees reversible errors that might be considered on appeal, so that when they get to the appellate court, they be viewed a little quicker, just from the standpoint that you have some confidence in the trial courts...

JUSTICE CHRISTIAN: I was much interested, Mr. Harris, when you mentioned this same idea a little earlier this morning. It's one I'd not heard of before. My inclination is to doubt that it's a good idea to insert another gate or another hurdle in this process. My inclination is instead to motivate the guy who is initiating the appeal way back at the beginning to think more realistically and make a sound choice as to whether there should be an appeal. When that happens, I say don't hold him back, let's adjudicate the appeal quickly.

ASSEMBLYMAN CRAMER: Mr. Harris, were you thinking of that being the trial judge or some...

CHAIRMAN HARRIS: I had a little problem with the trial judge himself, rendering the opinion, that's what I was trying to have, a separate party, a theoretically more independent party who might in fact, by virtue of his experience, serve as a quasi-appellate jurist within a superior court. Simply to review for error with some direct criteria that he would look for and if in fact determines -- it still would be able to go up to the appellate court for review, but he would have a sort of preclearing ability to determine whether or not those criteria had been met or not.

ASSEMBLYMAN CRAMER: The reason I asked that -- do you think the motion for a new trial on those kind of procedures has not been effective at the trial level?

CHAIRMAN HARRIS: I would like to hear Mr. Christian.

JUSTICE CHRISTIAN: Well, I do have my doubts. The way a criminal appeal starts in England is this way: It is by the convicted defendant applying to the trial judge for leave to appeal, and that trial judge, if he allows the appeal, will make a legal aid order. Having watched the operation, I am impressed by it, but I have no thought that we have that much confidence in our judges that this would be politically acceptable in this country. I simply don't propose that. There may be a way along the lines that you suggested, but I don't know.

CHAIRMAN HARRIS: Let me ask another question. And that is this: There seems to be a "pass the buck" kind of attitude relative to looking at the appellate process. In other words, we kind of look to the Judicial Council and say, "Well, why don't you come up with some recommendations?" We know if there is not a problem -- just with the process, there is certainly going to be a fiscal problem that's going to call for some reformation or correction. Then the courts look obviously at the Legislature, and say, "Well, some of these are legislative priorities." I'm wondering if you have any recommendations. Should we create a new entity to look at the appellate process? Shall we have a task force within the Legislature? How can we in fact move from talking about the problems and trying to really come up with concrete solutions that are going to work?

JUSTICE CHRISTIAN: Well, my experience in other areas has been that the special study commission or special legislative body's review of the problem, can work very effectively when there is a general perception among the people involved, but you are really under the gun in this particular problem. The example is the Tort Claims Act. We were then under the gun, something had to be done, and a Joint Commission was established. It worked very effectively and did very well. More recently there was a joint legislative study in the area of tort law which was not effective and not because there weren't able people involved; but because there was not a perception on the part of everybody involved, including the Legislature, that anything really had to be done. So nothing happened. And I don't know if people are serious yet about this situation. I think our problem is critical.

CHAIRMAN HARRIS: Mr. Robinson, are you serious?

ASSEMBLYMAN ROBINSON: I think Mr. Gampell is well aware of how serious I am.

JUSTICE CHRISTIAN: I want to say one more thing. One more suggestion and this is the most difficult area of the law, and that's in the criminal appeals area. How do you motivate the indigent appellate to think carefully and to take legal advice before he decides to make an appeal that's going to cost him nothing?

Because it costs him nothing at present and because the trial court on pronouncing judgment must inform the appellate of his right to appeal, and of the fact that if he is indigent, counsel will be provided for him without cost, there is a very high rate of appeal. Why not, it doesn't cost him anything. In fact, the statistics are surprising, they show that there is a rate of appeal of more than 100 percent compared with contested dispositions and the reason for that impossibility is that there are appeals after pleas of guilty as well, where there hasn't been a contested disposition. So, in effect, we are getting appeals in more than 100 percent of the cases.

ASSEMBLYMAN ROBINSON: Is that true in pre-trial motions? It is not just on final disposition?

JUSTICE CHRISTIAN: Well, the only pre-trial motion that comes to us, of course, is the 1538.5 on a writ and under subsection m on the appeal. I think it's anomalous, but I will tell you it's not a big deal, it's not one of the big problems. It's there, but it's not a huge one like these other things we are talking about.

You have on your agenda, for later today, an appearance by Professor Moskovitz of Golden Gate University, and I'm not going to anticipate what he has to say, but I want to say with all the emphasis that I can, it is time for us to use ingenuity in devising some financial incentive that will cause the indigent defendant in the criminal case to go through the same kind of a mental process that the non-indigent defendant does when he decides to appeal or not. Professor Moskovitz has a proposal that came originally from Professor Maurice Rosenberg at Columbia. It's a proposal that has not been tried for creating a modest financial incentive that will cause this defendant to think before he decides...

CHAIRMAN HARRIS: Some assessment. In other words that he may have to pay it back, i.e., a loan...

JUSTICE CHRISTIAN: Well, there are different ways of doing it. Rosenberg started this off, and I laughed the first time I heard it. His idea was that there should be, at the prison, a little fund called the indigent defense and rehabilitation fund. So you credit to each prisoner, he originally proposed $100, and then the prisoner, if he decides to appeal, can appeal, but he has to chip in to the extent of his $100, that doesn't meet the cost, the whole cost is much greater,

he chips in to that extent, and so he thinks a bit before he appeals, he might ask somebody, well, if I appeal, is there any chance that I'll make it? And his counsel may advise him, no, that there is no arguable issue here. If he does not appeal, then when he get out, he gets the $100 as walking around money for the...

ASSEMBLYMAN IMBRECHT: It's a good idea. We're going to have to look into something...

JUSTICE CHRISTIAN: Now you laugh when you first hear that. We must find a way to bring some real thought into this process instead of starting this paperwork treadmill in every case.

ASSEMBLYMAN IMBRECHT: On the way to the hearing this morning my consultant was giving me a little briefing on that proposal. Mr. Moskovitz is proposing a $500 -- on the surface of it, it sounds very interesting and I think it does provide that motivational thing that you are talking about. Politically, however, I have a little problem with voting for an effective $500 grant to a convicted felon. I'm not exactly sure how I would go about explaining that to my constituency, that if you are convicted of a felony, you are going to be given the benefit of $500 from the people of the State of California, even though ostensibly, it might save greater funds in the long term...

JUSTICE CHRISTIAN: Perhaps that's not quite the way...

ASSEMBLYMAN IMBRECHT: That's what I'm suggesting. I think I understand what Mr. Moskovitz and yourself are suggesting. I'm just wondering, isn't there some other type of incentive that can be provided or disincentive, if you will...

JUSTICE CHRISTIAN: Well, I'll tell you one and I'll tell you what is done in the United Kingdom, again, which I don't recommend. There is a provision that if you apply to the trial judge for leave to appeal and he denies it, then you can apply to the court of appeal for leave to appeal, and the panel of three will look at the -- they have a different kind of record than what we have -- they'll examine the thing, and they may grant leave to appeal, and if they do, again, legal aid comes in and lawyers are appointed and the whole process goes on. If they deny leave, they may add on the end of the term, the time during which this procedure's been pending, and that I understand is a powerful incentive to not appeal, unless you have... Again, I'm not suggesting that,...

ASSEMBLYMAN IMBRECHT: Let me just pursue one other line that is something similar to what Mr. Harris was suggesting earlier about a sort of pre-appellate view process to see if there is any clearer air, or anything of that nature. What if you were to designate -- say the PJ of a superior court with

respect to all criminal appeals, to undertake such a preliminary review and -- I don't know if it would be possible to preclude an appeal or if such an individual indicated that it was unlikely to be grounds for successful appeal but, perhaps at that point, trigger a reasonably substantial disincentive, maybe even something akin to what the British system is but not having the same -- not having the trial judge reviewing his own work -- but another member of the court that would have principle responsibilities...

JUSTICE CHRISTIAN: Well, I think something like that has potential. There are some basic things we would want to look at. We want to have immediacy and personal contact, so it should not be a paper process. It should involve people who know what really happened in the trial court, like the prosecutor, like defense counsel, like the trial judge or somebody in that same court. This ought to happen before the whole mechanism of working up a record has been set in motion.

There is an experiment going on in the Rhode Island Supreme Court right now, that is a little bit of a variation from this, that I'd like to mention to you, and that's a small state. There is no intermediate court and so the Supreme Court, of course, is the court of first and last appeal. They are handling first appeal cases like ours. And what they've done is this. They have a very broad rule-making power. When the notice of appeal is filed, one of the justices convenes a meeting within a few days involving the defense counsel and the prosecutor. The purpose of this meeting is like a settlement conference but of course, you can't settle a criminal appeal; but at this meeting, the judge listens to the story as to what this case is about. The defense counsel says, "Well, there was prosecutory misconduct here; this instruction should have been given." So the judge listens to what the other side has to say. He has the trial court file. He asks what really happened; he walks around the case a little bit and then he decides whether he thinks this case is a winner or not. If he thinks it's a loser, he issues an order to show cause, returnable before the whole court, why the appeal should not be dismissed, or there should not be a summary reversal. If he thinks it's a winner, he issues an order to show cause, returnable before the whole court, why there should not be a summary affirmance.

Now the point of this is that there is personal and immediate contact. Nobody's going to get lost in some paperwork shuffle. And then there is no disposition, either a reversal or an affirmance without the whole court having seen counsel and heard arguments. Now this is an experiment that's just started that's been under way only about six weeks now, so it's a little too early to say. But, that's quite similar I think to what Mr. Harris suggested and you did, too, Mr. Imbrecht, of a procedure that gets in early to try to sort out potential winners from the potential losers.

ASSEMBLYMAN IMBRECHT: I'm curious, because you seem to clearly demonstrate knowledge about some of the efforts that have been undertaken and other courses that deal with some of these problems. Is this a reflection of your personal investigation, or is there some source authority that we might turn to as well, that reviews these kinds of...

JUSTICE CHRISTIAN: Well, I took an interest in this when I was Director of the National Center for State Courts, for two years, and since that time, I have been lecturing on appellate administration each summer in the seminars at New York University and for that purpose I keep track of what's going on around the country.

ASSEMBLYMAN CRAMER: Just so I can better understand what you are saying to me. One recommendation is you want to pay defendants not to appeal, when you cut away, that's what you are saying to me?

JUSTICE CHRISTIAN: Yes, sir.

ASSEMBLYMAN CRAMER: And then you're talking about a pre-trial appellate procedure. Do you imagine that pre-trial appellate procedure being done in the local jurisdiction on the trial court level?

JUSTICE CHRISTIAN: That's where I think it should be done in order to preserve immediacy and real personal contact, rather than have the paper process.

ASSEMBLYMAN CRAMER: Okay. So you don't want a record prepared, but you would want to subject either the presiding judge or some judge of that court essentially to the appellate arguments, the case law reading that may very well be required, so in effect, you are creating a new and different procedure or administrative position at the trial court level?

JUSTICE CHRISTIAN: Well, I'm asking to reserve judgment on this because I don't think what we want to do is set up a new hurdle or a new process and so there may be another way entirely of doing this such as, you know, representative of our court, a judge or experienced staff member could take that function just as well as another judge of a busy trial court. So we're just beginning to think about this and I'm not ready to jump...

ASSEMBLYMAN CRAMER: Do you have some opinions about those individuals who plead guilty and who appeal; how often that would be a successful adventure into the appellate court?

JUSTICE CHRISTIAN: Well, unfortunately, there is a very high number of those cases and unfortunately, some of those cases are meritorious. The trial judges are having a terrible time with the determinate sentence law. It is full of traps for them;

they make mistakes all the time. I have thought that that's part of the sentencing function that really ought to be given to an escrow clerk rather than to a judge, it's become so complex. And so after there has been a plea of guilty, judgment has been pronounced and a lot of priors and consecutiveness as against concurrency, and all these other factors are worked out, then there is an appeal and then we go back over this thing -- nit-picking it -- and we find error in a high proportion of those cases.

ASSEMBLYMAN CRAMER: Some states have embarked upon a procedure whereby they have two different appellate divisions -- one, civil and one, criminal. You organized your talk along those lines and I wonder if you are making that as a...

JUSTICE CHRISTIAN: No, I certainly don't. The people who have thought about this are really -- I guess unanimously opposed to it. The trend is the other way. There are several reasons for it, one is that if you have a separate criminal appellate court, this tends to become a low status court. It's hard to get resources for it and the judges get case-hardened. You should hear Chief Judge Jack Onion of Texas who is the Chief Judge of the Court of Criminal Appeal of Texas explaining what's wrong with that system. Now Texas has just abolished it. Louisiana has recently abolished it. There are only two states left with it, Tennessee and Oklahoma. I certainly would not urge that we do anything like that.

ASSEMBLYMAN CRAMER: So aside from putting pressures on people, you are not prepared then to recommend to this body or to any other body to narrow the appellate rights of criminal defendants?

JUSTICE CHRISTIAN: No, sir. I'm not. I see so much payout available in the other areas that I've mentioned that I'd like to do those things first.

Mr. Chairman, you've been very hospitable. Are there other questions?

CHAIRMAN HARRIS: Mr. Justice, I want to thank you. We have certainly been enlightened by your comments and have been well educated. I know we usually don't share confidential notes from members of the Committee. But when you came up, Mr. Imbrecht handed me a note and said this is one of the real fast justices in our appellate court system and I think that is something that ought to be shared and we appreciate the information you offered.

JUSTICE CHRISTIAN: Thank you. I may move into Mr. Imbrecht's district.

ASSEMBLYMAN WILLIAM LEONARD: He's not sure where that district is.

CHAIRMAN HARRIS: All right. We are going to move this hearing along very quickly now and I hope that you will excuse me. The first three witnesses certainly have given us the foundation and much of what may be said afterward I think will be reflective of the comments of our first three witnesses. It is my intent to be out of this hearing within the next hour -- no more than an hour and 25 minutes, by 1:30 at the latest, we are going to take a lunch break. So, I am going to ask your indulgence and your speed if you have written comments, we would like to have them. If you do not, we will keep the record open so that they might be submitted. We'd ask for summary comments that will allow us to ask questions if we choose, but otherwise I would appreciate your speed and not just rambling; we don't need it.

Our next witness is Mr. Leonard Sacks, the Chair of the Amicus Curiae Committee, California Trial Lawyers Association. Mr. Sacks, welcome and we appreciate your comments.

MR. LEONARD SACKS: Thank you. I will be giving these comments on behalf of the California Trial Lawyers Association as an appellate specialist, but primarily I represent injured victims of torts on the plaintiff's side, and I was, of course, tremendously gratified to hear Justice Christian make the point that I felt -- I'm not going to belabor it -- the fact that there is a very real possibility that institutional defendants with large judgments against them are using the appellate courts as a very profitable bank. And along that line, I would suggest that perhaps this Committee would want to interrogate some of these institutional defendants to get their point of view on it, such as the large insurance companies, the insurer for the Pacific Southwest Airlines which is involved in many an appeal over that air crash.

ASSEMBLYMAN IMBRECHT: We can predict your testimony and theirs. The Committee's very knowledgeable on that subject.

MR. SACKS: Well, my point is this: Let's have them say under oath that this is not a consideration when they appeal, if they are willing to say that.

ASSEMBLYMAN ROBINSON: They're willing to say anything.

MR. SACKS: I hope I can quote you on that the next time I'm in court.

ASSEMBLYMAN ROBINSON: Well, all of you are. I mean both the trial lawyers as well as the institutional defendants before this Committee are willing to say whatever they feel is necessary to get the requisite number of votes and we're...

CHAIRMAN HARRIS: Mr. Sacks, do you have any specific recommendations on the appellate process, how we can make it more efficient?

MR. SACKS: Yes, well there's one thing I think nobody's mentioned and that is the State of California itself is, in my opinion, somebody that you might look at as a prime culprit. Now you have, for example, the Attorney General of the state. It's my impression that every time there is a tort judgment against the state, and this may also be true of local entities too, but perhaps more the state, there is automatically an appeal. They are a kind of litigant that possibly does not have the disincentives that private litigants do and they get involved in a lot of things that possibly they should not get involved in. The main thing that is my great gripe is that this Legislature a few years ago passed a law indicating that it is the public policy of this state that physicians have malpractice insurance. Now physicians have malpractice insurance in certain companies that have gone insolvent, Signal and Imperial I believe are two of the companies. Then you have Signal and Imperial's business being turned over to the California Insurance Guarantee Association and the California Insurance Guarantee Association taking steps to eliminate many of these claims which both shortchange the physician and the injured plaintiff on the basis of technical claim filings and these have resulted in vigorous litigation and who do we find on the side of the CIGA but the Attorney General and there are numerous cases like this. I don't think the Attorney General should even be bringing these cases but this is one very serious area where you've got a lot of appeals and possibly I would like to ask the justices whether they see a lot of state appeals that aren't meritorious.

ASSEMBLYMAN ROBINSON Mr. Sacks, on that issue, as a former member of the old Select Committee on Medical Malpractice, did the state not by administrative fiat put those two companies into conservatorship?

MR. SACKS: I think so, yes.

ASSEMBLYMAN ROBINSON: And that very act exposes the state to liability for that conservatorship and that's the reason for the Attorney General's involvement in those cases. I mean I think the record should reflect that there is a state taxpayer who has something at stake in those cases by the ministerial acts of the Insurance Commissioner during the period of conservatorship.

MR. SACKS: Well, I think this is true. It may have a taxpayer impact. The CIGA absorbed some of it but the point is that the state is perhaps appealing in every single instance where there's a taxpayer impact regardless of the prospects of success and then every time the state does get into a case they always ask that the opinion be certified which also brings in a lot of problems. I'm just suggesting that as one area.

ASSEMBLYMAN ROBINSON: No, I understand that. In the Legislature and Mr. Imbrecht is Vice-Chairman of Ways and Means Committee is well aware of it. Ways and Means, this year, for the first time, has taken a policy position that any state agency that involves itself in useless litigation before the appellate courts and ends up having attorney fees awarded against it as a result thereof have had those attorneys' fees taken out of their standing budget so it's costing them staff attorneys' time and that's about the only disincentive that the Legislature is capable of applying against and it's not just the Attorney General of the state, it's many other agencies that have involved themselves currently in litigation, Consumer Affairs and what have you. That disincentive is built in so they have the same disincentive that a private law firm would have in pursuing a non-meritorious case in the appellate courts. Am I correct?

MR. SACKS: Well, I don't know. They've got attorneys working for them and you know it's not like it's private parties...

ASSEMBLYMAN ROBINSON: If it's a non-meritorious case and the courts in their wisdom decide to impose attorney fees against them as the unsuccessful litigant, it's coming out of their budget believe me. That is a disincentive to pursue cases that they have no business pursuing.

MR. SACKS: Well, I don't think that it applies to the scope of cases that I'm talking about here. Certainly we cannot get penalties for frivolous appeals and these cases are in the numerous tort judgments against the state which they will...

ASSEMBLYMAN ROBINSON: But if you pray for them you're apt to get them.

MR. SACKS: Excuse me.

ASSEMBLYMAN ROBINSON: If you pray for penalties you're apt to get them. Statutorily, the courts are empowered to award them and have done so.

ASSEMBLYMAN IMBRECHT: We need to expedite this hearing. While Mr. Harris is on the phone, I'm going to exercise my prerogatives as Vice-Chairman of the Committee and thank you very much for your testimony.

Next on our agenda is Mr. Paul Cyril, Association of Defense Counsel. He'll be here later I'm informed. Mr. Michael Berger, past President of the Academy of Appellate Lawyers, Vice-Chair of the Committee on Appellate Courts of the State Bar. Mr. Berger.

MR. MICHAEL BERGER: Thank you, sir. I'm pleased to be here on behalf of both of those organizations, both of which have

pretty much the same sort of feelings about the problems we're facing. I don't want to take a whole lot of your time. I think Justice Christian did an admirable job of explaining to you what some of the problems are here. I hope that the shocking thing that he did say took root here in the Committee and that is that his court is virtually turned into a court of criminal appeals. There is a serious problem with the massive number of really worthless criminal appeals that are choking the system and I think something has got to be done about that problem trying to find some way to keep some of those appeals out of the system.

ASSEMBLYMAN IMBRECHT: Has the State Bar Committee worked on any recommendations in that area?

MR. BERGER: The State Bar Committee is at the moment working on a series of recommendations and some of the things which we are considering deal with the kinds of incentives and disincentives that Justice Christian talked about. I think we have to come to the point of considering monetary incentives. I think we have to consider the other thing that convicted criminals are interested in and that is time. If we don't tack time on to the end of the sentence perhaps you can consider not taking an appeal to be good behavior and give them time off the sentence. I think it's time we have to consider plea bargaining on appealing criminal cases. We've got to do something to choke down the number, to make them understand that they have some reason not to take the free automatic appeal that they have at the moment.

ASSEMBLYMAN IMBRECHT: Mr. Berger, when do you expect those recommendations to be available?

MR. BERGER: I believe we've been cleared to pass on our report as a report of the committee itself though not of the State Bar since the Board of Governors has not acted on it as yet. I will check on that. If that's true, I'll be happy to supply a copy.

ASSEMBLYMAN ROBINSON: Are you looking at the determinate sentencing law that was enacted by the Legislature in '77 and I think '76?

MR. BERGER: I don't think that that has been specifically mentioned.

ASSEMBLYMAN ROBINSON: Well, for example, one of the incentives might be, and it's just an idea that I just had, that the determinate sentencing law has set a formula for good time that all prisoners get unless there's a finding to the contrary, you know, if they do something, if they're incorrigible or what not and then the Adult Authority then can subtract from the good time that they would get. I think it's 10 percent or 20 percent of the sentence. That might be used as disincentives to

frivolous appeals without making that a standard frivolous appeal would be a standard for removing good time credit.

MR. BERGER: It's certainly something to think about.

ASSEMBLYMAN ROBINSON: And it would not be enhancement. I think the civil libertarians in the Legislature as well as in the public at large would probably revolt a little bit if we had the English system of adding time just for exercising a constitutional right.

MR. BERGER: I would agree with you which is why I think we've got to seriously consider giving them something rather than adding a punishment at the end and as distasteful as that may be in some mouths, the cost to the state and the citizens is just too great.

ASSEMBLYMAN ROBINSON: Mr. Imbrecht hit on the political problem. You're not going to get away with giving a $500 bounty.

MR. BERGER: It would be awfully hard to imagine how one could explain that in their newsletter.

(UNKNOWN) Well, maybe we can do it in terms of time then instead of money. That may be more palatable.

ASSEMBLYMAN IMBRECHT: Mr. Berger, might I ask you to communicate to the members of your committee the intense interest of this legislative Committee in pursuing this subject and ask you to perhaps expedite your consideration? I would certainly appreciate it if you could offer some recommendations to us by December, but by the first of the year at the latest, since we're going to have to pursue this legislatively at the beginning of January.

MR. BERGER: We are under a mandate from the State Bar to come up with recommendations and a program that we've presented the board is that we want to be able to do this on an item by item basis. As soon as something comes up we want to be able to present it to you. Rather than trying to put together some sort of massive package and running it through the Board of Governors, we want to work on specific recommendations, the kind you're interested in and we'd be very happy to work very closely with your Committee.

ASSEMBLYMAN IMBRECHT: Thank you very much. Is there anything further you'd care to offer?

MR. BERGER: There were a couple of other things on the criminal side that I think bear some consideration. One is the appeals after guilty pleas on things that didn't happen after the plea. There are those appeals that deal with substantive issues that occurred before the guilty plea and there's some question, I

think, that at least ought to be discussed about whether those appeals ought to be cut off. Second, there are the kinds of criminal cases where the sentence imposed after trial in superior court is in fact a misdemeanor sentence so you don't have a felony conviction. Maybe the courts of appeal ought not to be concerned with misdemeanor convictions. Maybe that ought to be diverted some place else, perhaps the appellate department of the superior court, but you, in effect, have the court of appeal working on misdemeanor convictions and there are a fair number of those.

One other thing, I was glad to see that there still is some interest in eliminating the divisional set-ups that we have particularly in Los Angeles and San Francisco. Both the Academy and the State Bar Committee are still intensely interested in that though we felt that, given the three new courts that were established in the last session, the Legislature had lost some interest in even pursuing it. The State Bar Committee did draft a proposed bill during the past year though, it didn't get up to you and I'd be pleased to send that along as well, if that's of any interest to the Committee. We think that it may be a way to even up the workload, what's going on in the courts of appeal as well as to provide more substantive justice to those people who are...

