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# A Needs Analysis of an Intermediate Appellate Court

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# A NEEDS ANALYSIS OF AN INTERMEDIATE APPELLATE COURT

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&  
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*The increased workload of the Minnesota Supreme Court, with its concomitant backlog and delay, has resulted in various ameliorative proposals, one of which is the creation of an intermediate court of appeals. In this Article, Mr. Harmon and Mr. Lang review the history of the current problem and critically assess the various alternative proposals. They conclude that the only adequate solution is the creation of an intermediate court of appeals.*

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## I. INTRODUCTION

Courts are chronically overworked. There never seems to be enough judges or staff. Funds are tight. There is not enough space, file cabinets, typewriters, or any of the usual supplies and support services that enable an enterprise to exist—let alone flourish. But the central and inescapable problem is that there is too much work, and there are not enough people to get it done. The result is precisely what happens when any enterprise is flooded with business: the work piles up and remains undone, delays develop, and the frustrated workers search for solutions. In the court environment, the problem is compounded because the number of workers cannot be expanded as the workload<sup>1</sup> grows, and the workload itself cannot be controlled. Courts, indeed, stand alone among institutions: business is always too good, and as the economy gets worse, business gets better.

Overwork in the judiciary is so pervasive that it may be said to be both characteristic and endemic. As new courts are created and new judgeships authorized, these courts and judges are immediately overwhelmed with work; the situation never seems to improve.

Overwork is prevalent and the judiciary is accustomed to it; nevertheless, some questions must be asked. How much work can judges handle and still do justice? What shortcuts can courts take to relieve their burdens and yet deliver a high-quality system of appellate review? Finally, at what point may we conclude that courts deserve some relief?

The purpose of this Article is to explore these questions as they relate to the Minnesota Supreme Court. This Article will examine the frequently proposed alternatives to the creation of an intermediate appellate court and analyze the advantages and disadvantages of these alternatives as they relate to the solution of the Minnesota Supreme Court's workload problems.<sup>2</sup> This Article also discusses the creation of an intermediate appellate court and

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1. For the purposes of this Article "court workload" means the number of cases filed and the number of written opinions, and "delay" means the time period between the notice of appeal and the decision.

2. See notes 21-114 *infra* and accompanying text.

attempts to illustrate the superiority of such an approach.<sup>3</sup>

## II. HISTORICAL PERSPECTIVE

Since at least the mid-1960's, there have been sporadic attempts on the part of various study groups and commissions to propose methods to enable the court to dispose of its workload and generally improve the appellate process. In September of 1966, for example, the Minnesota Citizens' Conference to Improve the Administration of Justice proposed a unified court structure that included a supreme court and an intermediate court of appeals.<sup>4</sup>

In March 1968 the State Judicial Council<sup>5</sup> undertook a study of the supreme court's "excessive case load."<sup>6</sup> The following December, the Council adopted a subcommittee report<sup>7</sup> calling for the enactment of legislation to increase the membership of the Minnesota Supreme Court to nine justices and two commissioners.<sup>8</sup> The subcommittee report also called for an amendment to article VI, section 1 of the Minnesota Constitution permitting the legislature to create an intermediate court of appeals.<sup>9</sup> The subcommittee considered and rejected the alternatives of expanding the appellate jurisdiction of the district courts, noting that such an appellate division of the district court would provide only insubstantial relief to the supreme court.<sup>10</sup> Concluding that a constitutional amend-

3. See notes 115-29 *infra* and accompanying text.

4. See Minnesota Conference on Courts, *The Consensus of the Minnesota Citizens' Conference To Improve The Administration Of Justice*, BENCH & B. MINN., June 1967, at 10, 11.

5. The State Judicial Council was "created for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the state, and of all matters relating to the administration of said system and its several departments." MINN. STAT. § 483.01 (1980).

6. Minnesota Judicial Council Minutes (Mar. 29, 1968).

7. The report was prepared by the Sub-Committee on Excessive Appellate Caseload.

8. See THE JUDICIAL COUNCIL OF THE STATE OF MINNESOTA, BIENNIAL REPORT 18, 21 app. (1968) [hereinafter cited as BIENNIAL REPORT].