ASSEMBLYMAN IMBRECHT: I am still very much interested in this topic. I carried the legislation that passed the Assembly and unfortunately it was heavily personally lobbied by a number of appellate justices who have political ties to their former colleagues in the State Senate. I think that's the fairest description I can possibly give as to why the bill was not successful in the State Senate but things have changed and the personalities on the Judiciary Committee have changed, not to mention the 5th District which has changed and so I think that there might be a better climate for those kinds of proposals.

MR. BERGER: I can tell you then that both of my organizations are still intensely interested in that and will be happy to work with you on that too.

One final item if I might. I noticed that the letters that were sent out to us mentioned some concern about the impact of the Judicial Council's circuit riding experiment. All I can say is that with the creation of three new courts, I don't see how there can be any circuit riding experiment. I think it's been effectively killed but it will be interesting to see what happens. You've eliminated the places where they could have sat.

ASSEMBLYMAN IMBRECHT: Well, they're going to have to do something with the justices in the First District. They might as well ride a circuit.

MR. BERGER: That would be fine if there were a place for them to go. I'd like to have seen them go to San Jose but I was overruled on that.

ASSEMBLYMAN IMBRECHT: Thank you very much, Mr. Berger.

MR. BERGER: Thank you.

ASSEMBLYMAN IMBRECHT: Before we continue, I just wanted to notice the presence in our audience and invite her to come forward, Assemblywoman Cathie Wright of Simi Valley has joined us. Cathie, if you'd like to join us here on the dais, you're certainly more than welcome. Next, I'd like to call Mr. Rudolfo Aros. Mr. Aros is not able to be with us. Terry Smerling. Is there anyone else here from the American Civil Liberties Union who wishes to testify? All right, fine, we'll move right along. Mr. Vance Raye. Vance is the Senior Assistant Attorney General for Legislative Affairs. We see him frequently in Sacramento at our Committee hearings.

MR. VANCE RAYE: Thank you, Mr. Chairman. I think many of the comments I would have made have been made already, so I'll be relatively brief. The Attorney General, of course, has an interest in appellate court efficiency since the Attorney General appears through various deputies before the courts of appeal and the Supreme Court of the state on a fairly regular basis. Just last year, our office spent over 175,000 hours of personnel time preparing respondents briefs in criminal cases alone.

ASSEMBLYMAN IMBRECHT: 175,000 hours?

MR. RAYE: 175,000 hours of attorney time on criminal appeals. I think one witness has already referred somewhat critically to our role in civil appeals also on behalf of other state agencies and that hour figure doesn't include the amount of time that we spend on civil appeals. The number of criminal appeals that our offices handle has increased dramatically over the past ten years. In 1970 we prepared approximately 2400 respondent's briefs. In 1980 that figure rose to well over 4,000 briefs. The cost of handling these appeals is of course fairly substantial. We estimate that it costs us well in excess of $2,000 per respondent's brief to file, to prepare respondent's briefs and to appear before the court of a peal and Supreme Court in these cases. When you consider that those cost figures are duplicated by the State Public Defender's Office and are, as I understand it, exceeded by the cost that it takes, the costs of the court of appeal in considering these appeals, then I think you get a pretty clear picture of the substantial amount of cost money expended by the state on criminal appeals.

ASSEMBLYMAN IMBRECHT: Probably in the neighborhood of $10,000 per appeal at a minimum.

MR. RAYE: Probably so, somewhere in that neighborhood. So it stands to reason that if we reduce the number of appeals, then we also effect a substantial cost reduction which is, of course, critical in these times of austerity. With this in mind, our office is considering a number of proposals to reduce the amount of time it takes us to respond to criminal appeals. We think, first of all, that something ought to be done about the right to appeal. Neither the California Supreme Court nor the U.S. Supreme Court, as someone has already pointed out, has ever articulated a constitutional right to appeal. We think the substantial increase in the number of appeals over the past ten years does not mean that the trial courts are committing more errors. It just means that people are appealing on more insubstantial issues. We've...

ASSEMBLYMAN IMBRECHT: Do you have any figures, Vance? Of the 4,000 briefs that were filed last year, how many of those represented indigent criminal appeals?

MR. RAYE: Approximately, as I understand it, almost all of those. About 93 percent, as I understand it, of the criminal appeals filed are indigent appeals. Somewhere in the neighborhood of 90 percent in any event, so a substantial number of those are indigent appeals. Therefore, you have the same costs being incurred on the other side by the Public Defender's office.

ASSEMBLYMAN IMBRECHT: Do you have any statistics as to the success rate?

MR. RAYE: As I understand it, the affirmance rate is about 90 percent, about 11 percent of criminal appeals result in reversals of the trial court decision so about 90 percent of all appeals are affirmed by the court of appeal.

ASSEMBLYMAN IMBRECHT: So it would not be unreasonable to suggest then that even assuming a 10 percent factor of legitimate appeals that were nevertheless had the trial court decision affirmed but that there was a legitimate issue to be discussed so we're probably looking at 70 to 80 percent of the criminal appeals being filed as being perhaps in the frivolous category. Is that too great a percentage?

MR. RAYE: I think that's a fair estimate.

ASSEMBLYMAN IMBRECHT: Okay.

ASSEMBLYMAN ROBINSON: How many of them were guilty pleas that were then subsequently appealed because of sentencing questions?

MR. RAYE: We don't have figures.

ASSEMBLYMAN ROBINSON: Would it be too hard to get those?

MR. RAYE: There's a substantial number. In fact our office sponsored some legislation this year which would have placed some restrictions on the right to appeal from guilty pleas because of our perception that that number is fairly substantial.

(UNKNOWN): Is that a Doolittle bill?

MR. RAYE: No, that was Senator Boatwright's bill, SB 383.

ASSEMBLYMAN ROBINSON: If we've got drafting mistakes or we have problems with the understanding by the trier fact of our intent in SB 42 that's causing a substantial number of appeals that were guilty pleas, just strictly because of a poor interpretation of SB 42, then I think that we ought to address that. The Legislature ought to address it and we're going to need hard facts in order to do that because of the delicate compromises that were involved in this original legislation.

MR. RAYE: Well, as I understand it, there are a significant number of appeals from guilty pleas on sentencing issues. In many cases those issues are fairly clear cut and the resolution of the issues is fairly clear cut. We're almost in the position of stipulating to the outcome of the appeal where the trial court clearly committed error.

ASSEMBLYMAN ROBINSON: Well, if we knew that number then we could take care of that part of the workload right there and Justice Christian said earlier that there was a significant number of those and your office since it will certainly have access to 90 percent of the cases and if you could give us some hard data...

MR. RAYE: Well, regrettably our statistics haven't broken down the appeals by...

ASSEMBLYMAN ROBINSON: I would suggest that you broaden your statistical base so that we can have that information and look at it.

ASSEMBLYMAN IMBRECHT: Please continue.

MR. RAYE: As I mentioned, we think there should be some limitation on the right to appeal in consideration of the fact that over 90 percent of criminal appeals result in affirmance and a substantial number of that 90 percent could be characterized as frivolous appeals. We think there are two ways to restrict the right to appeal. One way is the way that's set forth in a bill that we sponsored, SB 1197 by Senator Doolittle, which would invest in the trial court the responsibility for preliminarily

reviewing all appeals. Appeal would be only by certificate of appeal granted by a trial court. The denial of a certificate of appeal would be reviewable by writ of mandate to the court of appeal only. We thought that that would be at least one approach. We still do think that's one approach to dealing with the substantial increase in the number of appeals. Another proposal that we're considering is vesting discretion not with the trial court but with the court of appeal to decide whether an appeal, on its face, presents substantial issues that warrant consideration by a panel by the court of appeal. In other words, appeal would be in effect by a writ of certiorari to the court of appeal and the court of appeal would have discretion to refuse to entertain an appeal.

CHAIRMAN HARRIS: Would you suggest that it be a more cursory review or do you think we ought to have a special panel or a special judge who has that responsibility for granting the review and certiorari, maybe not done by judges but by staff with recommendations to the judges or what?

MR. RAYE: Well, as we envisage it, the writ would be filed, not exactly pro forma but a brief or paper would be filed with the court of appeal...

CHAIRMAN HARRIS: Nothing long?

MR. RAYE: Nothing long, simply specifying the allegations of error containing brief citations of authority in support of those specifications of error and then the court of appeal based on that would decide whether or not the appeal warranted further consideration. I think one thing that has to be pointed out is that there are cost elements in this whole system of criminal appeals. There's the cost incurred by the Public Defender, by our office, and by the court of appeal. Through this procedure, we would cut down on the cost incurred by our office which is approximately one-third of the total cost of handling a criminal appeal. In addition to that, we also...

ASSEMBLYMAN ROBINSON: I would argue in favor of someone locally making or accepting it rather than having a DCA because I think that once you take it to the DCA, there's going to have to be a record.

ASSEMBLYMAN IMBRECHT: I thought Justice Christian's suggestion there might make some sense, if you designated a superior court judge that would undertake this review process. I have some problem with the actual trial court judge whose error is being complained of reviewing his own conduct, but if you provided some process whereby defendants and prosecutors and perhaps trial judges could briefly argue these points before another superior court judge so that when it's fresh and contemporaneous, he can at that point decide upon the issuance of the certificate that you discussed.

MR. RAYE: I think our original thought was to have the trial court do it for the reasons that you outlined as an alternative and it's an alternative that we're considering. We haven't actually drafted the legislation yet.

ASSEMBLYMAN ROBINSON: Mr. Imbrecht is not suggesting the trier of fact. Didn't Doolittle's bill have the trier of fact in it?

MR. RAYE: The trier of fact with review, right. The judge who presided at the trial would review. We had two other proposals that we're also considering to expedite appeals. We think this Committee should consider a procedure whereby our office on behalf of the people can move for some reaffirmance of appeals filed with the court of appeal. We attempted to do this under existing law about three years ago and regrettably the Supreme Court ruled the procedure was improper as not being authorized and in fact being at odds with court rules and with statute but a statutory and possibly constitutional change could allow for a procedure whereby we could move for some reaffirmance of appeals that obviously have no merit.

CHAIRMAN HARRIS: The Supreme Court decision did in fact mention constitutional grounds?

MR. RAYE: It mentioned constitutional grounds, right. It sort of goes off on a number of different grounds, but I think ultimately people...

ASSEMBLYMAN ROBINSON: Do you have a citation on that?

MR. RAYE: I don't have a citation. The case name is People v Brigham and 25 Cal. 3rd, I believe. I guess I do have the citation, 25...

ASSEMBLYMAN ROBINSON: I'm going to read that opinion.

MR. RAYE: 25 Cal. 3rd, 283, People v Brigham. And a final suggestion we had was instituting a procedure whereby the court of appeal, and this could possibly be done by court rule, or just a change in internal operating procedures, whereby the court of appeal after reviewing the appellant's opening brief, defines the issues that it considers to be weighty enough to warrant response by our office. By doing this, this would cut down on the amount of time that we spend briefing issues that are obviously not going to be a factor in the court's ultimate decision on the appeal. Those are some of the suggestions, or some of the recommendations that are the things that we're considering, to deal with the problem of the appellate court's congestion as it relates to criminal appeals. Obviously our position on those recommendations or those suggestions are not fixed in concrete just as our position on Senator Doolittle's bill was not and we may or may not attempt to move that bill next

year, but we think something has to be done or something should be done to reduce the substantial amount of costs incurred by the process of criminal appeals.

ASSEMBLYMAN ROBINSON: Mr. Raye, I'd like to ask you to ask your colleagues in the office and the Attorney General what his position would be on a scheme similar to the one that Mr. Justice Christian described that would take some of the good time, some penalty for good time, under SB 42, would apply where the District Court of Appeals decided that the case or the appeal was being pursued without merit and that that would be one of the reasons, that it would be a disincentive to file these appeals.

MR. RAYE: Actually, we've talked about that. That would be kind of a modification of the system used in England.

ASSEMBLYMAN ROBINSON: What it does is it recognizes that when we passed SB 42, we put in a scheme of good time. Is it 10 or 20 percent? I forget the time of the sentence and we also put in penalties. You start doing a lot of manure disturbing and you end up not getting that good time. It just seems to me that if you're also costing the taxpayers $10,000 in frivolous appeals that that also would be grounds for not getting all your good time. An individual would then start thinking. I don't think it should be so severe that there is no way that anyone would appeal because the criminal law is a growing body of law and, notwithstanding what the Legislature does to make it grow, it certainly grows in the courts too. But there would be enough that there would be some recognition of the fact that just because you're the free state's attorney you don't...

MR. RAYE: I think it warrants consideration.

CHAIRMAN HARRIS: Mr. Raye, does that conclude your remarks?

MR. RAYE: Yes.

CHAIRMAN HARRIS: Thank you very much. I hope you'll listen to some of the things that have been said and give us further guidance from your office.

All right. Mr. Moskovitz.

MR. MYRON MOSKOVITZ: How are you, Mr. Harris? My name is Myron Moskovitz. I'm a law professor at Golden Gate University in San Francisco. I'm also a Berkeley resident and one of you constituents.

CHAIRMAN HARRIS: Yes, sir.

MR. MOSKOVITZ: I prepared this long...

CHAIRMAN HARRIS: I'm going to listen very attentively.

ASSEMBLYMAN ROBINSON: He won't browbeat you like he did my constituent yesterday.

CHAIRMAN HARRIS: That's right.

MR. MOSKOVITZ: I think I'll still be in your district. I've prepared this proposal that's in the back of your materials today that Mr. Justice Christian referred to and the way I came at this was to figure on what's the key component that restricts people's use of various procedural devices whether it's appeals, discovery, trials, whatever, and it's mainly money. A lawyer says you have the right to appeal. Do you want to do it? Your client says, "What's this going to cost me?" "It's going to cost you $20,000." "What's my chances of winning?" It's 20 percent, 30 percent, whatever and then the client decides and he balances that money against the chance of winning and because that happens in civil cases, the rate of appeal if fairly low. It's about 14 percent. That was last year. This year is was up to 17 percent. As Mr. Justice Christian pointed out, in criminal cases it's 110 percent and to me that's the key difference. Of the criminal appellants, 91.4 percent of them are indigent according to the State Public Defender's office.

ASSEMBLYMAN IMBRECHT: Of that remaining 9 percent, what's the rate of appeal there? The non-indigent criminal...

ASSEMBLYMAN ROBINSON: You mean the rate of affirmance.

ASSEMBLYMAN IMBRECHT: No, the rate of appeal of the 9 percent non-indigent criminal defendants.

MR. MOSKOCVITZ: Of those that appeal, 91 percent are indigent, 9 percent are not indigent, that's all I have.

ASSEMBLYMAN ROBINSON: But what would be the rate of affirmance amongst that 9 percent because that would give you a bench mark to gauge the other by. I think that's what you...

MR. MOSKOVITZ: That's a good point. I was lucky to get this. I mean, I had to pull a lot of strings to get this information because nobody is looking at this problem because the Judicial Council has none of these...

ASSEMBLYMAN IMBRECHT: The non-indigent is still faced with that same balancing question. How much is it going to cost me and what are my chances of success.

MR. MOSKOVITZ: That would be a good indicator. You're right.

ASSEMBLYMAN ROBINSON: Mr. Gampell, can you get that for us, the rate of affirmance in the non-indigent criminal appeals for a shot of time? Thank you.

MR. MOSKOVITZ: I can just tell you right now it will be tough for him to get this for the past. He may get it in the future if he tells the clerks to send...

ASSEMBLYMAN ROBINSON: I understand. He'd have to do a shot in time like he's done before on other issues. You know just take a picture of six weeks...

MR. MOSKOVITZ: That's right. As was pointed out earlier, the reversal rate, I don't have that for civil cases. I couldn't find it anywhere. In criminal cases, as was mentioned, it's about 11 percent reversal. There is a modification rate, too, that's about another 16 percent which, I think, as you indicated, is a passing phase. That will be cleared up in a year or two when trial judges learn the rules and maybe you clear up some of the legislation, but the reversal rate is fairly small. Another interesting statistic is the percentage of appellate opinions that are published. About 25 percent of the civil cases end up in published opinions which means the judges think they're pretty important. The figure for criminal cases is only 9 percent, very low.

ASSEMBLYMAN ROBINSON: Doesn't that vary district by district? I've been given to understand that some districts will have a tremendously higher publication rate and other districts have a considerably lower one.

MR. MOSKOVITZ: That's true of everything I'm telling you. All of these figures will vary by district, but the over-all rate is much different between civil and criminal. I got some cost figures for you too. You just heard some estimates from the A.G. The figures I got were for the representing the indigent defendant. The State Public Defender's costs are about $2800 a case, although they only handle about 37 percent of the cases. The rest are private attorneys under appointment by the court of appeals and the cost there is only about $750 because they don't pay them very well. The A.G.'s costs are about $2100 and the...

CHAIRMAN HARRIS: Why couldn't all of them be done by appointment?

MR. MOSKOVITZ: Well, I'll leave that to you. You're the ones that set up the State Public Defender and thought it was a good idea. I happen to also because they do such a good job.

CHAIRMAN HARRIS: But they're going to be under restrictions like everybody else, and if there's a more efficient way of doing it, then it seems to me that, in other words, as far as you know there's no bar to having it done by outside counsel.

MR. MOSKOVITZ: Well, one thing you have to recognize is they don't get a cross section. The State Public Defender gets the toughest cases. The appellate court clerks give them the hardest ones. Their reversal rate is much higher than the private Bar too. It's about 16 percent. Anyway, the sum total is between $6,000 and $8,000 per case considering the court of appeals, the A.G., the State Public Defender or private counsel. There's a fourth factor that the Attorney General didn't mention and that is the one you were concerned about, the transcript which is going to run about $1,000 a case although it can be much higher than that. That's a lot of money and a lot of it I have to say is wasted because you only have an 11 percent reversal rate. So, how do you cut that down? How do you plug into the system someway to make the criminal, indigent defendant decide for himself whether it's worthwhile? By definition they don't have money so you can't charge them.

ASSEMBLYMAN IMBRECHT: Just while you're talking, so I can do a little arithmetic, what was the total number of criminal appeals filed last year? Do you know, roughly?

MR. MOSKOVITZ: It was 4285, something like that. Almost the same number as civil cases. The basic principle is a good one, that you charge people and that makes them decide and I'll give you a very good example of that. It's one that you yourselves decided on and that's in Medi-Cal. Medi-Cal did a study in 1974 that showed if you charged people just a dollar or 50¢ for a drug prescription or for a doctor's appointment, it reduces the use of those services in situations where people really don't need them that badly. Now in 1980, the Legislature adopted this principle of co-payment in Medi-Cal across the board and you estimated you're going to save about 45 million dollars a year.

ASSEMBLYMAN IMBRECHT: We're having a little trouble with Beverlee Myers, the Director of the Department of Health on that point but all right.

MR. MOSKOVITZ: But the principle, I think, is a good one.

ASSEMBLYMAN IMBRECHT: Yes, I understand exactly your point.

MR. MOSKOVITZ: Now how do we do that with criminal defendants? The first avenue I investigated was getting them to pay something from their work in prison. About half the prisoners do some work, they get paid 5¢ to 35¢ an hour, and they could contribute a little bit out of that enough to make them think. It's not going to be enough to pay the cost of appeal. Everybody knows that but it should be enough to make them think about it and do it that way and it's not going to take away from any necessities of life because the prison gives them that and I investigated that, talked to people...

CHAIRMAN HARRIS: Let me interrupt you one minute. You mentioned a figure of six to eight thousand dollars as being the cost to appeal. How did you calculate that?

MR. MOSKOVITZ: I did it in a simplistic way. I took the total appellate court budget and divided it by the number of opinions and I cam out with a figure of I think $2,300, it's in my report, per published decision which is rough but that's the best I could do. For the State Public Defender, I simply called up their administrator and he told me it was $2,800, the A.G. the same thing, $2,100.

CHAIRMAN HARRIS: The reason I was asking is that I was trying to make sure that the judge's time has been calculated in and so on and so forth and I think that certainly the way you have done it is one way to do it.

MR. MOSKOVITZ: I just took their total budget and divided it by the number of opinions, that's all.

ASSEMBLYMAN ROBINSON: But the production of the record, the deputy district attorney time, you know a lot of time people are not here to pay you...

CHAIRMAN HARRIS: I think the number is low because I was coming up with the figure of 40 to 50 million dollars and it seemed to me that it was probably much more.

ASSEMBLYMAN ROBINSON: Right, so just adding those two components is significant. I mean, there's time for that deputy district attorney that tried the case to spend with the deputy attorney general that's going to handle the appeal...

MR. MOSKOVITZ: I didn't count that.

ASSEMBLYMAN ROBINSON: I know but those are significant costs that are still being paid by the same taxpayer.

CHAIRMAN HARRIS: Mr. Gampell.

MR. GAMPELL: If you're thinking of 40 or 50 million for the budget, 25 million of that is a pass through of the state's payment to superior court judges, that component of superior court judge's salaries and it has nothing at all to do with the Supreme Court.

CHAIRMAN HARRIS: What is your total budget, Mr. Gampell for the appellate courts?

MR. GAMPELL: Between 20 and 25 million.

CHAIRMAN HARRIS: That is strictly the...

MR. GAMPELL: Court of Appeal and Supreme Court but that's for every aspect.

MR. MOSKOVITZ: Well, my first idea, as I said, was to make them pay a little bit out of their prison wages and it turned out it just didn't work because only about half the prisoners have jobs. Jobs are desirable in prison, and they are based a lot on seniority so you've got to be there awhile before you get a job and when the convicted defendant has to decide whether to appeal, he's not going to have a job yet. It will take him a year or so to get a job so that doesn't work. So then I thought of this idea of, as you put it, giving them some money and then, I didn't say $500, I said $200, and he gets this money...

ASSEMBLYMAN ROBINSON: Fifty cents will get yourself in a lot of political trouble. Can you see our colleagues voting to give Sirhan Sirhan $50 or much less $200? I mean there's a real, real perception problem.

ASSEMBLYMAN HARRIS: A psychological, symbolic problem.

ASSEMBLYMAN ROBINSON: Or the Eastside rapist...

MR. MOSKOVITZ: I know. I have some ways of overcoming that I think. First of all, if you...

ASSEMBLYMAN ROBINSON: We wouldn't need reapportionment if that would pass.

MR. MOSKOVITZ: There's about 11,000 prisoners each year coming in. I propose giving each of them $200 which they have to forfeit if they want to appeal. I figured out that if this influences 10 percent of them not to appeal, which is a very low figure, the state's going to save 1.3 million dollars a year. If you influence 50 percent of them, you save over 12 million dollars a year, so one response to your constituents is that you have this tremendous savings ultimately to them and it's many times this $200. At $500 it wouldn't work out as well. I mean not only for the political reason you mentioned but you'd have to give $500 to a lot of people who wouldn't appeal anyway and your break even point becomes -- you'd have to influence a lot more of them. The only reason I put $500 in my proposal was that I sent my proposal out to a lot of judges and lawyers for feedback and it was mostly very favorable. Everybody thought it was a good idea to try it out, not to impose it statewide but just try it out, which is all I am recommending to you as a pilot program.

One of the comments that I got from a couple of people was $200 isn't enough to influence these guys. You're going to have to go a little higher than that these days and I'm not sure I agree with that. I think any amount that makes the man sit down with his lawyer and talk about it and think about it may be

enough to discourage a lot of meritless appeals even if it's $100. So what I proposed in the test project is to take 250 new inmates picked at random, divide them into five groups and you give one group 500, one 400 each, 3, 2 and 1 and then you do this for a year. You hold them tested against a control group who get nothing and see what happens. See if the rates of filing of appeals is different for any of the groups, if the reversal rate is different for the different groups and try it out. Now, you could add on to this some test some time off instead of money if you wanted. My initial reaction that giving time off for doing this is a bad idea. I...

ASSEMBLYMAN ROBINSON: My proposition is they already get time off. There's a state policy established in SB 42 in order to keep the prisoners under control in the prisons that they will get time off, I believe it's 20 percent, the staff can correct me, of the time sentence they get off. Okay, what I was suggesting is that the time that they would otherwise be entitled to, the filing of a frivolous appeal would be the same as setting your mattress on fire and therefore you would lose so many months of good time. That I believe is considerably more palatable because going to your argument of money, I'm serious, I mean you're a practitioner or you're a professional in this field, I assure you if polled the general practitioner or the lawyer in Orange County who handles a percentage of criminal cases but is not a criminal appellate specialist and asked them what they think of $50 bounty to all the prisoners and I've got a good mix of Republicans and Democrats, mostly Republican in my county, they will tell me I'm crazy and then as I jokingly said to Mr. Imbrecht, but is absolutely true given the competitive nature of the jobs that all of us hold both in the Senate and the Assembly, that no matter how well intended we'd only be able to convince a few CPA's and a few criminal appellate attorneys that what we were doing made economic sense, that we were in fact saving the taxpayers money. Everyone else would believe that we were again getting soft on crime and the result would be those individuals that were stupid enough to vote for the bill would not be around to vote for the next reapportionment plan.

MR. MOSKOVITZ: Well, I'll tell you I, as I said I sent this out to a lot of people,...

ASSEMBLYMAN IMBRECHT: Mr. Robinson speaks as an expert in campaign literature.

MR. MOSKOVITZ: I'm sure he's more expert that I am on that type of thing.

ASSEMBLYMAN IMBRECHT: He knows exactly as I do and I can perceive how that thing would be phrased and we're not just pursuing it -- one other concern as I sit here and think about the $100, I mean I'm trying to put my own mental state into the shoes of somebody sitting in a state prison. What good does

money do you while you're in the prison. I mean you have a few commissary privileges, I understand that, cigarettes and that sort of thing but not much beyond that and I must say that my mental attitude would be that I wouldn't even think twice about gambling $500 versus the prospect of my freedom, even on a very long shot. The benefits to me of having some additional commissary or the ability to buy some items in the commissary versus even an outside shot of my freedom strikes me as...

MR. MOSKOVITZ: The people in the system tell me that that's not right. It might be right at a very low figure but in fact these commissary privileges are very important to the prisoners. They don't have to take the soap that they're given by the system, or the cigarettes. They can get that kind of stuff, small radios, stuff like that and if you think about how long it's going to take them to earn the 20 bucks or whatever it takes to get a small transistor radio at five or ten cents an hour, that's hundreds of hours. $200, I figured out, translated into almost a year of work at five or ten cents an hour so it could influence a lot of people if their attorney advised them to take your year's worth of work which is what the state is giving you instead of this worthless appeal. But you see I'm not proposing we go ahead and do this and gamble on your view that 50 bucks isn't enough, we need to go to three or four hundred, or my view that 200 is enough. Let's try an experiment, try a number of different figures and see what we get. The time question, here's what bothered me and that is you compared it to the guy setting his mattress on fire. If he sets his mattress on fire he's shown that he's not rehabilitated and shouldn't get that good time off and shouldn't go out on the streets and all the things related to good time are things that relate to rehabilitation whereas dropping your appeal has nothing to do with that. You really are, in effect, making the guy serve more time because...

ASSEMBLYMAN ROBINSON: You have to understand that at the time the Legislature restructured our system of sentencing in the Penal Code we made a decision that we were no longer interested in rehabilitation. We acknowledged that the penal systems are exactly that, they're penal system, and therefore we will have fixed and determinate sentencing and that was a policy statement made at the time SB 42 was adopted so what I'm suggesting would be consistent with that policy.

MR. MOSKOVITZ: All right, rehabilitation is the wrong word but the factors that relate to good time do relate to whether the person has shown an indication he'll behave and this is different. Now I don't want to push this because if you feel...

ASSEMBLYMAN ROBINSON: No, this is an idea. If it's a harebrained idea, if there are problems with it I want to hear it.

ASSEMBLYMAN IMBRECHT: Let me just say one other thing to Mr. Moskovitz. I must say, I mean this is the kind of innovative thinking we've got to begin to deal with if we're going to resolve this problem and I want to make it very clear to you that I am in no sense criticizing your proposal in a frivolous way or anything like that.

ASSEMBLYMAN ROBINSON: No, I'm not either.

ASSEMBLYMAN IMBRECHT: When I was first appraised of it this morning on the way to this hearing as I mentioned earlier it was immediately intriguing. The political ramification of how we get around the prospect of in effect providing an automatic stipend to convicted felons is one that I think we need -- perhaps you can, and we can as well, think though a little better and see if there isn't some way to avoid that problem because I do think as well that even with a rationalization argument, this is going to save us money in the long term. The average person on the street is going to find that to be a hard concept to grasp and the average person on the street doesn't really have a perception of the appellate system today or what the costs associated with it are and there would be a tremendous educational lead necessary before we could bridge that conceptual gap.

MR. MOSKOVITZ: Well, let me ask you this because you're more aware of that than I am. My proposal is not to impose this statewide but do it on an experimental basis, but up about $160,000 to try this out in one district. Now I've spoken to Judge Puglia who is presiding judge of the Third District and also Judge Reynoso who is a judge in the Third District. They both like the idea. They would consider trying to persuade their fellow judges to go along with this in the Third District. Now those two, I selected those for a very deliberate reason. Puglia, of course, is a very prestigious judge who's head of the Judge's Association and he's generally considered a very responsible conservative and Reynoso has the same type of reputation as a liberal and people have questions about my proposal on both ends. You worry about selling your constituents on it because you're giving them money. On the liberal end people worry about aren't you inducing these guys to sell their rights so Reynoso and Puglia are willing to try considering it anyway with their fellow judges. Do you think if you tried it out on simply an experimental basis, on a very small basis like this, and perhaps add into it not just the five groups that get different amounts of money, but another two or three groups that get some time off or additional good behavior, do you think that would fly? If the results of that come back with a dramatic showing that you can reduce the number of appeals and save the state a bundle, either with the money or the time, wouldn't that really enhance? It would be part of this educational think you were talking about.

ASSEMBLYMAN ROBINSON: It certainly would be, in my mind, worth exploring. My thing about good time, I was not suggesting that as any kind of automatic. That would have to be a decision of the court...

MR. MOSKOVITZ: As long as you're experimenting, I see nothing wrong with putting that into an experiment at the same time.

CHAIRMAN HARRIS: Mr. Moskovitz, I think we have certainly the spirit of your ideas on the question of disincentives and incentives we do want to explore very, very closely and we appreciate your on-going cooperation with us and with our staff relative to finding out what, in fact, will work and also for our own lives what is going to be politically salable. We can educate our communities but also understanding all of the ramifications of any of the proposals we might consider. Is there anything you'd like to add to your testimony?

MR. MOSKOVITZ: No, I think I've pretty well covered it. One thing I would add is that I thought it was rather interesting that it took in a way someone like me on the outside of government, I'm the head of the State Housing Commission in another field, but in the criminal area I'm outside of government, and nobody in government was looking toward this type of thing and I had to, as I said, pull some strings to get a lot of this information. No one was trying to look at the whole picture. Each segment of government was looking at its own problems. I did get a negative reaction from the Department of Corrections that said pretty much if we go along with this thing we're going to get attacked by a lot of prison groups and I'm sure that's true but who is looking at the big picture?

CHAIRMAN HARRIS: We are. That's why we're having this hearing.

MR. MOSKOVITZ: That's why I'm here.

CHAIRMAN HARRIS: I appreciate that and also want you to understand that to a certain extent it has been a buck passing kind of a situation where we've looked at Corrections, we've looked at the judiciary, we've looked to everybody and said what are you doing, what's the Governor proposing, et cetera, and quite frankly, nothing was forthcoming but perhaps that is because of economic realities. Maybe that's one of the positive realities of Proposition 13. It is forcing us to look at the way we do business and decide what our priorities are going to be and whether or not there's a better way to do business. Thank you, Mr. Moskovitz.

MR. MOSKOVITZ: All right. If you need me, let me know.

CHAIRMAN HARRIS: We will. We'll be in touch and the staff certainly will be talking to you.

Our next witness is Mr. Henry Mann who is with the Appellate Research Division of the San Diego District Attorney's Office and who is representing the California District Attorney's Association. Mr. Mann.

MR. HENRY MANN: Thank you, Assemblyman. My name is Henry Mann. I'm with the San Diego County District Attorney's Office. I'll make very brief remarks. District attorneys historically have not been involved in the appellate process. We generally get involved with the pre-trial writs and when the people appeal. The three areas that we see in our limited experience, however, the major area that we see that could be corrected is to push the appellate rights of the defendant.

I have three examples I think which will lay this out. Under Section 1538.5 of the Penal Code, subdivision I, the defendant has a right after he brings his motion into the superior court to take a writ to the court of appeal and then subsequently to the Supreme Court. After a plea of guilty or a finding of guilt by the court or jury trial, he can also appeal this if there's been no definitive decision by the court of appeal before. We think that this particular area here could be eliminated, that is the pre-trial writ. I notice Justice Christian said that it didn't bother him very much. However, Justice Staniforth in discussing his writ procedures said three justices have to review that. Now the defendant files a petition. We are normally required to file a response which is loaded with facts and laws that somebody has to review. And we generally have two of those at any one time in our office each week. Now if you can multiply that by the amount in the Los Angeles I would believe that is somewhat significant and would be holding down the justices in looking at the appeals.

Another area is dealing with matters before the preliminary hearing in felonies. We've had a lot of situations in which the defense attorneys are unhappy with, for example, a discovery motion prior to preliminary examination. They then take an extraordinary writ to the superior court and then they go from superior court if they're not satisfied to the court of appeal and then subsequently to the Supreme Court. We think that that is an abuse because all of those errors can be tested later on appeal from conviction. They don't need to be contested obviously if the defendant is acquitted. And we think that one of the more gross abuses deals with misdemeanor cases and it was touched on a little bit by a previous witness. In a misdemeanor case, if a defendant is not happy with some action of the court, whether it be justice court or municipal court, they take a writ again to the superior court and again if they lose there they have the right to take the writ on to the court of appeal.

We believe that the legislative intent in creating the appellate department of the superior court is to take all these misdemeanor appeals out of the appellate courts and keep them in the superior court and that some tightening up on that legislation would help greatly and one example of that is we just had a zoning ordinance violation in this county. A person parked his truck on an acre and a half lot out in the county which was in violation of zoning regulations. That went all the way through the appellate process of the appellate department of the superior court and he lost. Then he took a writ to the court of appeal, it was briefed by both sides and the justices issued a published 12 page opinion to our chagrin overturning the conviction. But the point is that we don't believe that the matter of a zoning ordinance of that minimum nature should be before the court of appeal, that they have much other important work to do. So for the California District Attorney's Association, we feel that the tightening up of these areas would release a lot of significant time for the courts of appeal.

CHAIRMAN HARRIS: Thank you.

ASSEMBLYMAN ROBINSON: You're going to see a great deal of drunk driving cases doing the same procedure next year. A great deal.

CHAIRMAN HARRIS: The next witness is Mr. Charles Sevilla who is the Chief Deputy State Public Defender.

MR. CHARLES SEVILLA: I just want to say a few things in favor of that damned orphan the criminal appeal. There have been some statistics bandied about 70 to 80 percent of the criminal appeals in the state being frivolous. That's totally wrong. As one who does criminal appeals professionally, the figure is much lower than that although I will recognize that there is a problem with them. They exist but the percentage nowhere approaches that high figure. For example,...

CHAIRMAN HARRIS: That would depend on how one defines frivolous appeals.

MR. SEVILLA: Well, certainly, one would not describe a frivolous appeal as one which results in a reversal of the superior court judgment. That happens in 10 percent of the cases statewide. Statewide, also, an additional 13 percent of those criminal appeals are modified on appeal. Now what does that mean? A modification can mean striking an enhancement which saves a prisoner three years if it's a great bodily injury enhancement. That's a modification of the judgment. That's not a frivolous appeal to the prisoner who is in state custody and sees three years go off the top of his sentence so those are not frivolous. That one-quarter of the total of criminal appeals we've already isolated as a result, resulting in a change of the disposition imposed by the superior court.

CHAIRMAN HARRIS: And 25 percent of the cases do...

MR. SEVILLA: Are absolutely meritorious.

ASSEMBLYMAN IMBRECHT: However, since I came up with that number and I was trying to concede some of this thing, I certainly would agree with you that reversal is not the only definition of meritorious and you may recall what I suggested is you double that number to suggest that there are others where reversals did not occur but nevertheless were meritorious and I think that might -- I mean it's clearly just a seat of the pants kind of estimate but even if you were to double the 23 percent, you're still looking at about half of the appeals as probably frivolous. I mean I try to be very careful in my terminology.

MR. SEVILLA: Right. I don't disagree that there are appeals that should never get into the system. The problem is whether the remedy is going to be more drastic than necessary. Some of the remedies suggested deserve looking into. The Moskovitz proposal about paying the prisoner $100 or $200 seems politically non-feasible and it's a suggestion that's been around for at least half a dozen years. A book was written on that particular topic about six years ago and to my knowledge no state or federal system has adopted it or even come close. One of the suggestions of the Attorney General's representative was for discretionary appeals, that is an appeal by leave of the trial court, for example, or the appellate court. If you've got the trial judge making that decision, I think we've already discussed it and everybody concedes there are problems with that. If you've got the appellate court making the system, what you have is you're building in an appeal to get an appeal and you're basically, while you may think that you're saving some time, I would say that you're building into another bureaucratization of the process.

CHAIRMAN HARRIS: But it's quicker if it's more cursory. If we can remove that 50 percent that are in fact frivolous by that kind of a process, then it in fact is not only a cost saving but is an efficiency.

MR. SEVILLA: I'm not sure that that's going to happen. I think what's going to happen is, as we've discussed, if there are different types of personalities on the bench, you're going to have some divisions which are less productive taking fewer cases, not necessarily because of the meritorious appeals that are coming before them but because they just decide that the faucet will be turned to one-quarter on, whereas another division, side by side in Los Angeles, for example, may take three times the number of criminal appeals because they are productive. It's just not fair and it's very difficult to devise a system of discretionary appeals which is going to be fair where somebody in San Francisco who appeals under identical circumstances as somebody in L.A., under that system the odds of

one getting an appeal granted and going through with the process and another not are real great and that's simply not fair.

ASSEMBLYMAN ROBINSON: I think what the Chairman suggested though was using a trial court, not the same trier of fact, using something like a criminal law and motion judge to review and do this because the records already there, he can have his informal discussions in camera with the trial judge. He can talk to the D.A., the Public Defender, the...

MR. SEVILLA: We've got something like that going already. Senator Presley carried a bill, SB 1773, about two or three years ago, which is now Section 1240.1 of the Penal Code which requires the trial attorney in every criminal case after a judgment of conviction has been rendered to go meet with the client, sit down and talk to him about the merits of the appeal whether it's good, bad or what have you, and then fill out a certificate, if you will, stating the grounds for the appeal. What are the meritorious grounds for the appeal? My impression is that that statute is not being adhered to, that it is not being enforced by the trial court. That is one step in the direction you're talking about, getting the trial judge to at least force some talking about what are the issues for an appeal.

ASSEMBLYMAN ROBINSON: Well, part of this would be that, prior to going to the District Court of Appeal, the defense attorney or the public defender would have to file a couple of pages on the errors and that would be viewed by, for lack of a better term, a criminal law and motion judge or something, some judge sitting in assignment in the same court, that would have access to all the records, some clerk and everything else so that there would not be...

MR. SEVILLA: But not the transcript?

ASSEMBLYMAN ROBINSON: Right, because the record would not have been cleared.

MR. SEVILLA: If he or she doesn't have a transcript, I would say that it is almost, I'd say any creative trial attorney should be able to, if there's a contested trial, to come up with an issue that is arguably, on paper, meritorious for appeal and it would be very difficult for a conscientious trial judge who hasn't heard the trial to say that's frivolous because that judge isn't going to have heard the case, isn't going to know if the error is overwhelmingly frivolous...

ASSEMBLYMAN ROBINSON: I'm a non-lawyer so I need education sometimes. All right. In a criminal trial, can't the defense attorney even though he is the Public Defender or a defense attorney sitting on assignment request a daily record or daily transcript like any wealthy requestant could?

MR. SEVILLA: You can request it. It's a matter of...

ASSEMBLYMAN ROBINSON: And if he sees reversible error taking place, would it not be his incentive to then communicate with the reporter that he wants a transcript the next day? Isn't that available to him?

MR. SEVILLA: No.

ASSEMBLYMAN ROBINSON: It's not.

MR. SEVILLA: It's a matter of discretion in felony cases. It's a matter of right in capital cases for a daily record.

ASSEMBLYMAN ROBINSON: It's discretion on the trier of the fact.

MR. SEVILLA: Right.

ASSEMBLYMAN ROBINSON: Well, maybe as a trade-off for that we take that discretion of the trier of fact away. Mr. Chairman, I'm talking about your idea, that if the defense attorney sees some reversible error taking place, he could request a daily record so he would have it ready for this informal or formalized meeting where the reversible issues would be reviewed prior to going to the DCA. That might be a trade-off very well for that.

MR. SEVILLA: It would create a little delay in getting that record completed, I suppose. I tend to think that if we would require trial counsel to sit down with the client and go over the merits of the appeal with the client, which we do under Section 1240.1 and have the attorney articulate that...

ASSEMBLYMAN IMBRECHT: I really don't see that process at all because if I'm the defendant sitting there and my public defender is going over the merits et cetera, and then I'm going to, and I suspect other people are going to pursue it from the same perspective, I'm going to say then, well, what is the downside pursuing this appeal? What am I going to lose?

MR. SEVILLA: There are some downsides.

ASSEMBLYMAN IMBRECHT: Okay. Let me hear what those are.

MR. SEVILLA: Okay. In many of the guilty plea appeals, which have been discussed, there is a tremendous downside in a number of them when the guilty plea is a product of a plea bargain because when the defendant goes up and wins, the bargain is over and that defendant goes back and faces all the charges that were originally placed against him or her so the attorney

sitting down and talking that over with the client has a great benefit and my feeling is it's very spotty enforcement as to whether that takes place. I've had appeals, I just had a capital appeal, it wasn't capital when it came up, the fellow was charged with a capital offense. He pled to first degree murder and got life with the possibility of a parole and he appealed and I asked him what is he appealing for? If we win the appeal it doesn't destroy the ability of the prosecutor to go forward with the case. It means he comes back and faces a capital offense. Those things should be discussed when the defendant files an appeal but with the trial attorneys to talk about the downside of such an appeal. Our office probably files about five to ten percent of the filings are abandonments or what we call no merit briefs. That is, we get what are, what we consider frivolous appeals and instead of filing a frivolous brief we talk it over with the client. Some cases we persuade the client to abandon especially when there's a downside to appealing. In other cases, the court requires us to file what's called a no merit brief which is a special procedure and gets very expedited treatment.

CHAIRMAN HARRIS: Let me ask a question. Are economic disincentives, i.e., budgetary problems that all state agencies are facing going to have any effect at all on your policy, your procedure, the way you decide which cases to pursue vigorously, which ones have more merit than others? I mean, is there going to be a natural kind of a clearing out just because of fiscal reality?

MR. SEVILLA: Well, here's what we do. We think we've got an obligation to take the more difficult cases. We have the expertise. On the other side of the ledger, it is important to us to try to handle as many cases as we can so what we are doing, we're taking more death penalty cases which are incredibly voluminous transcripts and then on the other side we're trying to use, get more of the smaller cases which we can turn out quicker because we have expertise.

ASSEMBLYMAN IMBRECHT: Do you know if the 2 percent cut order from the Governor was applied to the State Public Defender's Office?

MR. SEVILLA: The way I heard it, it was 5 percent for us, not 2 percent.

ASSEMBLYMAN IMBRECHT: That's next year.

MR. SEVILLA: We got the 2 percent done already. We're now working on the 5 percent. Yes.

ASSEMBLYMAN IMBRECHT: Two percent is the current fiscal year. The 5 percent is for the budget process that's happening for -- see right now, the Department of Finance is preparing the budget that will be submitted to the Legislature in January. The

2 percent is this fiscal year. The Governor's executive order exempted a number of departments and agencies and my recollection was it was most things associated with the court system.

MR. SEVILLA: I don't think we were exempted from any cut. But back to Assemblyman Harris' question about how it's affecting us. One of the things we're trying to do is to make the system less costly from the defense perspective. We got a grant from LEAA a couple of years ago to devise an automated research system and that is now coming into fruition to be made available. It's already been made available to every county public defender in the state. What it amounts to is we put on microfiche all of our briefs and index them with a computer, so that a county public defender who's researching a motion can go to this index and there they will find in a microfiche card the motion already written for them, basically they can change the names and the same thing has been made available to appellate counsel so that should make it a little cheaper to handle criminal appeals.

CHAIRMAN HARRIS: More specifically what I'm trying to get to is this. We talked about, for example, the economic disincentives that exist for civil litigants who want to appeal. What I'm really trying to get to is what kinds of appropriate disincentives exist in the public defender's office so that because you have expertise you sort out those cases that are in fact, if not frivolous, have little merit or little chance of succeeding and you say well, on our review there is not a logical chance for you to win this and therefore given our resources, we'll file the thing but we're not going to pursue it vigorously because it doesn't make sense. Now if you want to do something else, you want to take it somewhere else, I mean are you doing any of those kinds of things?

MR. SEVILLA: Well, after we've invested the time of reading the record, if we find that there's nothing there, we'll consult with the client. If there is nothing there, we do one of two things. We convince the client that this thing is worthless and to file an abandonment of his appeal. That happens about 5 percent of the time roughly. The other alternative is to say to the client, despite your insistence on going forward with the appeal we have an obligation ethically not to file frivolous appeals. Therefore, we are going to file what the court has deemed a Wende brief, named after a case called People v Wende which basically states the facts of the case and doesn't argue any argument for reversal. That's what we do. After we've read something it doesn't make sense to turn the case back to the system to the court and say appoint somebody else.

ASSEMBLYMAN ROBINSON: What percentage do you file a Wende brief then? Five percent?

MR. SEVILLA: It's probably 5 percent.

ASSEMBLYMAN ROBINSON: So a total of 10 percent of the cases are the clients that come to you insisting on appeals, 10 percent of them you refuse to pursue.

MR. SEVILLA: Well, we either file or convince them to abandon the case or...

ASSEMBLYMAN ROBINSON: Five percent is abandonment and 5 percent are Wendes.

ASSEMBLYMAN IMBRECHT: They cannot refuse to pursue it. The right vests in the client and they have...

ASSEMBLYMAN ROBINSON: No, I understand that but it's 10 percent of them that they use other expedited procedures.

CHAIRMAN HARRIS: Okay, continue, I'm sorry.

MR. SEVILLA: That's about all I had in terms of responses.

ASSEMBLYMAN IMBRECHT: You're in a pretty difficult ethical situation there. I mean there's even a stretched, I mean in terms of that Wende brief thing, if there's any kind of reasonable argument that can be made even if you know the chances of its succeeding being very, very slim, your fiduciary relationship with the client is such that it requires you to go forward.

MR. SEVILLA: Right

ASSEMBLYMAN ROBINSON: How about the good time disincentive in concept?

MR. SEVILLA: Any way you get down to it you're punishing the defendant for filing an appeal and it will be tested constitutionally.

CHAIRMAN HARRIS: Let me ask a question that will be helpful to us. Given the probable reality that, within constitutional bounds, we're going to be doing something as relates either to the scope of appellate review or the process itself, somehow we're going to be trying to look at ways to separate the wheat from the chaff, so to speak, to make sure that those individuals who in fact have been the recipients or the victims, if you will, of errors or who have not had competent counsel, how will be able to separate those cases out.? We'd really appreciate the advice of the State Public Defender as to methodologies and approaches. We want to look at something. We don't want you to simply say, "well, you know, that's not our job. Our job is to defend people." Because quite frankly I think it's going to happen and that's the only reason that I'm pursuing it as vigorously as I am because I'd like to see it

happen in a humane way. I'd like us to do it as positive as we can as it relates to civil liberties and trying to make sure that people , in fact, do get their day in court and do get their day in the court of appeal. But looking at the fiscal realities and looking at the fact that we're not going to be expanding the number of justices, we'd like your advice and if you'd ask your office to review the situation and just to give us some indices of where you think there are possibilities for corrective action that we have to prioritize how we might do that consistent with the Constitution.

MR. SEVILLA: We'd be happy to participate in that dialogue. That's why we're here.

CHAIRMAN HARRIS: Thank you and I appreciate that very much. All right.

Our last witness is Mr. Paul Cyril who is the representative of the Association of Defense Counsel. Mr. Cyril.

MR. PAUL CYRIL: Good afternoon. In anticipation of having a voice problem, I did prepare a short written presentation that you may wish to read at some point and I would just take up with you some of the highlights, if there are any, and I unfortunately also missed the early part of your session, so I don't know if some areas that involve civil appeals, principally...

ASSEMBLYMAN IMBRECHT: Let me mention one to you that Justice Christian raised with us. I think I can probably predict your response. But without being so forward, he argued that we ought to consider tying the interest rate on judgments to something closer to the prime so that there is no economic incentive for the institutional defendant who has a substantial judgment against to pursue an appeal simply to retain monies for a period of time.