9. See *id.* The Judicial Council's subcommittee, and 18-member group composed of attorneys and judges, was persuaded by statistics revealing that the volume of cases before the supreme court had increased by more than 100% during the preceding decade, resulting in a delay of 16 months in processing appeals. The subcommittee found that the court was issuing more than 300 written opinions annually by 1967, or an average of more than 40 opinions per justice. See *id.* at 19. In addition, they discovered that the number of cases considered by the court had increased from 192 to 277 between 1965 and 1967. See *id.*

10. See *id.* at 21-22. The subcommittee noted:

Expansion of the appellate jurisdiction of the District Courts . . . involves a constitutional problem. Article VI, Section 1 of the Constitution provides:

"The judicial power of the state is hereby vested in a supreme court, a district court, . . . and such other courts, . . . with jurisdiction inferior to the district court as the legislature may establish."

ment would be necessary to create an intermediate court, the subcommittee recommended that "immediate action should be taken to give the legislature the power to establish an intermediate appellate court whenever necessary."<sup>11</sup>

In 1968, the Governor's Commission on Law Enforcement, Administration of Justice and Corrections concluded that the establishment of an intermediate appellate court would relieve the court of its excessive workload.<sup>12</sup>

In June, 1968, the Judicial Administration Committee of the Minnesota State Bar Association proposed a revision to article VI of the state constitution that would provide the legislature with the power necessary to establish an intermediate court.<sup>13</sup>

In considering the problem of workload and delay, the supreme court, at its meeting of August 29, 1967, voted to "sit in divisions as a solution to the problem" of an increased appellate caseload.<sup>14</sup> Specifically, the court decided to sit in divisions of five justices, with four votes required for a decision.<sup>15</sup> This procedure, denominated as Rule XXIII of the Supreme Court Rules of Practice, was formally adopted on October 3, 1967.<sup>16</sup>

Minutes of supreme court meetings in succeeding years reflect the court's concern about its increased caseload and the cumbersome requirement of a constitutional amendment needed to empower the legislature to create the necessary intermediate court. Also reflected in the minutes was the discussion of immediate palliative measures, such as legislatively established panels of district court judges to review decisions of boards and commissions, and municipal and county courts; the legislative appointment of commissioners who would function as members of the court without

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Thus, while there is no doubt that the Legislature could create an appellate division of the District Court . . . it is very doubtful that the jurisdiction of such an appellate division of the District Court could include the power to review decisions of a single judge District Court, since an appellate function is higher than the trial function.

*Id.* at 22 (emphasis in original).

11. *Id.* at 23.

12. See Subcommittee on Reorganization and Reform, *Court Reorganization And Reform*, in GOVERNOR'S COMM'N ON LAW ENFORCEMENT, ADMINISTRATION OF JUSTICE AND CORRECTIONS 4 (1968) (on file at William Mitchell Law Review office).

13. See Judicial Administration Committee, *Proposed Revision of Judiciary Article*, BENCH & B. MINN., May-June 1968, at 168, § 4B, at 170.

14. See Minnesota Supreme Court Minutes (Aug. 29, 1967).

15. See *id.*

16. See Knutson, *Appellate Review by Divisions*, BENCH & B. MINN., Nov. 1967, at 6, 9-10.

the power to vote; and the reduction or elimination of oral arguments in some cases.<sup>17</sup> While the justices unanimously agreed that the ultimate solution to their workload problem would be the creation of an intermediate court of appeals,<sup>18</sup> only the stop-gap measures have been adopted over the past decade.

In 1973, the Constitutional Study Commission of the Minnesota Legislature rejected the recommendation of its Judicial Branch Committee that an intermediate appellate court be created by constitutional amendment.<sup>19</sup> Instead, the Commission adopted an alternative proposal that the legislature be authorized to establish an intermediate court if it deemed necessary, but concluded that the legislature might add two justices to the supreme court or utilize additional district court judges to serve temporarily on the court as an alternative to the creation of an intermediate court. The legislature, in 1973, approved the addition of two justices to the court.<sup>20</sup>

As will be noted in this Article, neither the addition of two justices nor other measures have solved the court's workload problem.

### III. ALTERNATIVES TO THE CREATION OF AN INTERMEDIATE APPELLATE COURT

Most states have employed remedies other than intermediate courts as a means of assisting their supreme courts, and have turned to the intermediate court solution only when the supreme court became hopelessly overburdened. In Minnesota, the history of the intermediate appellate court movement suggests that such a court will be created, if at all, only after every other alternative has been exhausted.