MR. CYRIL: I've heard that suggestion made in other places as well and, in my personal experience, I don't think that the parties that my organization represents are in a position as attorneys to take appeals simply on that basis. I think as attorneys we have a higher commitment to the legal process and we generally would not countenance a client of ours telling us to file an appeal even though it's frivolous or unwarranted because they want to save some money. Secondarily, if you're talking about the insurance business...

ASSEMBLYMAN IMBRECHT: I doubt very much if they would say that to you but...

MR. CYRIL: I think we find that most cases that even reach the appellate court level that have gone through the trial level are cases that do in fact involve a significant question of

fact or law, and that most cases, I think, we all recognize never even make it to the trial. The overwhelming majority are settled, disposed of in some fashion long before trial so that the cases that do in fact get tried are cases with substantial questions generally speaking and then you go through the process of sorting out whether an appeal is appropriate and that narrows it down considerably more. Also you can point out the fact that insofar as insurance money or insurance interests or insurance defendants are involved, they already have the Insurance Code provisions in place here in this state, Section 790.03, subdivision H and the Supreme Court decision in Royal Globe which creates a disincentive, as it were, to the taking of appeals where settlement is really the right way to go.

CHAIRMAN HARRIS: Mr. Cyril, let me ask this. I was just kind of glancing through your statement and I think it's very good. You make some very specific recommendations that I'd like you to sort of summarize so we might be able to ask a couple of questions and help us in our deliberations and our understanding. You might go through your statement very quickly and summarize those specific points that you mentioned. I think we would be able to...

MR. CYRIL: Our membership is in Northern California from the Oregon border to Kern County and we do not represent the southern association which is separate and, of course, we're only talking about civil cases and cases involving generally speaking...

ASSEMBLYMAN IMBRECHT: How does Royal Globe impact upon the appellate process?

MR. CYRIL: It raises, under one of the provisions of the Insurance Code, subdivision H, and this is not my own idea, this has been asserted in cases that I've handled, the point is made that if you file an appeal in a case where the jury has found liability, say, and damages in a certain amount, the argument is that liability has become reasonably clear, therefore you should settle the case at that point and if you don't you're...

ASSEMBLYMAN ROBINSON: There is no case though that follows Royal Globe that expands it to the appellate process. It's basically an extension of common law bad faith. I've read that case and the way it reversed the All State case. I mean it really goes to settlement, refusal to settle within policy limits prior to going to trial and there's no recent litigation or decision of the court that expands that to the appellate process, is there?

MR. CYRIL: The Royal Globe case to my knowledge is the last word on the subject and I'm saying to you only that we've had it asserted by representatives of the plaintiff that if in fact you do file an appeal...

ASSEMBLYMAN ROBINSON: With a threat, they're asserting Royal Globe all over the place. I mean you get a Royal Globe letter before discovery has even commenced at the filing.

MR. CYRIL: Yes.

ASSEMBLYMAN ROBINSON: And that's because the Royal Globe decision requires a separate proceeding before the court in order to assess bad faith damages.

MR. CYRIL: My point being solely that if you are considering interest as a way of creating disincentives insofar as insurance companies are concerned, I think, that the disincentive is there already to do something that is going to run afoul of Royal Globe. Now maybe interest ought to go up for reasons that are totally...

ASSEMBLYMAN ROBINSON: But what I'm suggesting, if you assume that it's extended to the appellate process, Royal Globe requires a separate procedure. The court was very clear that you cannot come in and award punitive damages based on a Royal Globe theory. You must go pursue a Royal Globe theory in a separate action and that action may not commence until after the close of the first action, so if you're talking about a 10 million dollar judgment, you're being dilatory in maybe settling the Royal Globe ten years from now still would be very cost effective. I'm not saying that that what's going on. I'm just saying that I'm not sure Royal Globe is your best defense for post-judgment interests not being increased.

MR. CYRIL: Well, I'm not here to argue interest as an economic proposition. That may be appropriately raised.

CHAIRMAN HARRIS: Mr. Cyril, go ahead please.

MR. CYRIL: My first observation is in regard to settlement conferences. We think, generally speaking, that this is a fine introduction into the appellate system. When I first started practicing we didn't normally have settlement conferences at the appellate court level. To my recollection, it started a few years ago, at least in the northern part of the state, over in Sacramento in the 3rd District and my experience over there and my colleagues' experience with those settlement conferences is basically favorable. We think that they are a good thing to have at that level. It will depend, of course, on the individual. Settlements are very personal sorts of endeavors by judges. Some are better at it than others and I think what you see is that it depends on the effectiveness of the particular judge. The experience of counsel perhaps also gets involved there, but we commend this and certainly would urge that this sort of thing be continued.

One of the problems we've heard of is the burden that writing opinions creates on a judiciary and certainly it does. Perhaps there is a way of following the New York procedure that one of my colleagues mentioned to me before I came here. That is to cut down the scope and size of opinions in cases that can be considered more routine. Limitation of appealable issues is another area that was mentioned as a possible way of dealing with congestion and delay in the courts. I think there may be some. There are already limitations on appealable issues just from the body of case law as we know it. You don't take appeals against a substantial evidence case where there is evidence. That's a limitation but sometimes these things come up and they come up not only from the defense side presumably, but from the other side as well. So it seems to me that the limitation on appealable issues is built into the system but that if you created some new ones you then create another area for dispute and you perhaps have another hearing on it, a motion to dismiss or some such...

I think that that just adds to the workload and expense so I think perhaps the better answer is, and this is perhaps more one that the Bar should address rather than the Legislature, is to try to upgrade the skills and effectiveness of appellate attorneys so they don't raise things that do waste time. Of course I'm a member of another association, the California Academy of Appellate Lawyers and we certainly try to influence the Bar in that direction to raise the standards.

CHAIRMAN HARRIS: I read your comments on the penalties of appeals of defendants and I think I understand your arguments. Other than interest, do you think there are other disincentives that might be utilized in the civil area?

MR. CYRIL: Well, of course, everybody has heard the notion of having attorneys' fees awarded as a disincentive for either a lawsuit or an appeal that is unmeritorious. That's the sort of thing that perhaps cuts both ways more fairly than interest and I don't know what the statistics are to show what is creating all the delay. There's a lot of problems in the criminal appeal area and I don't know how much the civil side really does this but I know that we've gone in the First District from being fairly current to virtually no movement at all, but I can't see that it's because of any thing that's passing through my office.

ASSEMBLYMAN IMBRECHT: Let me pursue this question of interest just a little bit more. I don't perceive of interest post-judgment as a penalty but something that is rightfully that of the aggrieved party who has now had a formal judgment by a court in California that there is...

MR. CYRIL: Yes, there's post-judgment interest now and I certainly have no quarrel with that.

ASSEMBLYMAN IMBRECHT: But it's much, much lower than what the current price of money is for commercial markets and that's...

MR. CYRIL: The point I was trying to address is...

ASSEMBLYMAN IMBRECHT: I'm not thinking of interest as a penalty to be imposed and it's hard for me to see it being fairly characterized under those circumstances, in that context.

MR. CYRIL: The point I was trying to address is should interest rates be increased to create disincentives for appeals that shouldn't be filed, I say to you that maybe the interest rates ought to be increased because of the economic climate, for historical reasons, for...

ASSEMBLYMAN IMBRECHT: The question is, the real question is, do the low current interest rates create an incentive for appeal? I'm not suggesting we raise interest rates to create a disincentive necessarily, but to eliminate what may be the circumstance today which there maybe is in effect an actual incentive. The cost of money is 21 or 22 percent and we're only charging 10 percent interest on judgments. That's a pretty substantial contrast.

MR. CYRIL: As a practitioner I can tell you truthfully I don't see that as a factor coming up in my cases and that's all I can tell you.

ASSEMBLYMAN IMBRECHT: Judge Christian testified to us earlier that he sits in settlements of appeals where he is convinced that's the factor, where there's a substantial judgment that's been rendered of a million dollars or more against an institutional client.

MR. CYRIL: I guess it just depends on how you see this but I certainly don't. My members of my organization...

CHAIRMAN HARRIS: I certainly appreciate the offer of assistance and advice from your organization. I hope you have a sense that we are serious about doing something about our appellate process in California if for no other reason than...

MR. CYRIL: Right.

CHAIRMAN HARRIS: And we would like to have your participation so that we're not doing something that's haphazard, something that's not going to be workable. If there are other specific recommendations that you would care to offer after deliberations with your colleagues and your association, we would be more than happy to receive them and we certainly would appreciate your on-going advice and cooperation as that proceeds.

MR. CYRIL: Thank you. We're glad to do it.

CHAIRMAN HARRIS: If there are no other witnesses, this hearing will be adjourned and we thank all of you for your time and your participation and in appropriate cases we look forward to continued efforts on behalf of the appellate process.

# # # # # #

EXHIBIT A

CALIFORNIA LEGISLATURE

Assembly Committee on Judiciary

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MEMORANDUM

TO: All Members of the Assembly Judiciary and Criminal Justice Committees

FROM: Geoff Goodman, Rubin Lopez, and Ray LeBov

SUBJECT: Interim Hearing on Appellate Court Efficiency

DATE: October 6, 1981

On October 15, 1981, the Assembly Judiciary and Criminal Justice Committees will hold a joint hearing in San Diego on Court of Appeal efficiency. The hearing is scheduled to begin at 10:00 a.m. in Room 310 of the County Administration Building, 1600 Pacific Highway, San Diego, California.

Members of the staffs of both Committees have solicited testimony from Justices of the Appellate Court, appellate attorneys and other experts. The witnesses were requested to present testimony which identifies problems, if any, in appellate court structure, administration and practices as well as proposals for improving appellate court efficiency. In particular, witnesses were asked to focus on addressing the following issues:

1. Identification of the nature, extent, and cause of problems, if any, relating to volume and delay in California Courts of Appeal. For example:

   -- What is the impact of criminal appeals on civil appellate calendaring?

   -- How does the current appeal court structure, including the existence of multiple divisions within districts, affect judicial efficiency?

   -- Do available statistics indicate the existence of substantial problems in delay or congestion in the appellate courts?

2. Identification and evaluation of approaches and experiments presently being used to solve these problems. For example:

   -- What is the effect of the expanded use of pre-hearing settlement conferences in the First and Third Appellate Districts?

   -- What results can be anticipated from the Judicial Council's circuit riding experiment?

3. Further suggestions for improving appellate court efficiency. For example:

   -- Would limiting or restricting appealable issues be a reasonable approach to curing volume and delay problems?

   -- How does the use of legal research attorneys affect appellate caseload? Does the use of central staff attorneys result in greater productivity?

INCREASED WORKLOAD

Over the past two decades, appellate courts throughout the country have experienced a dramatic increase in workloads. Many reasons have been given for the expansion of appellate caseloads: exploding population, increased urbanization, the recognition of the rights of prisoners, criminal defendants and consumers and the tendency of many segments of society to rely on the courts to solve social problems.

California's Courts of Appeal, like their counterparts elsewhere in the United States, have experienced persistent increases in caseloads. The following tables illustrate this increase by comparing workload, disposition by written opinion, and judgships at five-year intervals from 1964-1965 through 1979-1980.*

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*"Report of the Chief Justice's Special Committee on Appellate Practices and Procedures in the First Appellate District," April 21, 1981, p. 9.

CIVIL AND CRIMINAL APPEALS FILED

Year	First Dist.	Second Dist.	Third Dist.	Fourth Dist.	Fifth Dist.	State
1964-65	659	1,304	240	401	118	2,722
1969-70	1,136	2,089	370	725	223	4,543
1974-75	1,571	2,374	596	1,000	374	5,915
1979-80	2,276	3,153	931	1,641	833	8,835
Average Annual Increase, 1969-70 to 1979-80 (Approximate):						
	7%	3 1/2%	10%	8 1/2%	14 1/2%	—

DISPOSITIONS OF APPEALS AND ORIGINAL PROCEEDINGS BY WRITTEN OPINION, TOTAL AND PER JUDGE*

Year	First Dist.		Second Dist.		Third Dist.		Fourth Dist.		Fifth Dist.		State	
	Total	Per Judge	Total	Per Judge	Total	Per Judge	Total	Per Judge	Total	Per Judge	Total	Per Judge
1964-65	446	51.8	890	74.2	140	46.7	216	72.0	123	41.0	1,835	61.2
1969-70	769	64.1	1,590	79.5	232	58.0	437	48.6	175	58.0	3,203	66.7
1974-75	1,527	99.2*	2,347	103.8*	516	81.9*	851	97.8*	330	86.8*	5,571	98.1
1979-80	1,712	100.0*	2,377	105.2*	664	83.0*	1,350	124.4*	556	109.0*	6,659	104.7

Also see the graphs attached as Exhibits 1-5. These graphs are in "semi-log" scale so that equal vertical distances represent equal percentages of change, and a constant percent of change produces a "straight line" slope, regardless of the size of the number.

PROPOSED CHANGES

The traditional answer to increasing appellate caseloads has been to increase the number of appellate judges. This solution has not always been possible and according to some writers, not always satisfactory. (See Goldman, Jerry, "The Appellate Settlement Conference an Effective Procedural Reform," State Court Journal, Vol. 2, No. 1, Winter 1978, pp. 3-5).

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*Per authorized judge for 1964-1965 and 1969-1970; per judge-equivalent (not available for 1964-1965 or 1969-1970) for 1974-1975 and 1979-1980 to take into account assigned judges and extended absence and vacancies in office.

Recently the Special Committee on Appellate Practices and Procedures in the First Appellate District submitted its final report. (A copy of the Summary of the Report is attached as Exhibit 6). The Report contained six specific findings:

1. Appellate caseload is growing steadily.

2. Such techniques as the use of central staff for dealing with increased appellate caseload without a corresponding increase in judgships have facilitated the work of the courts, but have created some appearance of diminished judicial control over the appellate decision-making process, and have reached the limit of their effectiveness.

3. Appellate caseloads per judge are already excessive.

4. It does not now appear to be necessary or practical to make any material change in the law providing for the right to appeal.

5. Some measures to discourage appeals taken solely for the purpose of delay would be appropriate.

6. Some measures can be taken to speed appeals without sacrificing the quality of the decisionmaking process.

The Special Committee also made 18 separate recommendations regarding methods of handling increased appellate caseloads. Those recommendations are included in Exhibit 6 to provide an overview of the broad range of proposals in this area.

What follows is background material on some specific issues -- expanded use of pre-hearing settlement conferences, the use of professional and centralized staff, and restrictions on criminal appeals.

PREHEARING SETTLEMENT CONFERENCES

The Prehearing Settlement Conference (PHSC) is a relatively recent innovation designed to reduce appellate court judges' workload and to expand their available time by encouraging settlement. Although the specific operation of PHSC's differ from court to court, there are several elements common to the innovative procedure. Opposing counsel meets with a judge or, in a few courts, with a staff attorney who through various procedures seeks to encourage or arrange settlement of the case. The proceeding is confidential. If settlement is not reached, the judges hearing the appeal have no knowledge of what was said in conference. The conference mediator (i.e., the judge or staff attorney) is not involved in the later substantive consideration of the appeal. Approximately 12 state appellate courts have implemented some form of PHSC procedure.

The major benefits from a PHSC program are that it may lessen the number of appeals that require consideration by our appellate court and permit a narrowing of issues prior to hearing. However, there are some potential drawbacks that must be recognized. Critics suggest that the time spent by mediators could be better spent hearing and deciding cases under normal processes. Some critics suggest that preparation for settlement conferences delays the normal process (e.g., the preparation of transcripts may be delayed pending a settlement conference). Further, critics suggest that the time and expense required by PHSC programs simply do not justify the effort of implementation.

In California, the First, Second and Third Appellate Court Districts have settlement conference programs. Rule 19.5, California Rules of Court, permits presiding appellate justices to order appellants to file a short statement of the nature of the case and the issues on appeal after the notice of appeal had been filed and to order all counsel to attend a prehearing settlement conference. Each district is permitted, by local rule, to establish their own program to meet local needs. For example, in the First Appellate District, counsel are ordered to appear at a PHSC in all cases that are subject to the program (the program excludes juvenile and in pro per cases). However, parties are allowed to "opt out" of the program if they think settlement would not be useful. The PHSC program in the Second District is completely voluntary and parties must agree to participate in the program before the case is arraigned to a settlement judge and a conference date set. The Third Appellate District's program is mandatory. If any party accepts an invitation to participate, regardless of the desire of other parties, the case is submitted to the conference program. If no party accepts a settlement, the judge decides after briefly reviewing statements proposed by the parties, whether to order a conference.

Statistical data on the success of the California program is incomplete. Nevertheless, the Third District strongly advocates PHSC's expanded use and has published the following data:**

**See Janes, Betram, George E. Paras, Anita Rue Shapiro, "The Appellate Settlement Conference Program in Sacramento," California State Bar Journal, (Vol. 56, No. 3, March 1981, p. 112).

Conferences and Settlements in Civil Appeals
at the California Court of Appeal, Sacramento

Year	Civil Appeals	Settlement Conferences	Cases Settled
3 month trial period	156	66 (42%)*	36 (55%)**
1975	316	134 (42%)	72 (54%)
1976	387	92 (24%)	54 (59%)
1977	439	194 (44%)	105 (54%)
1978	439	295 (67%)	147 (50%)
1979***			
1980	530	363 (68%)	134 (49%)****

*Percentage of civil appeals in which settlement conferences were held.
**Percentage of settlement conference cases that settled.
***No statistics are available for 1979.
****The number of settlement conference cases that have settled thus far, and the percentage of all nonpending settlement conference cases that have settled.

Civil Appeals Dismissed*
California Court of Appeal

	Statewide**		Sacramento	
Fiscal Year	Civil Appeals	Dismissed	Civil Appeals	Dismissed
1972–1973	2014	430 (21%)***	263	32 (12%)****
1973–1974	2116	400 (19%)	264	43 (16%)
1974–1975	2380	489 (21%)	306	88 (29%)
1975–1976	2837	668 (24%)	346	121 (35%)
1976–1977	2883	825 (29%)	400	138 (35%)
1977–1978	3064	785 (26%)	454	211 (46%)
1978–1979	3219	867 (27%)	443	176 (40%)
1979*****			515	210 (41%)
1980*****			530	247 (47%)

*After the record was perfected.
**Except Sacramento.
***Percentage of statewide (except Sacramento) civil appeals dismissed after the record was perfected.
****Percentage of Sacramento civil appeals dismissed after the record was perfected.
*****No statewide statistics are available at this time.

CENTRALIZED AND PROFESSIONAL STAFF

Another controversial aspect of appellate court procedure is the role and function of the courts' staff attorneys (i.e., attorneys assigned to particular individual justices, writ attorneys and central staff attorneys). There is a sharp division of opinion as to precisely what functions the courts' staff should perform. It is generally agreed that legal staff can help increase a court's productivity. However, some commentators have observed that such a staff, particularly a central court staff (i.e., staff serving the court as a whole) may fulfill what is more properly a judicial function and have undue influence in the deciding of cases. This function is believed to be most likely to occur when the ratio of

career legal staff to short-term or temporary staff is too great. Accordingly, the Administrative Office of the Courts has sought to maintain a "delicate balance" between the two levels of experience. The intent is to ensure a constant infusion of fresh ideas and enthusiasm through turnover of temporary legal staff while also giving the court the benefit of some experienced, well-trained career staff.

The California Courts of Appeal adopted a central staff research plan in 1969. As conceived of at that time, the role of central staff is "to identify cases deemed 'routine,' and after doing appropriate research, to prepare comprehensive memoranda and draft opinions in those cases. The staff memorandum and draft opinion are submitted to a panel of the Court which assumes responsibility for approving the staff work, referring it back for further work, or (at the request of any of the three judges) assigning the case to a member of the panel for conventional treatment."* This diversion of "routine" cases to central staff is intended to reserve more judicial time for cases involving substantive issues. However, it has been criticized as a usurpation of a judicial function by non-judicial personnel. While conceding that the expanded role of the legal staff is convenient and may increase judicial productivity, some commentators argue that the cost is too great: i.e., the quality of justice rendered suffers and the public acceptance of the court's opinions is diminished.

Other experts, such as Bernard Witkin, disagree. They argue that the volume of appellate cases is so great that an expert professional research staff is crucial to judicial efficiency and that the court does not actually delegate judicial functions. The authority to decide cases remains with the justices, only the task of stating the reasons for decisions is delegated and the products are "carefully considered decisions that follow the controlling statutory and decisional law."**

ISSUES CONCERNING APPEALS IN CRIMINAL CASES

Proposals relating to criminal cases generally aim at the perceived problem that there are too many meritless appeals. Several approaches to this problem may be raised at the hearing:

1. Expedited Handling. Some have proposed that the court be permitted to dispense with full written opinions in cases which raise no valid issues. It is argued that oral opinions from the bench or

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*"Report of the Chief Justice's Special Committee on Appellate Practices and Procedures in the First Appellate District," April 21, 1981, p. 15.

**"Witkin on Appellate Court Attorneys," California State Bar Journal, March/April 1979.

summary affirmances by written memorandum could save substantial court time. The State Constitution currently requires a written opinion with the reasons stated (Art. VI, Sec. 14). Opponents of this approach express concern that the quality of decision-making might suffer if a written opinion were not required. They also question whether a significant amount of judicial time would be saved.

2. Screening Appeals. Another approach is to limit the number of appeals by screening which cases may be appealed. One Attorney General sponsored bill (SB 1197, Doolittle) would have required the trial court to decide whether or not a case raised sufficient issues to justify an appeal. The Judiciary Committee has not yet taken action on the bill. A copy of the Committee's analysis is attached (Exhibit 7).

3. Discouraging Appeals by Indigents. Professor Myron Moskovitz has suggested an unusual approach that seeks to discourage indigent defendants from filing meritless appeals. Under his proposal, an indigent would be credited with a certain sum of money. If he appealed, the money would go toward the costs of appeal. If he did not appeal, the money could be used by the inmate for expenses in prison. A copy of his proposal is attached (Exhibit 8). The attachment includes a compilation of relevant statistics.