There are certain well-recognized remedies for handling an increasing volume of cases at the supreme court level. Each is designed to increase the capacity of the court to dispose of its work by adding judges, by reducing the amount of judge time devoted to hearing and processing cases, or by decreasing the number of

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17. *See* Minnesota Supreme Court Minutes (Mar. 28, 1968); *id.* (July 18, 1968); *id.* (Nov. 21, 1968); *id.* (Jan. 16, 1969); *id.* (Feb. 4, 1971).

18. *See id.* (Jan. 16, 1969). Currently, the supreme court may temporarily assign a retired justice of the supreme court or one district court judge at a time to act as a justice of the supreme court. *See* MINN. STAT. § 2.724(2) (1980).

19. MINNESOTA CONSTITUTIONAL STUDY COMM'N, FINAL REPORT 24 (1973).

20. *See* Act of May 24, 1973, ch. 726, § 1, 1973 Minn. Laws 2133, 2134 (codified at MINN. STAT. § 480.01 (1980)).

appeals. The following discussion will briefly examine these remedies and explore their relevance to Minnesota.

### A. *Additional Judgeships*

The addition of judges is the most obvious suggestion for increasing a court's productivity. The rationale for this approach is that more workers will produce more work; the question is whether this hypothesis holds true for a court of last resort.

The American Bar Association Standards Relating to Court Organization provide that the highest appellate court in the state "should have not less than five nor more than nine members."<sup>21</sup> The Commentary to this standard cautions that "[a]dding additional judges to a highest court may actually slow down its operation rather than speeding it up."<sup>22</sup> Justice John R. Dethmers of the Michigan Supreme Court has argued persuasively against unlimited expansion of the size of the supreme court:

[Increasing the number of high court judges] does not lessen the work of each judge necessary for the study of records and briefs, legal research, and examination of opinions in cases in which the other members write. This he must do, of course, in order to decide whether he agrees and will sign such opinions or write dissents. Enlarging a court does not decrease the amount of time required for listening to oral arguments of counsel and for conference, consultation, and discussion by the judges. In fact, increase of the numbers increases the man-hours thus consumed . . . .<sup>23</sup>

Adding judges to the Minnesota Supreme Court would unquestionably require a constitutional amendment. Article VI, section 2 of the Minnesota Constitution provides: "The supreme court consists of one chief judge and not less than six nor more than eight associate judges as the legislature may establish."<sup>24</sup> In 1973 the Minnesota Legislature authorized the addition of two new justices to the supreme court<sup>25</sup> as an alternative to the creation of an intermediate court. The additional judges, however, did not significantly increase the number of opinions produced in subsequent

21. ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION § 1.13(a) (1974) [hereinafter cited as STANDARDS RELATING TO COURT ORGANIZATION].

22. *See id.*, Commentary, at 35.

23. Dethmers, *Delay in State Appellate Courts of Last Resort*, 328 ANNALS 153, 158 (1960).

24. MINN. CONST. art. VI, § 2.

25. *See* Act of May 24, 1973, ch. 726, § 1, 1973 Minn. Laws 2133, 2134 (codified at MINN. STAT. § 480.01 (1980)).

years by the court, nor did the number of hearings increase substantially.<sup>26</sup> Instead, the new justices actively participated in the court's well-established methods of handling its burgeoning caseload—sitting in panels, using prehearing conferences, and applying other techniques for disposing of cases by summary means.

A companion approach, which is more flexible than creating additional permanent judges, is to make temporary judicial assignments to the supreme court as the workload requires. These may be retired justices or active or retired trial court judges.<sup>27</sup> The argument against permanently expanding the size of the supreme court is applicable in this instance as well. In addition, there may be a concern that judges who were not elected to the supreme court may be in a position to cast decisive votes in cases in which the court is divided.<sup>28</sup> Perhaps the most telling argument against such temporary assignments is that they tend to dilute the collegial environment that supreme courts strive to develop. This concern has been forcefully expressed as follows:

[Adding temporary judges] produces the problem of integrating new members of a court and raises the possibility of internal doctrinal conflict or inconsistency. When additions to the court are temporary, there is less opportunity for the new members to learn the norms and thought processes operative in the court, even if the new judges are conscientious in their efforts to absorb the court's ways of deciding its cases.<sup>29</sup>