GG/RL/RL:df

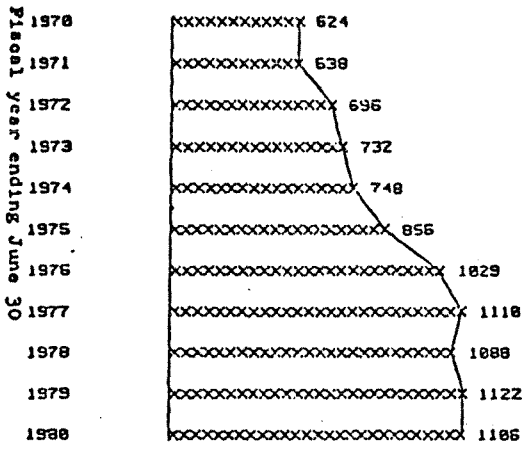
Attachments

EXHIBIT 1

FIRST APPELLATE DISTRICT

DISTRICT 1 -- CIVIL APPEALS -- LOG SCALE

Civil

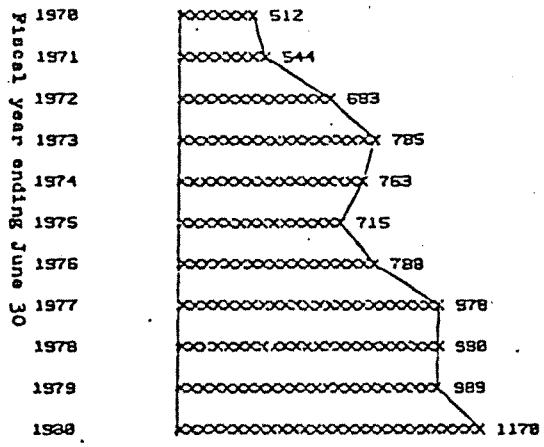


APPROXIMATE AVERAGE GROWTH RATE
7.16 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
5.09 % PER YEAR

DISTRICT 1 -- CRIMINAL APPEALS -- LOG SCALE

Criminal

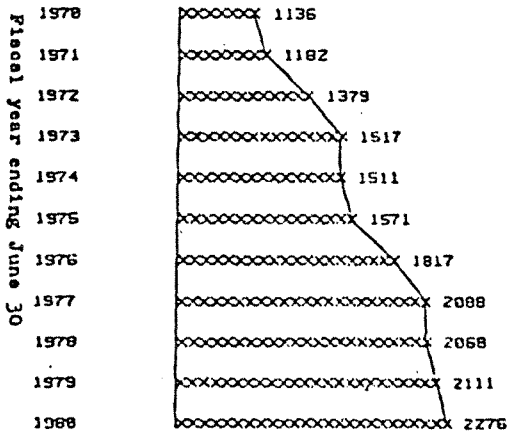


APPROXIMATE AVERAGE GROWTH RATE
7.62 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
8.62 % PER YEAR

DISTRICT 1 -- TOTAL APPEALS -- LOG SCALE

Total

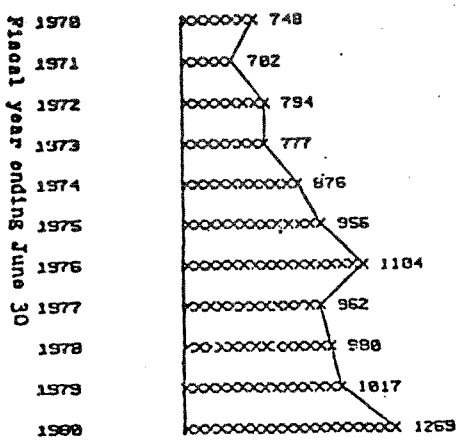


APPROXIMATE AVERAGE GROWTH RATE
7.30 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
7.2 % PER YEAR

EXHIBIT 2

Civil

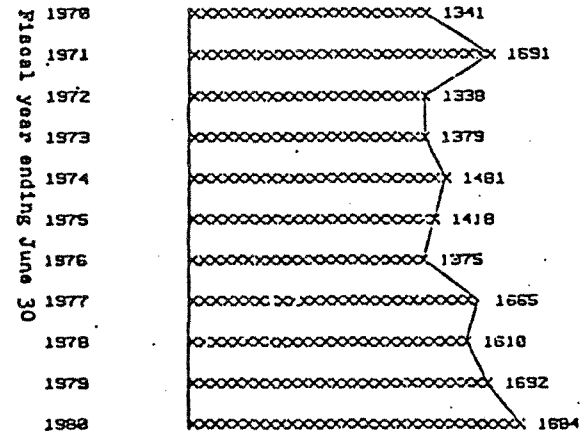


APPROXIMATE AVERAGE GROWTH RATE
5.85 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
5.43 % PER YEAR

DISTRICT 2 -- CRIMINAL APPEALS -- LOG SCALE

Criminal



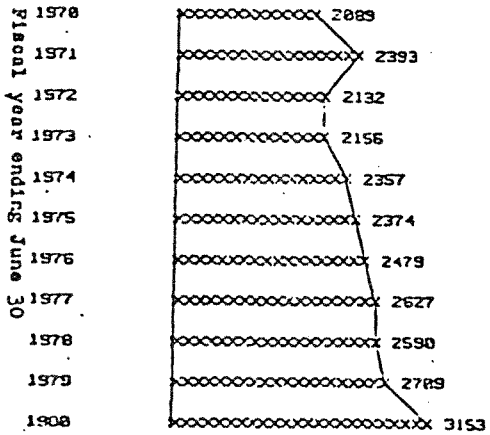
SECOND APPELLATE DISTRICT

APPROXIMATE AVERAGE GROWTH RATE
2.35 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
3.46 % PER YEAR

DISTRICT 2 -- TOTAL APPEALS -- LOG SCALE

Total

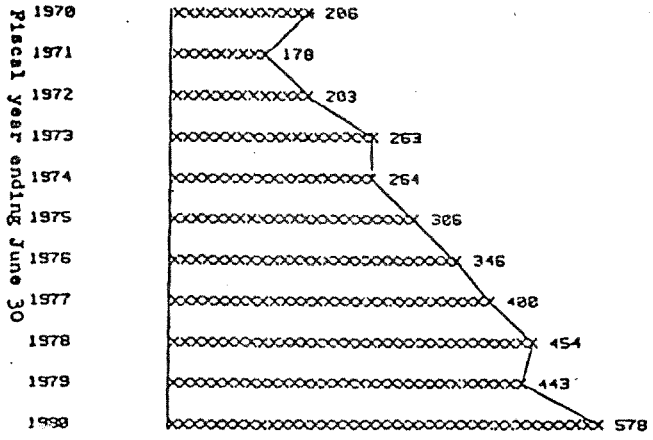


APPROXIMATE AVERAGE GROWTH RATE
3.31 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
4.2 % PER YEAR

EXHIBIT 3

Civil

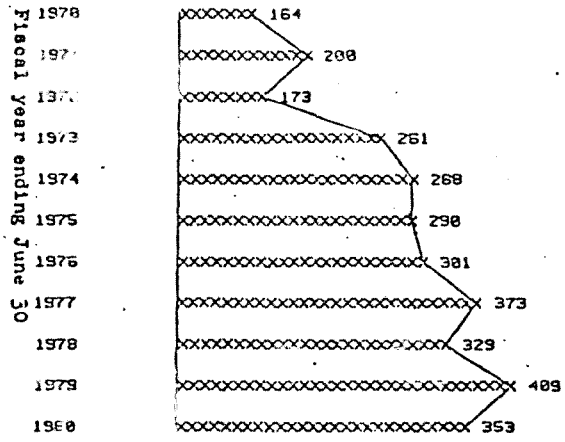


APPROXIMATE AVERAGE GROWTH RATE
[illegible] 16 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
10.87 % PER YEAR

DISTRICT 3 -- CRIMINAL APPEALS -- LOG SCALE

Criminal



THIRD

APPELLATE

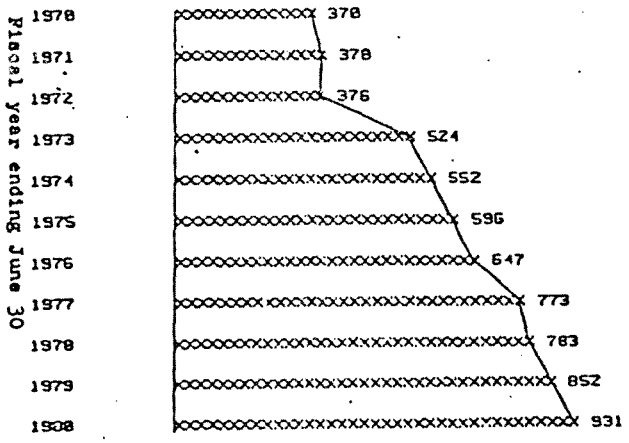
DISTRICT

APPROXIMATE AVERAGE GROWTH RATE
8.9 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
7.97 % PER YEAR

DISTRICT 3 -- TOTAL APPEALS -- LOG SCALE

Total



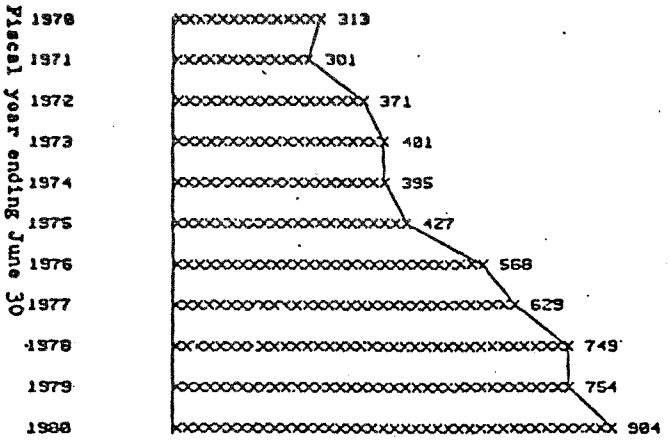
APPROXIMATE AVERAGE GROWTH RATE
10.52 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate

EXHIBIT 4

FOURTH APPELLATE DISTRICT

Civil

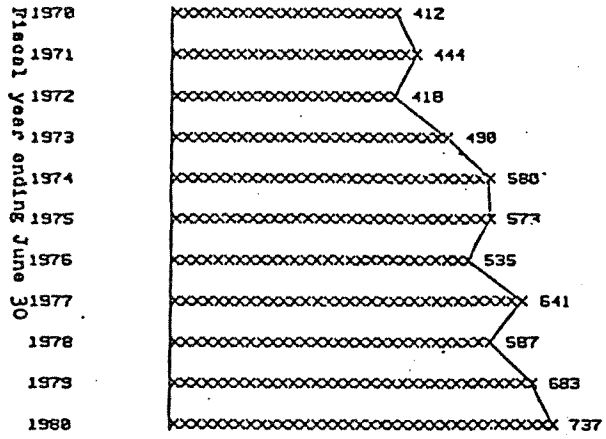


APPROXIMATE AVERAGE GROWTH RATE
11.88 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
11.19 % PER YEAR

DISTRICT 4 -- CRIMINAL APPEALS -- LOG SCALE

Criminal

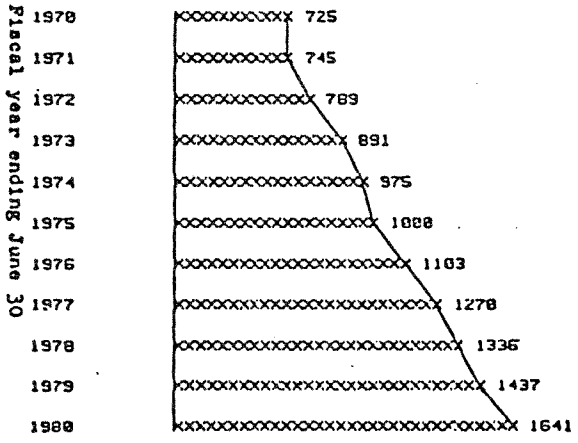


APPROXIMATE AVERAGE GROWTH RATE
5.71 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
5.95 % PER YEAR

DISTRICT 4 -- TOTAL APPEALS -- LOG SCALE

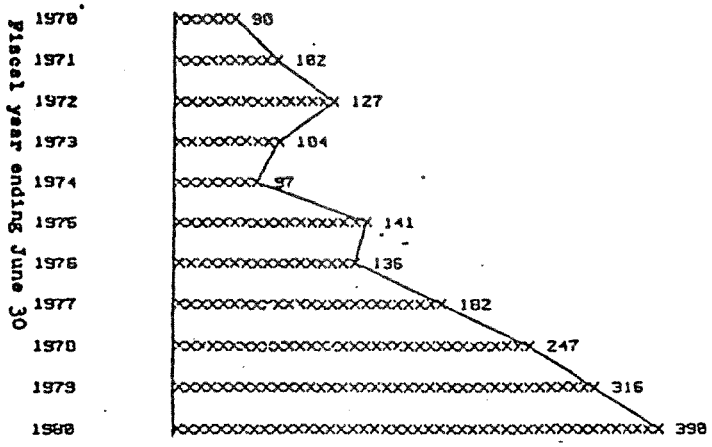
Total



APPROXIMATE AVERAGE GROWTH RATE
8.65 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
8.51 % PER YEAR

Civil

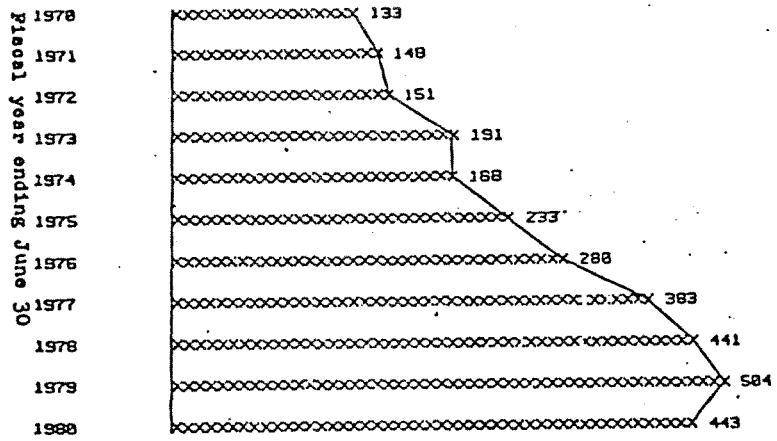


APPROXIMATE AVERAGE GROWTH RATE
14.93 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
15.79 % PER YEAR

DISTRICT 5 -- CRIMINAL APPEALS -- LOG SCALE

Criminal



FIFTH

APPELLATE

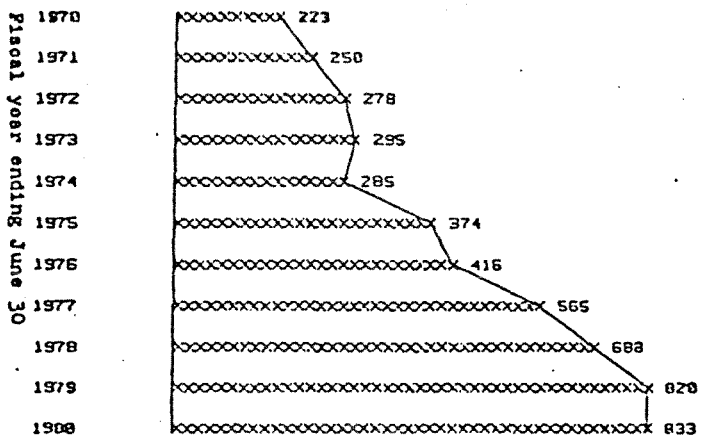
DISTRICT

APPROXIMATE AVERAGE GROWTH RATE
15.58 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
12.79 % PER YEAR

DISTRICT 5 -- TOTAL APPEALS -- LOG SCALE

Total



APPROXIMATE AVERAGE GROWTH RATE
15.38 % PER YEAR
OVER THE 10 YEARS

Compounded Percentage Growth Rate
14.69 % PER YEAR

EXHIBIT 6

REPORT OF THE CHIEF JUSTICE'S SPECIAL COMMITTEE ON APPELLATE PRACTICES AND PROCEDURES IN THE FIRST APPELLATE DISTRICT

SUMMARY

A. The special committee finds:

1. Appellate caseload is growing steadily.

2. Such techniques as the use of central staff for dealing with increased appellate caseload without a corresponding increase in judgeships have facilitated the work of the courts, but have created some appearance of diminished judicial control over the appellate decision-making process, and have reached the limit of their effectiveness.

3. Appellate caseloads per judge are already excessive.

4. It does not now appear to be necessary or practical to make any material change in the law providing for the right to appeal.

5. Some measures to discourage appeals taken solely for the purpose of delay would be appropriate.

6. Some measures can be taken to speed appeals without sacrificing the quality of the decision-making process.

B. For reasons discussed in the full report, the special committee therefore recommends that:

1. New Court of Appeal judgeships should be created over the next several years so as to reduce the work-load per judge to an average of 75 to 85 majority opinions per year. The Legislature should immediately add at least four judgeships for the First Appellate District.

2. If workload is reduced to the level suggested

in (1), the Courts of Appeal should consider mandatory court decision conference procedures which will assure an oral three-judge discussion of each case prior to filing of an opinion.

3. Preargument court conferences should be held sufficiently in advance of oral argument to permit notification to counsel of points which the court particularly wishes discussed at argument.

4. There should be two personal research attorneys available per judge. Central staff should not exceed one attorney per two judges.

5. A rule should be adopted requiring conformance with the general practice of naming, in a footnote to the opinion, the judges who participated in the decision of a "by the court" case.

6. Legislation should set postjudgment interest rates in civil cases to the maximum allowed under the state Constitution.

7. Legislation should provide for the automatic award, as costs to the prevailing party in a civil appeal, of attorneys' fees of not less than $500 and not more than $1,500.

8. The time to appeal in criminal cases should be reduced from 60 to 30 days.

9. Transcript preparation in criminal cases should begin, automatically, upon conviction after trial (unless otherwise ordered), and upon conviction based on a plea if ordered by the trial court.

10. In criminal appeals, the rules should provide that the record on appeal normally include closing arguments, oral instructions, and oral proceedings in suppression hearings under section 1538.5 of the Penal Code; and the clerk's transcript should include all written pretrial motions and written instructions.

11. The use of computer-aided transcription should be expanded. There should be limited experiment in producing

transcript from sound recordings. The Judicial Council should review means of assigning court reporters in trial courts so as to reduce delays in preparing reporters' transcripts on appeal.

12. A 50-page limit should be imposed on briefs, regardless of the method of preparation (with longer briefs permitted on special application). Briefs should be required to give page references to the record indicating where points on appeal were preserved.

13. Each Court of Appeal should adopt a strict policy on extension of time for filing briefs and apply the policy uniformly. In civil cases, the parties should not be permitted to stipulate (without court approval) for extensions of more than 30 days for the filing of briefs.

14. Each Court of Appeal should develop procedures to identify defective briefs as soon as possible after filing, and in any event, before the case is placed on calendar.

15. The First Appellate District should have a properly located law library staffed by a full-time professional law librarian.

16. A Rule of Professional Conduct should be considered to require counsel on appeal to notify their clients of the Court of Appeal decision and of the deadline for seeking a hearing in the Supreme Court.

17. Each court's procedures for handling emergency writ applications should be publicized.

18. Rule 14(b) should be amended to clarify the procedure and criteria governing amicus curiae briefs.

EXHIBIT 7

SENATE COMMITTEE ON JUDICIARY 1981-82 Regular Session

SB 1197 (Doolittle)
As introduced
Penal Code
JGD

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CRIMINAL APPEALS
-CERTIFICATION OF MERIT-

HISTORY

Source: Attorney General

Prior Legislation: None

Support: Unknown

Opposition: State Public Defender

KEY ISSUE

SHOULD APPEAL AFTER CONVICTION BE CONDITIONED ON A CERTIFICATION OF MERIT FROM THE TRIAL COURT?

PURPOSE

Existing law authorizes every defendant convicted of a criminal offense to appeal as a matter of right.

This bill would condition appeal on certification by the trial judge that the defendant has raised an issue or issues that may necessitate reversal of the conviction.

The purpose of the bill is to attempt to reduce the volume of criminal appeals.

(More)

COMMENT

1. Certification procedure

(a) Appeals from guilty plea

Existing law limits the right of appeal of an offender who pleads guilty to only those cases wherein a judge files a certificate of probable cause with the county clerk, based on the defendant having shown "reasonable grounds" for the appeal (P.C. Sec. 1237.5).

This bill would establish an even stricter test for defendants who consistently maintained their innocence.

IS THIS THE AUTHOR'S INTENT?

(b) Self-criticism for trial judges

This bill requires the defendant to convince the trial judge to certify the case for appeal, unless the trial judge was not available.

In most cases appeals are predicated upon one form or another of judicial error. This bill would therefore require that a defendant convince the trial judge he or she may have erred in order to be granted an appeal. Moreover, this bill would require that a judge certify not only that he or she may arguably have erred, but that the error might not have been harmless and could therefore result in reversal on appeal.

IS IT REALISTIC TO EXPECT TRIAL JUDGES TO INVITE REVERSAL OF THEIR DECISIONS?

(More)

IF A TRIAL COURT WERE TO MAKE SUCH A FINDING SHOULD IT NOT IN MOST CASES SIMPLY GRANT A NEW TRIAL?

(c) Non-appealability of certification denial

The trial court order denying appeal would only be reviewable by writ to the Court of Appeal. If denied by the Court of Appeal a writ could not be taken to the Supreme Court.

2. More complicated than present procedure

Proponents contend that the procedure established by this bill would reduce the number of frivolous criminal appeals, thereby saving appellate court time and resources. They have apparently overlooked, however, the impact this bill would have on trial courts.

In addition, and subsequent to, a motion for new trial this bill would require, in effect, that the appeal be made in the trial court. All issues that would normally be considered on appeal would first have to be argued before the trial judge, who would not only have to rule on their probable merit, but on whether or not any alleged errors were or were not harmless in terms of impact on the verdict. Such determinations would require briefing by the parties, complete with references to the record, and, finally, oral argument.

SHOULD TRIAL JUDGES BE REQUIRED TO SPEND THEIR TIME AND RESOURCES HEARING APPELLATE ARGUMENTS?

Only after the trial judge had denied certification would the defendant be able to make application for writ of mandate to the appellate court.

(More)

SHOULD A TWO-STEP PROCEDURE (MOTION FOR NEW TRIAL AND APPEAL) BE REPLACED BY A FOURT-STEP PROCEDURE (MOTION FOR NEW TRIAL, APPLICATION FOR CERTIFICATION, APPLICATION FOR WRIT, AND APPEAL) IN THE NAME OF JUDICIAL ECONOMY?

3. Alternative approach

Another way of accomplishing the goal of making appeals discretionary without at the same time institutionalizing an unwieldy certification procedure would be to institute certiorari review, whereby the Court of Appeal would be given authority to deny applications for appeal after reviewing an applicant's written arguments.

WOULD THIS NOT BE A SIMPLER, MORE EFFECTIVE METHOD OF INSTITUTING DISCRETIONARY REVIEW?

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SENATE BILL No. 1197

Introduced by Senator Doolittle

April 10, 1981

An act to amend Section 1237 of, and to add Sections 1237.3 and 1237.4 to, the Penal Code, relating to criminal appeals.

LEGISLATIVE COUNSEL'S DIGEST

SB 1197, as introduced, Doolittle. Appeals.

Under existing law, a defendant may appeal from a final judgment of conviction by a superior court. However, where the defendant pleaded guilty, the defendant may not appeal unless the trial court has filed a certificate of probable cause for the appeal.

This bill would require a defendant appealing from a judgment of conviction to obtain a certificate of appeal from the court before which the matter was heard, as specified. The bill would limit appellate review of the decision to grant or deny the certificate, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1237 of the Penal Code is amended to read:

1237. ~~An~~ *Subject to the provisions of Section 1237.3, an* appeal may be taken by the defendant:

1. From a final judgment of conviction except as provided in Section 1237.5. A sentence, an order granting probation, or the commitment of a defendant for insanity, or the indeterminate commitment of a defendant as a mentally disordered sex offender shall be deemed to be a final judgment within the meaning of this section. The commitment of a defendant for narcotics

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addiction shall be deemed to be a final judgment within the meaning of this section 90 days after such commitment. Upon appeal from a final judgment the court may review any order denying a motion for a new trial.

2. From any order made after judgment, affecting the substantial rights of the party.

SEC. 2. Section 1237.3 is added to the Penal Code, to read:

1237.3. Notwithstanding Section 1237, no appeal may be taken without first securing a certificate of appeal from the court before which the matter was heard as prescribed in Section 1237.4.

SEC. 3. Section 1237.4 is added to the Penal Code, to read:

1237.4. (a) No appeal may be taken by the defendant under Section 1237 without first securing a certificate of appeal from the court before which the matter was heard. The certificate may only be granted upon application by the prospective appellant filed within 60 days of the court's judgment, or date of entry of the order appealed from. The application shall set forth with particularity all errors of law asserted to have been committed by the trial court and all issues of law and fact to be raised on appeal.

(b) The application for certificate of appeal shall be determined by the judge who presided at the trial; provided, however, that in case of the inability of that judge to determine the application the same shall be determined by any other judge of the same court.

(c) The application shall be granted if it raises arguable issues of law which, if determined meritorious by the court of appeal, could necessitate reversal or modification of the judgment.

(d) An order granting the certificate of appeal shall not be an appealable order and shall not be otherwise subject to review by the court of appeal or supreme court. The denial of an application may be reviewed only if the application was timely filed and then only in the court of appeal by writ of mandate filed within 30 days of the

denial of the application for certificate of appeal.

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EXHIBIT D

EXHIBIT 8

Proposal for Test and Evaluation of Incentives to Reduce the Number of Indigent Criminal Appeals

by Myron Moskovitz

Professor of Law

Golden Gate University

San Francisco, California

July 21, 1981

I. Summary of Proposal

To investigate the possibility of saving the California judicial system several million dollars each year by giving indigent convicted felons a monetary incentive not to appeal which is similar to the monetary incentive which operates on non-indigent litigants, where such appeals are unlikely to succeed.

II. The Problem

In 1963, the United States Supreme Court held that indigent criminal defendants have the right to counsel (paid by the state) on appeal, without a preliminary showing that the appeal would be meritorious.[1]

Since then, the number of criminal appeals has increased substantially, even more than the number of civil appeals. The California Judicial Council reports the following:[2]

	1959-60	1969-70	1979-80
Civil Appeals	1,339	1,981	4,249
Criminal Appeals	720	2,562	4,586

Of the 4,586 criminal appeals filed in 1979-80, 4,191 (91.4%) were filed by indigents.[3]

The number of criminal appeals may be expected to rise even further in the next few years, because of the current legislative penchant for increased sentences and mandatory state prison terms.

Many of these appeals are either completely without merit or are marginal. In its 1980 Annual Report (at page 60), the Judicial Council noted that "relatively few [criminal appeals] are successful." The Court of Appeal wrote opinions in 3,028 criminal appeals in 1978-79. 77% were affirmances in full. Another 12% were affirmances with modifications. Only 11% were reversals. Id. at page 61. In addition, in 1978-79, only 9% of the criminal appeals resulted in opinions which the Court felt were important enough to publish (as compared to 25% in civil cases). Id. at page 64.

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[1] Douglas v. California, 372 U.S. 353 (1963).

[2] These figures appear in the Annual Reports published by the Judicial Council.

[3] Interview with Administrator of State Public Defender's Office, June 15 and 18, 1981.

The problem has been of sufficient dimension to cause both the United States and California Supreme Courts to issue decisions specifically instructing appellate counsel[4] and the Court of Appeal[5] on how to handle worthless appeals.

Worthless and marginal criminal appeals impose both monetary and nonmonetary costs on at least four major institutions in the judicial system.

Trial Courts

Almost every time a notice of appeal is filed by an indigent criminal defendant, both a reporter's transcript and a clerk's transcript must be prepared.[6] If the trial has been lengthy, the reporter's transcript can be quite expensive, costing several thousand dollars.

Appellate Courts

Appellate Courts are expensive. According to the California Judicial Council, the total budget for the Courts of Appeal in California for 1979-80 was $15,443,000, and these courts issued 6,659 written opinions during this period. This averages out to $2,319 per written opinion.[7]

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[4] See Anders v. California (1967) 386 U.S. 738; People v. Feggans (1967) 67 Cal. 2d 444.

[5] See People v. Wende (1979) 25 Cal. 3d 436.

[6] See California Rules of Court, Rules 35 and 36.

[7] This figure may be slightly overstated, as it does not take into account duties performed by the Courts of Appeal which do not result in written opinions--such as reviewing petitions for writs of mandate and habeas corpus. Nevertheless, these other duties do not take a major part of the Courts' time, so the above figure is probably fairly accurate.

One might expect this figure to be lower for nonmeritorious appeals, since there are fewer (if any) legal issues to review in such cases. But this savings in work might be offset by a special burden which the Courts must bear in such cases (and no other cases): "to conduct a review of the entire record" to determine for itself whether there are are any arguably meritorious issues.[8]

Nonmeritorious and marginal appeals also have several nonmonetary effects on appellate courts:

- If the increase in such appeals is faster than the appointment of new judges, the rising workload might affect the quality of work of the appellate courts. (Mr. Justice Compton of the Court of Appeal for the Second District recently noted that "there is concern that the quality of justice is being diminished by appellate backlog with its attendant delay."[10])

- Appellate court judges might become skeptical of the merit of all indigent appeals.

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[8] People v. Wende (1979) 25 Cal.3d 436, 441.

[9] Governor Brown's 1981-82 budget proposal states that: "In the past decade, increases in the number of judges on the Courts of Appeal have lagged far behind the increase in the caseloads of those courts. Total filings in the five Courts of Appeal rose by 84% between 1969-70 and 1979-80; the number of judges increased by only 23%. In 1969-70 there was a total of 48 judges on the 5 Courts of Appeal; in 1979-80 the number had grown to 59. In the former year there was an average of 157 filings per judge; by 1979-80 the average had risen to 250." Los Angeles Daily Journal, January 13, 1981, page 1. (The Governor requested additional annual appropriations of $1,781,550 for 15 more appellate judges--plus $1,963,360 for more law clerks. Ibid.) Similar increases in filings per judge have been reported in Colorado, New Jersey, Virginia, Florida, and Oregon. Martin & Prescott, The Problem of Delay in the Colorado Court of Appeals, 58 Denver Law Journal 1, 3-4 (1980).

[10] People v. Rojas (1981) 118 Cal. App. 3d 278, 290.

- Since criminal cases are given priority on appeal,[11] civil litigants may have their cases substantially delayed. According to Mr. Justice Christian of the Court of Appeal for the First District, "at the present time a nonpriority civil case must wait between 16 and 18 months, depending upon the division in which it is pending, after the filing of the last brief before being calendared for oral argument."[12] This affects not only the litigants, but also the public, which needs to have unsettled issues of civil law resolved expeditiously. Although criminal cases have priority, they too can be delayed by their heavy numbers--as much as 8 months between the filing of briefs and issuance of opinion.[13] This might have the following effects: (1) if the case is reversed for dismissal, delay may cause a presumably innocent inmate to serve unnecessary time (except in the rare case in which he was released on bail during the appeal--see California Penal Code §§ 1243-44, 1272), (2) if the case is reversed for retrial, delay can cause loss of evidence to prosecution or defense, (3) delay could actually discourage meritorious appeals, where the sentence would be served before the appeal could be heard and decided.

Appellants' Attorneys

In California, indigent criminal appellants are represented either by private attorneys (who volunteer for appointment by the appellate courts) or by the State Public Defender. The cost to the state for the private attorneys is not too great--about $750 per case--mainly because we pay them so poorly.[14] The State Public Defender's Office--which uses full-time specialists in criminal appeals and handles about 37% of the indigent appeals --has estimated its costs at an average of about $2,804 per appeal.[15] Worthless cases might cost a bit less, as there are fewer issues to brief. Even in these cases, however, the attorney must spend substantial time reading the transcript and researching some law. The Administrator of the State

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[11] California Judicial Council, 1980 Annual Report, page 63.

[12] Christian, "Reducing Delay in the Courts," 56 California State Bar Journal 120 (1981). See also California Judicial Council, 1980 Annual Report, page 64.

[13] California Judicial Council, 1980 Annual Report, page 64.

[14] See footnote 3, supra. Compensation is authorized by California Penal Code § 1241.

[15] The Administrator of the State Public Defender's Office indicated that some Court of Appeal clerks assign cases to the State Public Defenders--rather than private counsel--where the appeal involves large transcripts and/or difficult issues. He also stated that the State Public Defender had a reversal rate of [illegible] reversal rate for all criminal

Public Defender's Office estimates that worthless appeals, in which "Anders briefs" are filed (about 6% of their caseload), involve about the same amount of work as other appeals.

There may also be nonmonetary costs: (1) heavy caseloads might affect the quality of work, (2) handling a lot of "dead-bang losers" may be bad for morale, resulting in excessive turnover of attorneys, and (3) facing judges who may have become skeptical about the merits of indigent criminal appeals can also be quite disheartening.

Prosecuting Attorneys: In California, all felony appeals are handled by the Attorney General's Office. The effect of nonmeritorious and marginal appeals on its budget and quality of work may be similar to the effect on the State Public Defender's Office. Currently, the Attorney General's budget office estimates that each appeal costs them an average of $2,110.

In sum, the total cost of the usual indigent criminal appeal may be estimated at between $6,179 and $8,233. (This is based on $1,000 for transcripts, between $750 and $2,804 for appellant's counsel, $2,110 for the Attorney General, and $2,319 for the Court of Appeal.)

III. Possible Solutions

A. The Premise

In non-indigent litigation (civil or criminal), the key regulator of the use of various procedural devices is the fact that the client must pay attorney's fees in order to use the device, whether it be discovery, a jury trial, or an appeal. The attorney advises the client as to how likely the procedural device is to further the client's interests and how much the device will cost. The client then balances these considerations and makes a decision.[16] If a criminal appeal has a 30% chance of success but will cost him his life's savings, he might decide to forego the appeal. In indigent criminal appeals, this regulator is absent. Except in very rare cases,[17] every indigent has everything to gain and absolutely nothing to lose by appealing, whether his chance of winning is 30%, 3%, or one in a million.

There are strong indications that this is exactly how the inmates see it. While the chance of reversal on appeal is generally rather low (see page 2, supra), nevertheless, it appears that a very large percentage of defendants appeal. In 1978-79, over 82%[18] of all superior court "contested criminal dispositions" were appealed[19](as compared to a 14% appeal rate for contested civil cases[20]). Of the convictions that followed a contested trial, an an astounding 99.5% were appealed.[21]

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[16]See Posner, "An Economic Approach to Legal Procedures and Judicial Administration," 2 Journal of Legal Studies 399, 430-431 (1973).

[17]If arguably reversible error was committed at trial, but the trial court imposed a sentence lower than the statutory minimum, filing an appeal could be risky business.

[18]Up from 33% in 1968-69 and 51% in 1974-75. Calif. Judicial Council, 1980 Annual Reports Reports, p. 58.

[19]Ibid. A footnote to this figure states, "Note that this does not necessarily reflect the precise percentage of appealable dispositions actually appealed. For example, "superior court contested dispositions" includes nonappealable acquittals and excludes convictions on pleas of guilty, a few of which were appealed. The table is, therefore, presented only to show the general relationship between appellate workload and Superior court dispositions."(emphasis added)

[20]Ibid.

The premise of this study is that if a cost regulator is properly plugged into this situation, many indigent inmates will decide to forego appeals where the chance of success is so low that most non-indigents would do the same, without feeling that they have lost valuable rights.

The proponent is aware of no study, experiment, or practice which has put this premise to the test in indigent criminal appeals--or, for that matter, in any aspect of the criminal justice system.

The function of payment as a cost regulator has, however, been tested in the field of medical services. In 1972-73, the California Department of Health conducted an experiment on "copayment" in the Medi-Cal program. An extensive report on this experiment appears in Brian & Gibbens, "California's Medi-Cal Copayment Experiment", 12 Medical Care (Special Supplement, December 1974). About 30% of those eligible for Medi-Cal were required to pay one dollar for each of their first 2 visits to a doctor each month and 50¢ for each of their first 2 drug prescriptions each month. Copayment was required only for people who could "afford it". Id at p.1. Even though the dollar and 50¢ requirements were viewed as "minimal" deterents, the report concluded that:

> The overall pattern revealed shows that copayment had an effect and the effect was toward lower utilization (of medical services) particularly for less critical services. [Id. at p. 56][22]

The only negative aspect of copayment was that it appeared to cause a reduction in the use of preventive (as opposed to corrective) health care services. Id. at p. 56.

[22]A more subjective opinion was once voiced by Sigmund Freud, who said that fees gave a patient an incentive to terminate psychoanalysis when he or she felt "cured" (or hopeless). See New York Magazine, November 24, 1980, page 77.

It might be noted that the California Legislature recently adopted a copayment plan which would require most Medi-Cal recipients to pay $1 for each doctor visit, $1 for each drug prescription, and $5 for each hospital emergency room visit where the visit was not in fact for an emergency. This copayment plan is expected to save the state $45 million in 1981-82.[23]

B. Payment from Wages for Work in Custody[24]

In California, about half of the state prison population does some sort of work for pay. In 1981, there were 25,600 inmates. Of these, about 8,700 worked in "work support" positions (kitchen, laundry, etc.), 345 worked in "inmate welfare" positions (e.g., the prison canteen), 2,150 worked in the prison industries program (maufacture of license plates, flags, furniture, etc.), and 1,500 worked in conservation camps (doing forestry and firefighting). Pay ranged from 5¢ to 35¢ per hour, depending on the skill required and the inmate's seniority.

The wages may be spent at the prison canteen on cigarettes, candy, small "luxury" items (like cologne), and even small appliances such as radios. Most inmates want to have such items occasionally, so they would like to some money, even the small amounts which are paid for prison work. Thus, the jobs are much sought after, and prison officials do not have enough jobs for all inmates who want them.

One's initial impression might be that if an indigent inmate had to pay a portion of his prison wages towards the costs of his appeal, we would have an effective cost regulator similar to that faced by non-indigent inmates. Such a requirement should be constitutional, since the inmate is still being provided with all the necessities of life, free of charge. (One official stated, "A man can serve his entire term without spending a penny.")

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[23] San Francisco Examiner and Chronicle, June 14, 1981, page 4.

[24] All figures in this section are from an interview with George Warner of the California Department of Correction, on May 18, 1981.

The portion of wages taken should be set at a percentage high enough to make the inmate feel he is giving up something substantial if he appeals, but not so high as to discourage him from working or pursuing a potentially meritorious appeal. Perhaps something like a third of his wages for one year would be appropriate, or maybe a sliding scale (depending on wages) would be better.

Preliminary research indicates that this scheme will not work, at least in the California prison system. The problem is one of timing. Since the jobs are desirable, and there is only one job for every two inmates, the newer inmates may have to wait some time for a job opening. Even if a new inmate gets a job, he will probably start at a very low pay, near 5¢ an hour. Also, every new inmate spends some time initially at one of the reception centers--Vacaville or Chino--where there is very little likelihood of work for him. This is where he is likely to be when the time for filing notice of appeal runs. The net result is that, at the time when the inmate is called upon to decide whether to appeal, he is either working at a very low-paying job or--most likely--not working at all. In this situation, he has little or nothing to give up in return for appealing.

A possible way around this problem would be to require the inmate who decides to appeal to agree to pay part of his wages in the future, when he does get a higher-paying job. Correctional officials indicate that this will not work, because most inmates have trouble relating to future consequences: "If these guys could plan ahead, they wouldn't be here," said one.[25]

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[25] "Inmates in the prison system, generally,...have very little patience to work for or wait for the things they desire." Report to the Director, California Department of Corrections, "Team for Inmate Work Training Expansion Programs," March 15, 1981, at pp. 12-13.

C. Payment from an "Inmate Appeal Fund"

The essence of this idea is simple: if the inmate doesn't have the money to serve as a cost-regulator, let's give it to him.

While the above conclusion was reached independently by the proponent, he later discovered that he had been preceded by a very thoughtful discussion of this concept, in Carrington, Meador, and Rosenberg, Justice on Appeal, at pages 91-95 (West, 1976).[26] There, the authors propose establishing a "Criminal Defense and Rehabilitation Fund," which would "give the indigent defendant something to lose in the appeal similar to that which the non-indigent has." Id. at 93. They further state:

> This plan would force the defendant to think about his case as a non-indigent must. The plan would not treat indigents less favorably. Indeed it would afford them a financial benefit not now available. [Id. at 94].

While Carrington, et al, set out the basic concept, they do not discuss the many important details that would have to go into such a system. This proposal--if funded--would attempt to develop those details.

Here is how such a system might work in California:

Step 1: Whenever a defendant is sentenced to state prison, $200 is deposited by the state into his "inmate appeal fund." He may not spend any of this money--yet.

Step 2: After his trial attorney consults with him regarding whether an appeal might be successful,[27] the inmate decides whether to file a notice of appeal. If he allows the time for filing a notice of appeal to pass without filing, he gets to spend or keep the $200 as he wishes.[28] If he files a notice of appeal, a clerk's transcript and (usually) a reporter's transcript must be prepared, which costs money. Therefore, a "transcript fee" of $100 will be deducted from the appeal fund. The inmate still cannot spend the remaining $100--yet.

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[26]Mr. Justice Winslow Christian also referred to this notion at 56 California State Bar Journal 121-122 (1981).

[27]This consultation is already required by California Penal Code §1240.1.

[28]Subject to reasonable prison regulations. For example, it might be wise to provide that he cannot spend more than $50 a month, and that he can have it only in the form of credits at the prison canteen, or on his release, or send it to his family.

Step 3: Appellate counsel is appointed, who reads the transcripts and consults with the inmate. The inmate may then continue the appeal or dismiss it. If he fails to sign a dismissal within (say) a week after the consultation, the appellate counsel will begin work on the opening brief, and an "appellate counsel's fee" of $100 will be deducted from the appeal fund. If the inmate signs the dismissal in time, he may then keep or spend the remaining $100.

If this system induces a mere 10% of the state prison inmates who now appeal not to appeal, the savings to the state will be substantial. About 11,000 people are sentenced to state prison each year. Records on how many of these appeal are not presently kept, but it has been suggested that a large number do so. Let us assume that 4,000[29] inmates appeal. Let us also assume that each appeal costs the state about 7,000[30] (for the appellate court, attorney general, and appellant's counsel). The state would have to pay $2,200,000 to provide $200 appeal funds for the 11,000 inmates. If 10% of the 4,000 who would appeal decide not to appeal, then the state saves 400 times $7,000, or $2.8 million. In addition, the state gets back $720,000 from the 3,600 inmates who go ahead with their appeals and forfeit the $200. The state comes out ahead by over $1.3 million every year.

If the appeal fund system induces more than 10% to decide not to pursue appeals, the savings increase dramatically:

%	Annual Savings
10%	$1,320,000
20%	$4,040,000
30%	$6,760,000
40%	$9,480,000
50%	$12,200,000

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[29] The Administrator of the State Public Defender's Office said that almost all of their clients are in state prison. Therefore, since there were 4,586 criminal appeals in 1979-80, it is fair to assume that 4,000 of these came from prison inmates.

[30] This $7,000 figure is roughly the sum of the usual costs of the transcripts ($1,000), the appellant's counsel ($750-$2,804), the Attorney General ($2,110), and the Courts of Appeal ($2,310).

This, of course, is in addition to the nonmonetary, qualitative benefits to the state discussed earlier.

Before such a system should be established statewide in California prisons, several issues need to be explored.

First, the figures mentioned in this proposal should be confirmed or amended, in order to demonstrate the cost-effectiveness of the proposed system. Where present record-keeping practices do not keep track of certain important figures, additional record-keeping may be recommended.

Second, an attempt should be made to set an amount for the appeal fund which is proper: not so high as to induce inmates to drop appeals which have a decent chance of success, and not so low as to be considered trivial by the inmates. The $200 mentioned above was a visceral attempt to meet these criteria. $500--or $100--might well be a more appropriate figure.

Third, we must ensure that indigent inmates will be at least as well advised as their non-indigent counterparts regarding the possible success of an appeal. Presently, such advice must be given by trial counsel under Penal Code s 1240.1, but not by appellate counsel, who usually has no particular reason to advise his client that the appeal has little chance of success.

Fourth, we should examine whether the system should be applied to convicted felons who receive probation (with or without county jail time). These cases apparently account for the bulk of felony convictions, but only a small portion of appeals. Would the appeal fund system be cost effective if applied to these people? (Excluding these people should raise no equal protection problem. See In re Sims (1981) 117 Cal. App. 3d 309; In re David G. (1979) 93 Cal. App. 3d 247, 252-255.).

Fifth, should the system be applied to juvenile appeals? Do they constitute a significant number of appeals? Is there a way to focus on those juveniles who file most of the appeals (e.g., those "sentenced" to California Youth Authority)? Is any "appeal fund" simply too tempting to an indigent juvenile inmate whose ability to make intelligent decisions about his life is presumably quite dubious?

IV. Methodology

A consultant on testing methodology will be retained to assist in designing a pilot project to test and evaluate the effectiveness of the proposed system.

The pilot project might take the following form. To facilitate evaluation, the project should be confined to a single appellate district. During a one year period, all felons who are convicted and sentenced to state prison in that district will be tracked. Two hundred and fifty of these inmates (the test group) will receive "appeal funds"; the rest (the control group) will receive nothing, and their decisions regarding appeal will not be affected by the project. Of the 250 in the test group, 50 will receive appeal funds of $500, 50 will receive $400, 50 will receive $300, 50 will receive $200, and 50 will receive $100. Each appeal fund will be divided into 2 parts ("transcript fee" and "appellate counsel's fee") in accordance with the 3-step procedure described earlier. At the end of the year, we will determine whether the percentages of notices of appeal and opening briefs filed were different for any of the groups.

Smaller test and control groups involving convicted felons who were not sentenced to state prison and juvenile offenders might also be selected.

To run the pilot project, we will need the cooperation of several agencies:

1. Superior Courts in the pilot district will have to inform defense counsel of the project whenever the convicted defendant has been selected for the test group, so that defense counsel may take the appeal fund into account when advising the defendant whether to file a notice of appeal.

2. The Court of Appeal for the pilot district will have to inform appellant's counsel of the project whenever appellant is part of the test group, and instruct counsel to consult with the appellant before preparing the opening brief. If this requires an extension of the time for filing the opening brief, the Court should be prepared to grant such extensions.

3. The Department of Corrections will have to agree to administer the inmate appeal funds and establish reasonable regulations regarding the spending of moneys not forfeited.

V. Evaluation

The consultants will keep track of filings by the test and control groups, and at the end of the year will compute the totals and percentages from each group who filed notices of appeal and opening briefs.

Questionnaires will be sent to each member of the test group and an equal number in the control group, after the opening brief has been filed, the appeal has been dismissed, or the time for filing the notice of appeal has run. The questionnaire will ask the inmate what influenced his decision regarding his appeal. Similar questionnaires will be sent to the inmate's trial counsel and appellate counsel. If the inmate decided not to pursue an appeal, counsel should also be asked his opinion as to whether an appeal would have been hopeless, marginal, or possibly successful. This will give us some idea as to whether potentially meritorious appeals are being discouraged by the appeal fund.

Though this would delay completion of the evaluation for several months (at least), it would also be helpful to track the success rate of those inmates in all groups who go through with their appeals. If the project succeeds in discouraging mainly hopeless and marginal appeals by the test groups, then one would expect that those inmates in the test groups who do follow through on their appeals will have a higher percentage of reversals and modifications than appellants in the control group. Also, it should be surprising if any Anders-Wende briefs are filed by members of the test groups. If any are filed, we should try to discover the reason for this.

VI. Results

At the end of the evaluation, a report will be prepared. The report will describe the purpose of the pilot project, its methodology, and the results of the evaluation. If the results look promising, the report may recommend legislation adopting the inmate appeal fund system on a statewide basis.

VII. Advisory Committee

It would be very helpful to have an Advisory Committee, made up of representatives from participating and interested agencies, to help set up the pilot project and the evaluation, and later to review the results and make recommendations. At a minimum, the following agencies should be requested to send representatives to the Advisory Committee: the Judicial Council, the Court of Appeal for the pilot district, the Attorney General, the State Public Defender, and the Department of Corrections. Other people who show particular interest or expertise regarding this matter may also be invited to be members of the Advisory Committee.

VIII. Timetable

After this proposal is funded, it should take no more than 4 months to retain a consultant on testing methodology, assemble an Advisory Committee, and design the pilot project. To put the pilot project in place would take another two months. The pilot project will then operate for 12 months. Evaluation should take no more than another 3 months, although if we wish to include data on reversal rates, this will take about another year. Preparation of the final report should take about 4 months (though much of this can be done while we are waiting for the reversal statistics).

In sum, the final report should be ready no later than 32 months after the proposal is funded.

IX. Budget

A proposed budget for the test and evaluation is attached as Appendix I.

X. Recipient

The evaluation will be conducted under the auspices of Golden Gate University, a private, non-profit institution of higher education, whose main office is located at 536 Mission Street, San Francisco, California 94105. Telephone: (415) 442-7000. The University will be responsible for administering the funds, and is willing to make in-kind contributions to the evaluation.

XI. Director

The director of the evaluation would be Myron Moskovitz. Mr. Moskovitz is currently a Professor of Law at Golden Gate University and Chairman of the State Commission of Housing and Community Development. He received his L.L.B. with honors from Boalt Hall in 1964, served as law clerk to Mr. Justice Ray Peters of the California Supreme Court, was Directing Attorney of the Marysville Office of California Rural Legal Assistance, Inc., and Chief Attorney of the National Housing Law Project. He has published extensively and has handled many cases in the California appellate courts. His complete resume is attached as Appendix II.

PROPOSED BUDGET
(32 Months)

	Cash		In-Kind Contributions
	Subtotal	Total	
I. Consultants			
Director (400 hours @ $80 per hour)	$32,000		
Consultant on testing methodology (100 hours @ $80 per hour)	8,000		
One research assistant (400 hours @ $10 per hour)	4,000		
One executive secretary (200 hours @ $10 per hour)	2,000		
		$46,000	
II. Travel			
Mileage (7500 miles @ $0.20 per mile)	1,500		
Per Diem (50 days @ $50 per day)	2,500		
		4,000	
III. Operating Expenses			
Telephone ($31.25 per month)	1,000		
Copying	500		
Postage	500		
Space* (32 months @ $500 per month)			$16,000
Inmate appeal funds**			
250 State prison inmates	75,000		
Probationers and juveniles	10,000		
Recipients indirect costs (20% of total project cash costs of $137,000)	27,400		
		114,400	
REQUESTED FUNDING		$164,400	

*Space will be contributed by recipient.
**All funds forfeited by inmates who choose to appeal will be returned to the grantor.

EXHIBIT E

ASSEMBLY JUDICIARY AND CRIMINAL JUSTICE COMMITTEES

INTERIM HEARING

APPELLATE COURT EFFICIENCY

SAN DIEGO, CALIFORNIA

OCTOBER 15, 1981

CHAIRMAN & MEMBERS:

MY NAME IS JOHN DAVIES, I AM WITH THE ADMINISTRATIVE OFFICE OF THE COURTS. I APPRECIATE THE OPPORTUNITY TO BE HERE WITH YOU TODAY.

PURSUANT TO THE COMMITTEE'S INVITATION, I HAVE PROVIDED YOUR CONSULTANTS WITH DATA RELATING TO THE INCREASE IN APPELLATE WORKLOAD AND PRODUCTIVITY.

JUST AS CALIFORNIA'S POPULATION HAS INCREASED OVER THE PAST 20 YEARS, SO HAS THE NUMBER OF ATTORNEY'S IN THE STATE (TO 80,000), AS HAS THE NUMBER OF TRIAL COURT FILINGS, AND, IN TURN, APPEALS TO THE COURTS OF APPEAL IN THIS STATE.

GROWTH

OVER LAST 10-12 YEARS, THE NUMBER OF CIVIL AND CRIMINAL APPEALS HAS GROWN AT ABOUT THE SAME RATE, AND THIS IS NOT UNIQUE TO CALIFORNIA.

DURING THE 11 YEAR PERIOD 1967-68 TO 78-79, THERE WAS AN AVERAGE ANNUAL INCREASE RATE IN CIVIL APPEALS OF ABOUT 7%.

THE CRIMINAL RATE OVER THIS TIME HAS ALSO BEEN 7%. INTERESTINGLY, THE GROWTH RATE OVER A SUBSTANTIALLY SIMILAR PERIOD IN THE UNITED STATES NINTH CIRCUIT WAS A CLOSE 6.5%.

IN 1980

1980 SHOWED A CHANGE REPORTED IN OUR 1981 JUDICIAL COUNCIL REPORT, IN WHICH CIVIL APPEALS ACCELLERATED.

THE 1979-80 FIGURES SHOWED A 16% JUMP OVER THE PREVIOUS YEAR TO 4,249 CIVIL APPEALS.

THIS OCCURRED AT THE SAME TIME THAT THE NUMBER OF CONTESTED SUPERIOR COURT CIVIL ACTIONS DECREASED. INCREASING THE PROPORTION OF SUPERIOR COURT CONTESTED DISPOSITIONS TAKEN ON APPEAL TO 17% FROM 14%.

ON THE CRIMINAL SIDE THERE WERE 4,586 CRIMINAL APPEALS, A 7.2% INCREASE OVER THE PREVIOUS YEAR, AND GENERALLY IN LINE WITH THE 7% TEN-YEAR TREND.

IN GENERAL THEN, THE RATES OF INCREASE ON THE CIVIL AND CRIMINAL SIDES HAVE INCREASED SINCE 1970 AT ABOUT 7%; WITH THE LATEST REPORT YEAR STATISTICS SHOWING CIVIL JUMPING 16% AND CRIMINAL INCREASING 7.2%.

THERE'S BEEN A LONG-RANGE PRODUCTIVITY INCREASE BY APPELLATE COURTS DURING THIS PERIOD OF INCREASING WORKLOAD

LOOKING BACK OVER THE PERIOD 1959-60 TO 1979-80, WE FIND THAT TOTAL FILINGS IN THE COURTS OF APPEAL OF THIS STATE INCREASED FIVE-FOLD, FROM 1,895 TO 14,757.

APPEALS ALONE INCREASED TO 8,835, OR ABOUT 4.7 TIMES AS MANY.

WRITTEN OPINIONS OUTPUT BY THE COURTS OF APPEAL, JUMPED 4.6 TIMES TO 6,659 FROM 1,440.

THE NUMBER OF JUSTICES DURING THAT TIME, HOWEVER, INCREASED FROM 21 TO 59, OR 2.8 TIMES.

CLEARLY, THE APPELLATE COURTS HAVE BEEN INCREASINGLY PRODUCTIVE, BUT NOT QUITE SO MUCH AS THE INCREASE IN THE GROWTH OF APPELLATE LITIGATION.

PRESENTLY

THERE ARE A NUMBER OF SYSTEM-WIDE CHANGES THAT HAVE RECENTLY BEEN PUT IN PLACE WHICH SHOULD FACILITATE A MORE EFFICIENT, PRODUCTIVE APPELLATE SYSTEM.

FIRST, THANKS TO CHAIRMAN HARRIS, THERE WILL BE AN ADDITIONAL 3-JUDGE DIVISION IN THE FIRST DISTRICT (S.F.), AND 6 MORE JUDGES IN THE SECOND (LA-SANTA BARBARA (3)); 4 IN THE FOURTH (ORANGE COUNTY); 2 IN THE FIFTH (FRESNO); AND 3 IN THE NEW 6TH DISTRICT. AS YOU KNOW, THE STANDARD APPLIED IN THAT CASE WAS 105 WRITTEN OPINIONS PER JUDGE PER YEAR, UP FROM THE JUDICIAL COUNCIL'S OFFICIAL POLICY OF 95 PER JUDGE PER YEAR, 95 STANDARD ADOPTED IN 1975 AND BASED IN PART ON THE RECOMMENDATION OF THE NATIONAL CENTER FOR STATE COURTS.

ADMINISTRATIVE MEASURES HAVE INCLUDED:

1. BY CHIEF JUSTICE DIRECTION THERE'S BEEN AN INTRODUCTION OF COMPUTERIZED BUSINESS PRACTICES, INCLUDING WORD PROCESSING, LEGAL RESEARCH (LEXIS), AND IN THE NEAR FUTURE DATA PROCESSING DOCKETING BY THE CLERK'S OFFICE.

2. APPOINTMENT AND REPORT OF THE CHIEF JUSTICE'S SPECIAL COMMITTEE ON APPELLATE PRACTICES AND PROCEDURES IN THE FIRST APPELLATE DISTRICT - THE FEINBERG - SELIGSON REPORT.

EACH OF YOU HAS RECEIVED EITHER A COPY OR A SUMMARY OF ITS FINDINGS AND CONCLUSIONS, I BELIEVE. THIS MATTER IS TO BE DISCUSSED AT THE NOVEMBER JUDICIAL COUNCIL MEETING.

3. ADOPTION OF THE RULE 21.5, PROVIDING FOR THE COURTS TO DO CIRCUIT RIDING FOR THE CONVENIENCE OF THE PARTIES AND THEIR COUNSEL AS A COURT PERCEIVES POSSIBLE NEED.

THE EFFECT OF THIS IS AS YET UNDETERMINED, WITH THE FIRST EXERCISE TO BE IN SAN JOSE, BY THE FIRST DISTRICT LATER THIS YEAR.

4. JUDICIAL COUNCIL HAS UTILIZED EIGHT PERMANENT LIMITED-TERM POSITIONS FOR SECOND SO-CALLED "ELBOW-CLERK" ATTORNEYS WITH SUCCESS:

ONE OF THE DIVISIONS TO UTILIZE THESE 2ND PERMANENT LIMITED-TERM ELBOW CLERKS WAS THAT OF NOW SUPREME COURT JUSTICE OTTO KAUS OF THE SECOND DISTRICT, WHO REPORTED THIS ALLOWED HIM TO:

SPEND SIGNIFICANTLY MORE TIME DOING "INITIAL RESEARCH" - (NOT SUGGESTED BY THE PARTIES, A COLLEAGUE, OR RESEARCH ATTORNEY);

SPEND TWICE AS MUCH TIME READING THE RECORD IN CASES HE HAD TO DECIDE BUT WAS NOT THE PRINCIPAL AUTHOR OF THE OPINION;

SPEND LESS TIME DOING ROUTINE WRITING AND EDITING;

CONFERRING WITH COLLEAGUES BEFORE CIRCULATION OF AN OPINION DRAFT WAS AUTHORED

OVERALL, HE ASSESSED IT THIS WAY:

"THE SECOND ATTORNEY HAS MADE IT POSSIBLE TO DEVOTE MORE TIME TO THE JUDGMENTAL ASPECTS OF MY JOB, AS DISTINGUISHED FROM THE ROTE WORK OF DIGESTING FACTS, DOING BASIC RESEARCH AND SO ON. IT HAS ALSO GIVEN ME MORE TIME TO EXAMINE APPEALS ASSIGNED TO OTHER JUDGES. IN ADDITION IT HAS GIVEN US A LITTLE MORE OPPORTUNITY TO DO CERTAIN THINGS WE SHOULD BE DOING, BUT FOR WHICH WE NEVER SEEM TO HAVE ENOUGH TIME: READING ADVANCE SHEETS, LAW REVIEW ARTICLES, ETC. ETO KEEP ABREAST OF NEW CASES AND OTHER DEVELOPMENTS IN THE LAW."

THE GOVERNOR'S LAST BUDGET AT THE REQUEST OF THE JUDICIAL COUNCIL ASKED FOR FUNDS TO PROVIDE EACH APPELLATE JUSTICE WITH SUCH A POSITION; THIS WAS DELETED IN THE BUDGET PROCESS HOWEVER.

(THE POSITIONS LAST 2 YEARS WITH SALARY INCREASE; LONGER WITHOUT FUTURE INCREASE OR A MOVE INTO A REGULAR STAFF POSITION.)

CENTRAL STAFF

POLICY OF JUDICIAL COUNCIL HAS BEEN 1 FOR EACH 2 JUSTICES SINCE 1975.

RAISES DEEP PHILOSOPHICAL QUESTIONS, SINCE THIS CREATES A BUREAUCRACY WITH AN INDEPENDENT LIFE OF ITS OWN, NOT SUBJECT TO SAME RESPONSIVENESS AS THE "ELBOW CLERKS"

TWO ALTERNATIVES MENTIONED:

GOOD POST-JUDGMENT INTEREST BILL TO REMOVE ANY FINANCIAL INCENTIVE FOR A PARTY TO TAKE AN APPEAL FOR FINANCIAL MOTIVES TO DELAY PAYMENT OF A JUDGMENT. (7% VS PRESENT MARKET)

IMMEDIATE PREPARATION AND FORWARDING OF TRANSCRIPTS AND RECORD IN CRIMINAL APPEALS CASES.

THE FIRST DISTRICT EARLIER THIS YEAR FOUND ITSELF FACED WITH A SUBSTANTIAL BACKLOG OF CASES NECESSITATING UP TO A 22 MONTH DELAY IN SOME INSTANCES.

THE PRESIDING ADMINISTRATIVE JUSTICE JOHN T. RACANELLI REQUESTED ASSISTANCE FROM THE CHIEF JUSTICE ON THIS MATTER.

IN RESPONSE TO THAT REQUEST, WITH THE COOPERATION OF THE ATTORNEY GENERAL AND THE STATE PUBLIC DEFENDER ON CRIMINAL CASES, AND WITH THE COOPERATION OF COUNSEL IN THE CIVIL MATTERS, APPROXIMATELY 100 CASES WERE TRANSFERRED TO OTHER APPELLATE DIVISIONS WHERE THE WORKLOAD WAS MORE MANAGEABLE.

IN ADDITION, NINE PRO-TEM JUSTICES WERE ASSIGNED BY THE CHIEF JUSTICE TO ASSIST THE FIRST BEGINNING SEPTEMBER 1, 1981 AND ENDING NOVEMBER 1, 1981. CLERK'S OFFICE SUPPORT STAFF WAS ALSO SUPPLEMENTED.

WILFRIED J. KRAMER, CLERK
ROBERT LISTON, CHIEF DEPUTY
MARY-LOUISE KING, DEPUTY
SUSAN WHITEACRE
D. BRUCE KORDENBROCK

OFFICE OF THE CLERK

Court of Appeal

THIRD APPELLATE DISTRICT

STATE OF CALIFORNIA

LIBRARY AND COURTS BUILDING
914 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814
AREA CODE 916, 445-4677

NOTICE TO COUNSEL REGARDING AVAILABILITY OF EXPEDITED APPEALS PROCEDURES

Our Court is instituting a program designed to permit resolution of certain civil appeals on an expedited basis. This program emphasizes reliance on oral argument rather than traditional written briefs as the primary vehicle for presentation of an appeal.

The premise underlying this program is that the Court does not require full briefing in cases where the issues are straightforward and can be delineated clearly and succinctly. Appellant's Opening Brief and Respondent's Brief, here limited to a maximum of ten (10) pages (in letter form if desired) excluding the statement of facts, will serve three basic purposes: (a) allow counsel to know the essence of the arguments to be made; (b) provide the Court with a means of advance preparation, and (c) provide the framework for oral argument. No Closing Brief is permitted. The Court believes that this program can permit faster, simpler, and less expensive appeals without sacrificing the quality of judicial review and decision.

Limited briefing addresses two problems which delay the resolution of an appeal and increase its costs. First, it reduces the time consumed and effort expended by counsel in briefing. Second, it shortens the time between the close of briefing and oral argument, thereby eliminating to a great extent the need for renewed preparation.

The oral argument will be scheduled approximately thirty days after the filing of briefs. The argument itself is intended as an informal and relatively open session at which counsel assist the Court's exploration of the issues. The Court expects to file its opinion within five to ten days after oral argument.

Participation in this program will be voluntary and will depend upon stipulations by counsel.

The program will operate as follows:

1. Only cases in which counsel have stipulated to the use of the original record will be considered for participation in the program at this time.

2. The Court will identify appeals it considers appropriate for the new procedures from those cases in which pre-argument statements are filed; from those which are not resolved following settlement conferences; and those cases in which a stipulation requesting the new procedure is received and accepted.

3. Counsel for appellant will be responsible for obtaining the required stipulations.

4. Upon receipt of the stipulation, the Court will enter a scheduling order setting forth the filing dates for the briefs, and setting the date for argument. Appellant will have twenty days from the order within which to file his/her brief. Respondent's brief will be due within twenty days of the filing deadline for appellant's brief. No extensions of time for briefing will be permitted. Argument will be set for approximately thirty days thereafter. In cases in which reporters' transcripts were ordered and have not been filed, the scheduling order will be made when the transcript is filed.

Any questions regarding the new procedures may be directed to Wilfried J. Kramer, Clerk, (916) 445-4677.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

3 Civil _____

STIPULATION FOR EXPEDITED APPEAL AND ISSUANCE OF SCHEDULING ORDER

We hereby request that this appeal be considered for expedited resolution as described in the court's letter of invitation and agree to issuance of a scheduling order providing for filing of typewritten memorandum briefs as follows:

(a) Appellant's opening brief within 20 days of order;
(b) Respondent's brief within 20 days after due date of appellant's opening brief.
(c) No appellant's closing brief will be accepted.

We understand that no extensions of time will be granted and that our briefs will be limited to 10 pages, not including statement of facts, and that the scheduling order will set a date for oral argument of approximately 70-90 days from date of the scheduling order.

Attorneys for Appellant	Attorneys for Respondent
_____	_____
_____	_____
_____	_____

The 6-month experimental pilot program for expediting civil appeals is sponsored by the Action Commission to Reduce Court Costs and Delay of the American Bar Association. Our Court is cooperating with the ABA in its implementation. Its purpose is to reduce appellate court costs and delays in briefing and decision. Our goal is to provide a written decision within 80-100 days after stipulation of counsel for expedited appeal. Its application is limited to cases in which counsel stipulate to its use.

Many briefs filed with the appellate courts are needlessly long. Although there may be only 1 or 2 pivotal issues, attorneys often add issues that are not necessary to proper review and decision. A needlessly long opening brief requires a needlessly long respondent's brief and needlessly long staff memo. It results in unnecessary work for the judges and staff. Issuance of a stipulated scheduling order limiting the size and time for briefing and setting a calendar date will, it is hoped, reduce the time, effort and expenses of counsel in preparing briefs and at the same time reduce delay in resolution of the appeal. The Court intends to rely more heavily on oral argument (as in the English system) and hopes to file its memorandum opinion within 10 days after oral argument.

The Notice to Counsel Regarding Availability of Expedited Appeals Procedures, a copy of which you indicate you have already received, describes the new procedure in more detail. During February 1981, counsel in 14 cases have stipulated to issuance of a scheduling order providing for expedited briefing. These cases will be heard on calendars in April and May 1981.

The American Bar Association is making available to this Court for a 6-month period, the assistance of a staff attorney employed by it but working under the Court's supervision.

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

Expedited Appeal Program
April 1 - August 4, 1981
Summary

1. Cases calendared to date: 68

   A. Dismissed before submission
      Settled: 4
      Late briefs: 1
      Nonappealable: 1

   B. Consolidated: 3

   C. Dates of oral argument:

April 20	July 13, 20
May 4, 11, 18, 20, 21	August 3, 24
June 1, 22	September 2, 21

2. Opinions filed to date: 39

   A. Days from stipulation to filing
      Average: 71
      Range: 48-96

   B. Length of oral argument (minutes)
      Average: 27
      Range: 4-75

   C. Days from oral argument to filing
      Average: 6
      Range: 1-23

   D. Filings per month:

April	May	June	July	Aug.
1	13	12	12	1

   E. Opinion length (pages)
      Average: 5
      Range: 2-15

   F. Disposition
      Affirmed: 33
      Reversed: 5
      Dismissed: 1

   G. Opinions Certified for Publication: 6

   H. Cal. Supreme Court Action
      Hearing denied: 2
      Hearing granted: 0
      Depublished: 0

   I. Staff calendar memorandum preparation (hours per case)
      Average: 8
      Range: 2.75-24.25

TABLE 1
Opinions Filed to August 4, 1981

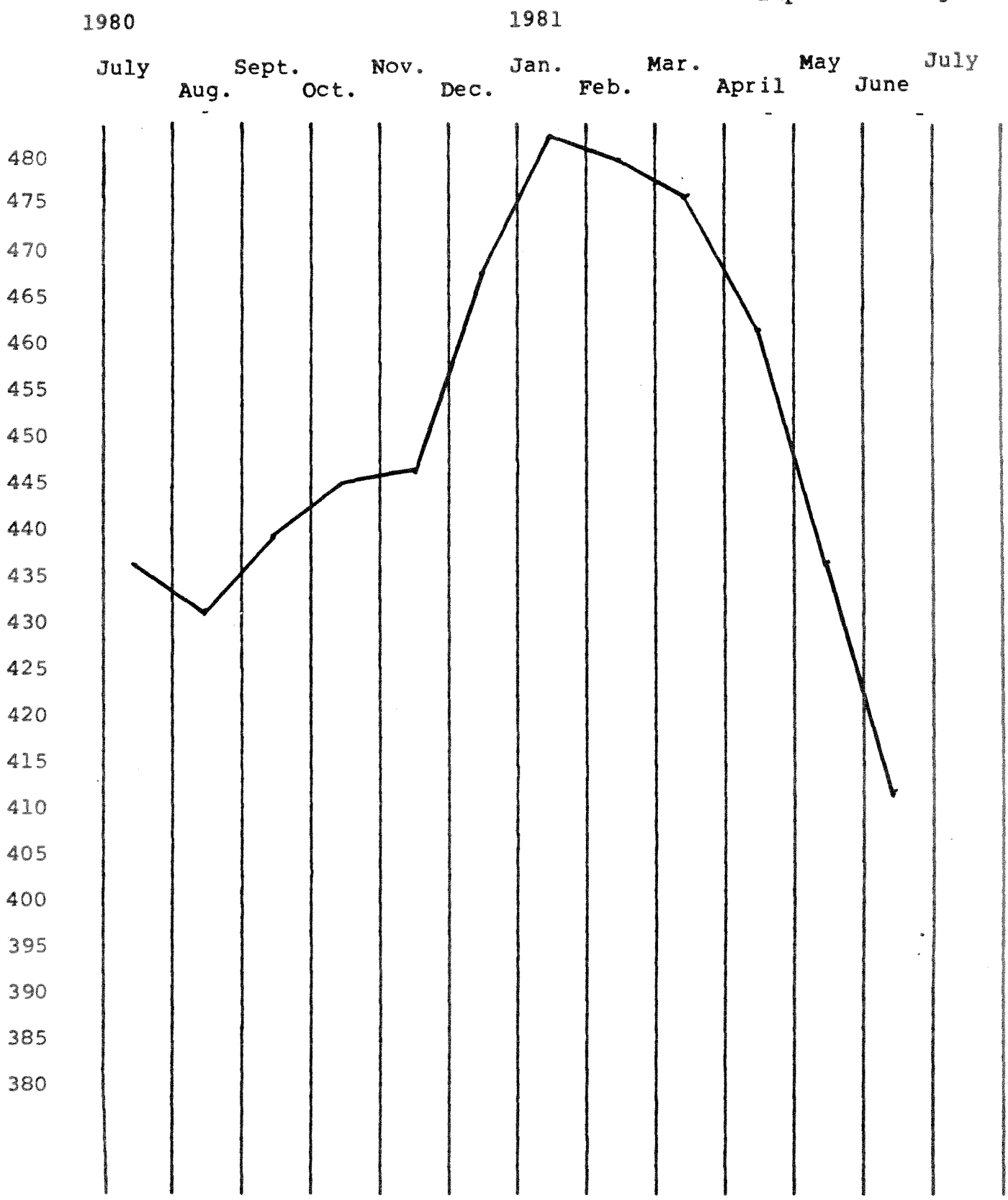
Case No.	Subject & Posture of Appeal	Length of Oral Argument (minutes)	Days from Stip. to opinion filing	Days from argument to opinion filing
.9973*	Insurance (demurrer)	42	88	4
.9917	Gov.Tort Liab.(demurrer)	35	86	4
20150	Wrongful death (demurrer)	41	82	2
20006**	Real Property (trial)	29	79	4
20063*	Gov.Tort Liab.(demurrer)	23	69	2
.9959	Gov.Tort Liab.(order)	23	83	3
20364**	Workers' Comp.(sum.judg.)	17	80	4
20378**	Admin. Mandamus (writ)	27	85	7
19626	Employ. Contract (trial)	44	68	7
19814	Corp. Liquidation (order)	31	90	12
19778	Community Prop. (order)	6	71	4
19861	Real Prop. (trial)	50	74	7
20365	Med. Malpr. (sum.judge.)	19	67	7
20242	Insurance (trial)	9	74	6
20191	Workers' Comp.(demurrer)	25	49+	8
19602	Insurance (sum.judg.)	29	77	1
20237**	Trust Tax (trial)	75	96	23
20319	Admin. Mandamus (writ)	15	63	2
20163	Sale Contract (trial)	15	59	4
19925**	Contrib. Negl. (trial)	21	84	7
20283	Community Prop. (order)	46	84	7
20112	Admin. Mandamus (sum.judg.)	56	64	10
19687	Coll. Estoppel (trial)	22	53	1
20192	Innkeeper Liab. (demurrer)	27	76	1
20323	Judgments(motion to vacate)	++	63	1
19875	Lease (trial)	37	70	2
19968	Estoppel (sum. judg.)	15	63	7
20390	Gov.Tort Liab.(judg.on plead.)	9	60	7
20043	Gov.Tort Liab.(judg.on plead.)	16	92	9
20185	Defamation (sum. judg.)	20	49	5
19996	Claim Stats. (demurrer)	26	68	7
20333	Insurance (demurrer)	4+++	49	5
20375**	Conspiracy (new trial mo.)	26	48++++	9
20421	Conservatorship (order)	31	70	3
20464	Sale Contract (trial)	25	78	3
20512	Pers. Injury (sum. judg.)	21	52	9
20293	Judgments (mo. to vacate)	40	54	9
20271	Real Prop. (trial)	28	87	18
20507	Insurance (sum. judg.)	10	61	1

* Hearing denied by the Cal. Supreme Court.
** Opinion certified for publication.

\+ Appellant's brief filed before settlement conference and stipulation.
++ No appearance for appellant; respondent waived argument; not included in average.
+++ No appearance for appellant; respondent answered court's question.
++++ Both briefs filed before stipulation.

CIVIL CASES PENDING
(Records filed)

Expedited Program



IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MEMO TO PRESIDING JUSTICE PUGLIA AND ALL ASSOCIATE JUSTICES:

There has been a dramatic decrease in total civil cases pending since implementation of the new "Expedited Appeal Program." The following statistics speak for themselves:

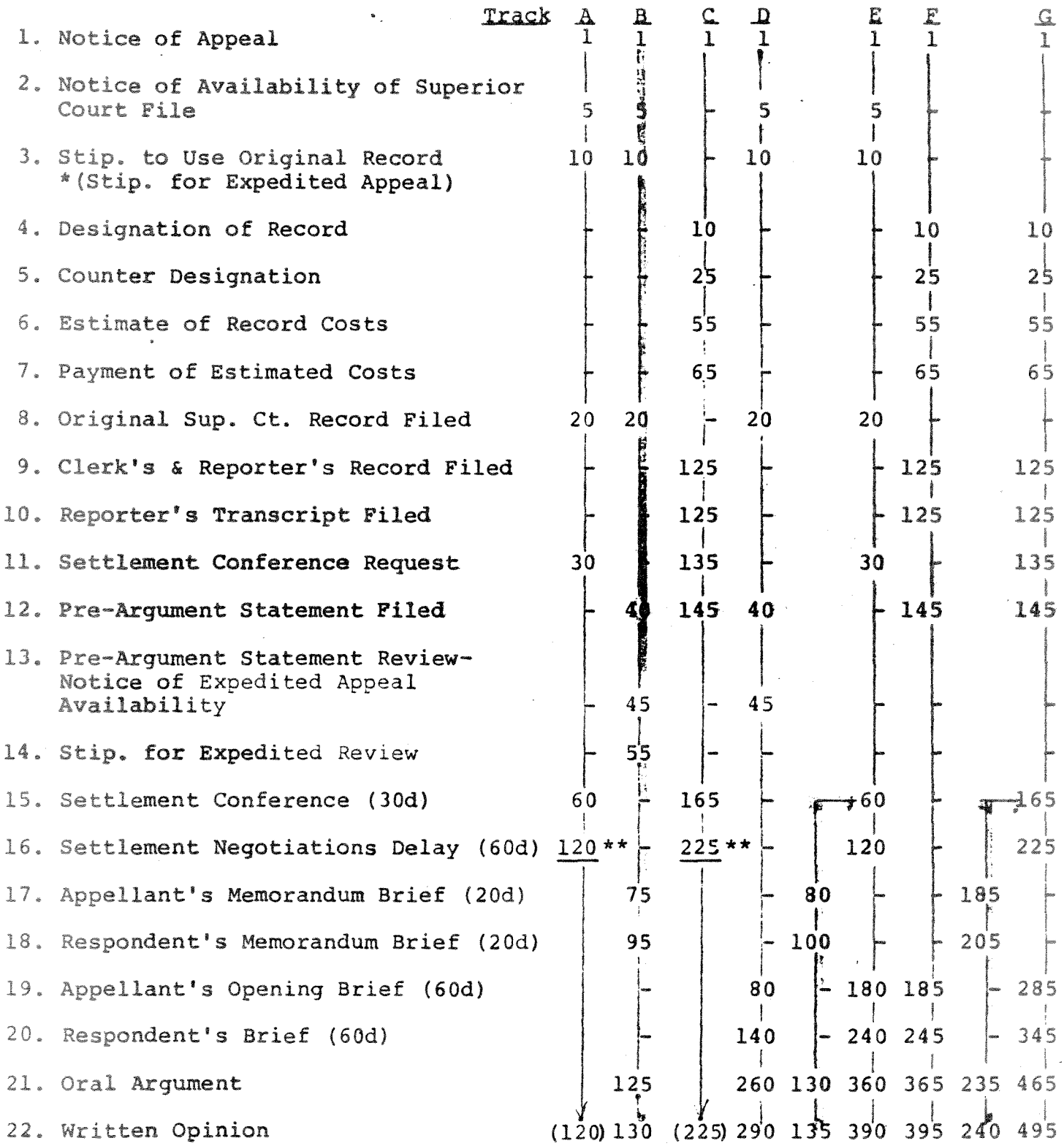
TOTAL CIVIL CASES PENDING

1980						1981					
July	Aug.	Sep.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June
436	431	439	445	446	468	483	480	476	463	436	413

Dated: July 13, 1981

Wilfried J. Kramer, Clerk

ESTIMATED TIME INTERVALS FOR PROCESSING APPEALS
(In Days)



Track A - Original Record-Settlement Conference (Successful) **
Track B - Original Record-Expedited Appeal
Track C - Clerk's & Reporter's Transcript-Settlement Conference (Successful) **
Track D - Original Record-No Settlement Conference
Track E - Original Record-Settlement Conference (Unsuccessful)
Track F - Clerk's & Reporter's Transcript-No Settlement Conference
Track G - Clerk's & Reporter's Transcript-Settlement Conference (Unsuccessful)

*Can be added later. Scheduling order would then be made when original record is filed shortening total time from 130 to 105 days for Track B.

June 1, 1981

Expedited Appeals after 2 months or 1/3 of contract period.

In the past 8 weeks, 37 cases have been calendared on this program. Thirty-five stipulations have come after settlement conferences; in three cases counsel stipulated before the settlement conference was held.

As of the end of today, the court will have heard oral argument in 21 cases and filed opinions in 15. Only two cases will not have met the 5-10 day from oral argument to filing feature of the program; one missed by only one day. Relevant time periods are summarized below:

Case No.	Subject & Posture of Appeal	Length of Oral Argument (minutes)	Days from Stip. to opinion filing	Days from argument to opinion filing
19973	Insurance (demurrer)	42	88	4
19917	Gov.Tort Liab.(demurrer)	35	86	4
20150	Wrongful death(demurrer)	41	82	2
20006	Real Property (trial)	29	72	4
20063	Gov.Tort Liab.(demurrer)	23	69	2
19959	Gov.Tort Liab. (order)	23	83	3
20364	Workers' Comp.(sum.judg.)	17	80	4
20378	Admin. Mandamus (writ)	27	85	7
19626	Employ. Contract (trial)	44	68	7
19814	Corp. Liquidation(order)	31	89	11
19778	Community Prop. (order)	6	71	4
19861	Real Prop. (trial)	50	74	7
20365	Med. Malpr. (sum. judg.)	19	67	7
20242	Insurance (trial)	9	74	6
20191	Workers' Comp.(demurrer)	25	49*	8
Average		28	76	5

* Appellant's brief filed before settlement conference.

Remaining Calendar Dates Scheduled Thus Far

June 22	6 cases
July 13	6 cases
July 20	4 cases

ÆD J. KRAMER, CLERK
ÆRT LISTON, CHIEF DEPUTY
ÆARY-LOUISE KING, DEPUTY
SUSAN WHITEACRE
D. BRUCE KORDENBROCK

OFFICE OF THE CLERK

Court of Appeal

THIRD APPELLATE DISTRICT

STATE OF CALIFORNIA

LIBRARY AND COURTS BUILDING
914 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814
AREA CODE 916, 445-4677

Re:

Dear Counsel:

From its examination of of appellant's pre-argument statement, the court believes that this appeal would benefit from our new procedure which permits expedited decision based on filing of typewritten memorandum briefs, limited to 10 pages, exclusive of the statement of facts, followed by prompt oral argument and written memorandum opinion. Use of the new procedure is dependent upon stipulation of counsel. It is appellant's responsibility to obtain the necessary stipulation.

The new procedure should permit resolution of an appeal within 75-80 days after filing of the stipulation as contrasted with the 14-15 months normally required. No extensions of time for briefing would be permitted. Failure by appellant to file his brief within the time provided may result in dismissal of the appeal without further notice. Filing of the memorandum opinion is anticipated within 5-10 days after oral argument.

If all counsel stipulate, a scheduling order providing as follows will be entered:

(a) Filing of appellant's typewritten memo brief: 20 days
(b) Filing of respondent's typewritten memo brief: 20 days
(c) Oral argument: 30 days

Please confer with opposing counsel and, if you wish to use the new procedure, return the enclosed stipulation to this office by _____.

Very truly yours,

WILFRIED J. KRAMER, Clerk

by:
Deputy Clerk

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

3 Civil _____

STIPULATION FOR EXPEDITED APPEAL AND ISSUANCE OF SCHEDULING ORDER

We hereby request that this appeal be considered for expedited resolution as described in the court's letter of invitation and agree to issuance of a scheduling order providing for filing of typewritten memorandum briefs as follows:

(a) Appellant's opening brief within 20 days of order;
(b) Respondent's brief within 20 days after due date of appellant's opening brief.

We understand that no extensions of time will be granted and that our briefs will be limited to 10 pages, not including statement of facts, and that the scheduling order will set a date for oral argument of approximately 70-90 days from date of the scheduling order.

Attorneys for Appellant	Attorneys for Respondent
_____	_____
_____	_____
_____	_____

WILFRIED J. KRAMER, CLERK
ROBERT LISTON, CHIEF DEPUTY
MARY-LOUISE KING, DEPUTY
SUSAN WHITEACRE
D. BRUCE KORDENBROCK

OFFICE OF THE CLERK

Court of Appeal

THIRD APPELLATE DISTRICT

STATE OF CALIFORNIA

LIBRARY AND COURTS BUILDING
914 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814
AREA CODE 916, 445-4677

Re:

Dear Counsel:

We have been notified that your settlement conference negotiations have been unsuccessfully terminated. You are hereby notified that your appellant's opening brief is to be served and filed by _____.

The court believes that this appeal would benefit from our new procedure which permits expedited decision based on filing of typewritten memorandum briefs, limited to 10 pages exclusive of the statement of facts, followed by prompt oral argument and written memorandum opinion. Use of the new procedure is dependent upon stipulation of counsel. It is appellant's responsibility to obtain the necessary stipulation.

The new procedure whould permit resolution of an appeal within 75-80 days after filing of the stipulation as contrasted with the 14-15 months normally required. No extensions of time for briefing would be permitted. Failure by appellant to file his brief within the time provided may result in dismissal of the appeal without further notice. Filing of the memorandum opinion is anticipated within 5-10 days after oral argument.

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(a) Filing of appellant's typewritten memo brief: 20 days
(b) Filing of respondent's typewritten memo brief: 20 days
(c) Oral argument: 30 days

Please confer with opposing counsel and, if you wish to use the new procedure, return the enclosed stipulation to this office by _____ _____.

Very truly yours,

WILFRIED J. KRAMER, Clerk

90 Days to Decision

Third Dist. to Experiment With Accelerated Appeals

90 days from stipulation

By ALAN ASHEY

SACRAMENTO — The intermediate appeal process will be compressed to less than 90 days from notice of appeal to final decision in an eight-month experiment to begin Feb. 1 in the Third District Court of Appeal in Sacramento.

The voluntary experiment, which will only involve civil cases, is being conducted in cooperation with the American Bar Association's Action Commission to Reduce Court Costs and Delay, said Wilfried J. Kramer, clerk of the Third District.

"The court believes that this program can permit faster, simpler, and less expensive appeals, without sacrificing the quality of judicial review and decision," said Kramer. Appeals normally take 15-16 months to be processed in the Third District, he said.

"We hope to demonstrate that a procedure can be employed in certain appeals which don't involve complex issues or lengthy records which will expedite the final disposition of those cases and relieve the appellate courts of a lot of their congestion," said Robert K. Puglia, presiding justice of the Third District.

Seth Hufstedler, chair of the ABA's Action Commission, said the concept of the experiment was developed over the past 18 months by the commission, and was tailored to correspond to specific procedures of the Sacramento court.

"We hope to attempt this in other courts, but we have not made any specific arrangements," Hufstedler said. "A number of other states have expressed an interest init, and we are engaged in discussing with them how best to do it."

No Delay of Transcript Submission

There are five basic elements to the experiment, Hufstedler said:

- Only cases where there will not be any significant delay in submission of a trial transcript will be encouraged to participate in the program. This would involve cases in which there is no transcript at all, such as summary judgments, or law and motion, probate, or domestic relations matters; or those in which a quick preparation of the transcript can be expected. About one third to half of all cases do not require transcripts because many court reporters in the area, with the assistance of the court, are able to produce computer-generated transcripts in significantly less time than is required for manual transcription, he said.
- Briefing will be minimized. "The points to be argued can be submitted in a Points and Authorities format rather than an extensive complicted brief," Haifstedler said.
- Argument will be scheduled as soon as possible after the briefs are submitted, usually within 30 days, so the case will be fresh in the minds of all parties.
- Greater emphasis will be placed on oral arguments, which will be more informal.
- The court is committed to an early ruling, within five days of oral arguments in most cases if possible.

No Limits on Oral Argument

Oral argument, customarily limited to 15 minutes per side in the Third District, will have no outer limits in cases participating in the experiment, Justice Puglia said.

"The whole spirit of this program is to make oral argument the most meaningful, perhaps the decisive element in the disposition of the appeal. Oral argument will last as long as is necessary for the judges to resolve any difficulties they may have with the case. I would anticipate significantly more dialogue between the court and attorneys, a greater air of informality, and less structure than in the traditional oral argument," Puglia said.

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"This is a pilot project which is being attempted with no certainty it will work as designed. We could continue it indefinitely in this court so long as counsel continue to stipulate to it. If it were shown over a period of time to be a resounding success, presumably whatever rule changes would be required for this sytem to be implemented more widely could be proposed to the Judicial Council," Puglia said.

Kramer said his office would compile statistics on the program for submission to the ABA commission for evaluation. Commission representatives will visit the court from time to time, and the reactions of participating lawyers, clients, and judges will also be sought as part of the evaluation process, Hufstedler said.

The initial pool of cases from which those involved in the experiment will be drawn will be those in which the attorneys have stipulated to use of the original Superior Court record in lieu of the clerk's transcript on appeal, Kramer said. Use of the original record is a time-saving option previously instituted by the court. As soon as the Superior Court file has been received, the attorneys are invited to participate in the program, with appellant's counsel bearing the burden of obtaining the required stipulations.

When the stipulations are received, a scheduling order will be issued by the court requiring appellant's brief to be filed within 30 days and respondent's brief to be filed 30 days thereafter. Oral argument will be set approximately 30 days thereafter, and the court's ruling, probably prepared in memo form, would be issued within another five days, Kramer said.

Briefs will be limited to 10 pages in length, excluding the statement of facts, need not be printed, and may be in memorandum form. No extensions of time will be granted, Kramer said.

Cases may also be drawn into the program in two other ways, Kramer noted: Third District procedures require counsel to either participate in a settlement conference, which occurs in about 50 percent of all cases, or submit a written pre-argument statement, Kramer said. The court, either from information gained in the settlement conference or from an examination of the pre-settlement statement, may encourage the use of an expedited appeal even though the attorneys did not initially request it, Kramer said.

American Bar Association's Action Commission Appellate Programs

by Joy A. Chapper and Paul Nejelski

The Action Commission to Reduce Court Costs and Delay was established in 1979 with Seth Hufstedler as chairman. The focus of the Commission's work is the identification, development, and testing of a number of proposals at both the trial and appellate levels to reduce litigation costs and delays, especially for the consumer. These proposals range from relatively simple innovations and modifications of existing procedures designed to effect incremental savings to large scale reforms attempting a dramatic reduction in cost and delay.

This paper describes three proposals the Action Commission is exploring within the appellate process. The first is an expedited appeals program that emphasizes reliance on oral argument rather than extensive written briefs as the primary vehicle for the presentation of an appeal. The second proposal involves efforts to focus oral argument of an appeal either by notifying counsel prior to the argument session of the issues of particular concern to the court or by circulating to them the court's tentative ruling or draft opinions. The third involves the use of telephone conferencing in lieu of in-person appearances for both motion hearings and oral arguments.

Expedited Appeals

The workload and delay problem confronting this nation's appellate courts is being addressed in a number of ways. Increasingly, reform efforts have begun to look at backlogs not in terms of the number of cases coming into the appeals courts or of the number of judges available to hear them but in terms of the requirements of the appeals process itself. Backlogs can be reduced or eliminated by modifying the appellate process in such a manner as to reduce the resources required to resolve an appeal without affecting the soundness and fairness of the process.

An idea that the Commission found particularly attractive, because of its potential for reducing the cost of an appeal to the litigant as well as the time and effort required by the court, involves the development of an expedited appeals track for certain cases. It emphasizes the presentation of cases to the court primarily through oral argument. In lieu of traditional written briefs, parties would submit more limited documents, perhaps even relying on trial briefs. Where this could be combined with procedures for reducing or eliminating trial court transcripts and for the rendering of a decision by the court orally at the conclusion of the argument, time and cost savings could be greatly increased.

Various aspects of this proposal have been the subject of limited experiments. A simulation conducted in Arizona in 1975 and 1976 emphasized oral argument and oral decisions for the resolution of appeals in certain civil cases. An on-going accelerated docket program for civil appeals in Colorado features elimination of the transcript and shortened briefs. There is no emphasis on oral presentation in the Colorado program, however, and argument is often waived. A third program, proposed for criminal cases in the Ninth Circuit, provides for an abbreviated trial record, determination of the case upon oral argument with no conventional briefs, and oral decisions. Oral decisions following argument have also been used in the Second Circuit and in the California First Appellate District in San Francisco.

The Action Commission has combined the various aspects of expedited appeals procedures into a single coordinated program. This program has four basic elements: (1) improved methods of handling transcript problems; (2) reduced emphasis on formal briefs; (3) increased reliance on oral argument; and (4) prompt decision following argument. The Commission believes that the adoption of these approaches — at least for some cases — would permit, faster, simpler, and less expensive appeals without sacrificing the quality of judicial review and decision.

The Commission is working with courts and bar groups in a number of jurisdictions to develop specific programs for implementation. Each program is being tailored to the specific conditions of that jurisdiction and its needs and interests. Depending upon local conditions, a program may place reduced emphasis on transcript preparation alternatives, or upon oral decisions. The crux of each program, however, is reliance on oral arguments rather than written briefs as the primary vehicle for the presentation of an appeal. Each of the four basic elements and recommendations is described in more detail below.

1. ***Improved Methods of Handling Transcript Problems*** – Pro-

cedures would be implemented to ensure that only those parts of the trial transcript necessary for the appeal are in fact prepared. In addition, new court audio systems and computer-aided transcription ("CAT") systems are faster and cheaper than traditional transcription, and their use could be explored. The Commission's recommendations address both what is prepared, and how. A program based on those recommendations may include one or both areas, although the inclusion of a CAT component is not essential to the Commission's program and would probably depend upon its preexisting utilization by court reporters in the implementing jurisdiction.

Many court rules provide for the filing of less than full trial transcripts and for agreed statements in lieu of the record. The issue then is one of utilization of these procedures by counsel in appropriate cases. A court should consider the adoption of additional procedures designed to encourage the utilization of transcript alternatives. These can include the establishment of presumptions in favor of agreed statements or in favor of limited transcripts in certain cases. These modifications could also be coupled with sanctions against counsel for the preparation of transcripts determined by the court to be unnecessary to the appeal.

2. *Reduced Emphasis on Formal Briefs* – Court rules should be promulgated providing for the use of simplified briefs or memoranda in those cases that do not require extensive briefing to raise and explore issues involved in the appeal.

The premise underlying the limited brief is that a court does not require full briefing in certain types of cases, e.g., where the issues are simple or routine, involving only well-settled issues of law and their application to relatively uncomplicated factual situations. The written submissions could be as short as a one-page citation to points and authorities or as long as a ten-page presentation of arguments in summary form. Its objectives, however, would be threefold: to allow opposing counsel to know the essence of the arguments to be made, to provide the court with a means of advance preparation, and to provide the framework for oral argument.

Limited briefing would address two problems which delay the resolution of an appeal. First, it would reduce the time consumed by briefing. Second, it would reduce the time between the close of briefing and argument by reducing the time and effort required by the court to prepare for argument.

3. *Increased Reliance on Oral Argument* – The argument session would be an informal conference in which counsel present their cases and the court actively explores with counsel the issues raised. Cases would be scheduled for oral argument before a regular three-judge panel. Where calendaring permits, the argument could be scheduled for as few as thirty days after completion of briefing. This would allow sufficient time for scheduling of the argument, for counsel preparation, and for court staff preparation for the assigned court panel.

The argument itself would be an informal and relatively unstructured session in which the parties involved in the case assist the court's exploration of the issues, resolving questions through conversational exchanges during the session. There would be no rigidly fixed time limit for argument, and the session could continue so long as the court found it useful. It could be generally understood, however, that each side would typically occupy no more than a specified amount of time, e.g., thirty minutes.

4. *Prompt Decision Following Argument* – In appropriate cases, the court can deliver oral decisions from the bench at or near the conclusion of argument. The objective of the oral argument is to provide a sufficient exploration of the issues involved in the case so that by the time the argument is over the case could be promptly decided.

The procedures to be followed concerning the decision would be flexible. The panel may choose to recess briefly and then announce its decision. Where decisions of the court are required to be published, 1) an oral decision could be transcribed for editing and filing or 2) a separate written opinion could be composed if necessary.

While the program encourages the oral decision at the conclusion of the argument, there are instances in which the court will reserve its decision. This could occur either where longer than a short recess would be required to formulate the decision and its underlying rationale, or where additional study was required. In these cases, it is important that the court not hold the matter under submission for any extended period. If the court determined that the limited brief/conference argument did not provide an adequate presentation, it could reschedule the case for full briefing and further argument.

Focused Oral Argument

The Commission's expedited appeals program is based on belief in the value of oral argument as an institution as well as in its adequacy as the primary method of presentation for many appeals. Oral argument gives visibility to the appellate process for the attorneys as well as the litigants, and can bring a case alive for the judges.

In many courts, oral argument is one of the first targets for curtailment or elimination in the effort to meet workload increases. Part of the reason for this is the complaint that oral argument in too many cases merely repeats the parties' briefs and adds nothing to the

court's understanding of the appeal.

The Commission believes that oral argument should be preserved, and that methods exist to make it more efficient and effective. Two which are presently under study and which we are interested in having implemented are notification to counsel prior to argument of the issues of interest to the court, and the circulation of tentative rulings or draft opinions. The Commission has been studying the recently adopted practice of a panel of the Superior Court in Los Angeles which normally gives a tentative ruling to attorneys before oral argument. Some form of prior notification could be introduced by a court either as part of a broader package of procedural reforms or as a discrete modification.

As with the expedited appeals package, these features may not be appropriate for all courts or for all appeals. In addition, while there are clear potential benefits to directed arguments, there may also be some less obvious effects. For example, if the court circulates a tentative decision or draft opinion, will counsel seek the opportunity to respond through the submission of supplemental briefs? Page limits on briefs are in part to encourage counsel to present only the major issues, those which could affect the resolution of an appeal. What effect would directed argument have on the number and character of the issues briefed?

Telephone Conferencing for Hearings and Arguments

One of the projects the Action Commission has undertaken is an examination of the utilization of telephone conferencing for the conduct of court business. Telephone conferencing has the potential for reducing the ultimate cost of litigation by reducing attorney travel and waiting time. Our research indicates that a very wide range of court business is now conducted by telephone. At the trial level, the telephone is used for scheduling conferences, pretrial hearings, and motion hearings in civil cases. Telephone conferencing is used less frequently in criminal matters, but in some courts telephone conferencing includes taking pleas as well as conducting motion hearings. A number of appellate courts currently use telephone conferencing for motion hearings or as an opportunity for a judge reviewing a motion submitted on the papers to obtain supplemental information from the parties.

The Action Commission is working on a proposal to introduce telephone conferencing in an intermediate appellate court where it will be used for motion hearings and oral arguments. The potential for a more general and widespread use of telephone conferencing exists at the appellate level than at the trial court level. First, there are fewer impediments — practical as well as legal — to the use of telephone conferencing at the appellate level. Due process and confrontation issues are less likely to arise. In addition, appellate matters are less likely to involve frequent exchanges and presentations of documentary material than are proceedings in the trial court. Second, the benefits to be derived from telephone conferencing in appellate matters may be greater than in trial matters. For example, because of the greater geographical area served by an appeals court, costs to the participants in appearing in person before the court may be greater. For many jurisdictions, the savings will inure to the court, whose members often sit in different locations around the state to hear motions and arguments.

JOY A CHAPPER is the Deputy Staff Director of the Action Commission. She had previously been Special Assistant to the District of Columbia Corporation Counsel and has clerked at the D.C. Superior Court. Ms. Chapper has served on a number of American Bar Association committees in the criminal justice area and has been involved in a variety of D.C. Bar activities relating to the courts and the practice of law. She is a graduate of the Georgetown University Law Center and Smith College.

PAUL NEJELSKI, a lecturer at the University of Maryland Law School, has been Staff Director of the American Bar Association's Action Commission to Reduce Court Costs and Delay since its inception in March 1979. Mr. Nejelski is a graduate of Yale College and Yale Law School. He has served as a consultant to a number of organizations, including the Ford Foundation and the Canadian Institute for the Administration of Justice.

Sacramento County Bar Association

101 Court Plaza Building • 901 H Street • Sacramento, California 95814 • Phone (916) 448-1087

From the Office of the President:

THOMAS W. ERES

August 12, 1981

Dear Colleague:

I am sending this letter to you and to the other attorneys who have handled cases under the Third District Court of Appeal's Expedited Appeal Program.

As you may be aware, the American Bar Association's Action Commission to Reduce Court Costs and Delay is working with the Court to provide it with an assessment of the impact of the new procedures. The Commission's report will assist the Court in its decision regarding the continuation or modification of the program. Some of the questions being addressed by the Action Commission relate to the effect of the expedited procedures on attorney case preparation and presentation and on attorney perceptions of the quality of judicial review under the procedures. One of the sources of information upon which the report will be based is interviews with attorneys.

In the next several weeks, the Action Commission staff in Washington, D.C., will be calling a number of the attorneys in cases that followed the expedited procedures to arrange a date and time for a telephone interview. The interview itself should last approximately twenty minutes. The interviews will be held in strict confidence, and no responses will be disclosed that can identify an individual attorney.

I would urge you to assist in the evaluation effort by agreeing to an interview and by sharing fully your reactions to the program.

Sincerely,

Thomas W. Eres
President
Sacramento County Bar Assn.