The Minnesota Supreme Court has used the services of district court judges since November of 1969.<sup>30</sup> The court, however, dis-

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26. See G. LANG & J. MARSHALL, *THE CASE FOR A MINNESOTA COURT OF APPEALS* app. A (1980) (Appendix A is a disposition report of supreme court filings for years 1973-1978) (prepared for Minnesota Supreme Court Judicial Planning Committee). In 1973 there were 218 signed opinions and 161 per curiam opinions; in 1975 there were 269 signed opinions and 186 per curiam opinions; in 1977 there were 282 signed opinions and 119 per curiam opinions. *Id.*

27. See note 18 *supra*.

28. Some may argue that judges who are temporarily assigned to the supreme court should be precluded from voting in contested cases or from writing opinions in such matters. A response to this argument is that any judge who functions as a supreme court justice should be encouraged to participate to the fullest extent possible, and to restrict his involvement is not only demeaning to him as a judge but also limits his utility to the court.

29. S. WASBY, T. MARVELL & A. AIKMAN, *VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES* 43 (1979) (publication of National Center for State Courts).

30. See Order assigning temporary justice to the Minnesota Supreme Court (Nov. 3, 1969) (on file at William Mitchell Law Review office). By this order Chief Justice Knutson assigned Ramsey County District Court Judge John Graff to act as a temporary justice of the supreme court for November and December of 1969. See *id.* This appointment



continued this practice in 1979, primarily because of overwhelming lower court caseloads that made even temporary assignments to the supreme court burdensome to the trial courts.

In conclusion, it is evident that increasing the size of the court would not necessarily produce a corresponding increase in productivity. The concept of collegiality requires that all justices participate in the major appellate court functions—reading briefs, participating in oral arguments, and conferring to decide appeals. It is likely that adding judges to the present court would actually result in an *increase* in the amount of time devoted to case conferences and circulation of opinions.<sup>31</sup> Adding judges in Minnesota has become an even less desirable alternative in view of the court's determination to decide cases in the 1980 term either en banc or without oral argument, thus eliminating oral arguments before panels of judges. The en banc, nonoral approach precludes the type of substitution of personnel that hearing cases in panels would facilitate, thus making the addition of judges inappropriate.<sup>32</sup>

### B. *Increasing Judicial Efficiency*

The reforms included in this category fall generally into five areas: restricting oral arguments; limiting briefs; reducing the number of written opinions; increasing the use of staff; and using judicial panels.

It is worth noting that there is a risk that certain attempts to increase judicial efficiency may damage the appellate process.

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was extended through January 5, 1970. *See* Order extending assignment of temporary justice to Minnesota Supreme Court (Jan. 2, 1970) (on file at William Mitchell Law Review office). The power to appoint a district court judge to serve temporarily as a supreme court justice is found in MINN. STAT. § 2.724(2) (1980).

31. For an extended discussion of the inherent limitations in adding judges to an appellate court, see Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 21-28 (1971).

32. Two commentators argue that large appellate courts are actually dysfunctional:

The folk wisdom that two heads are better than one has always been tempered by the observation that too many cooks spoil the broth. The process of conference, which is a real interchange of ideas and can produce a significant change of opinion in a group as small as three or five or perhaps even seven, becomes a totally different process when the numbers become as large as nine or eleven. Five men can confer; nine or eleven can only have time to state their respective positions. The breakdown of the conference tends to produce either an inordinate number of dissenting opinions, when all the justices study the case carefully but do not have time to persuade one another concerning it, or an inordinate number of "one-judge" opinions, when the court falls into the practice of accepting with minimal scrutiny the view of the man to whom the case has been "assigned."

Lilly & Scalia, *supra* note 31, at 27.

Many of these suggested reforms increase the probability that actual decisionmaking will be delegated to nonjudges, or decrease the likelihood that the litigant will receive meaningful appellate review. The "pure" appellate process guarantees that every appellant will have the opportunity to argue an appeal before a full complement of appellate judges; this notion is contained in the American Bar Association Standards Relating to Appellate Courts. Section 3.01 provides:

(a) Supreme Court. In hearing and determining the merits of cases before it, the supreme court should sit *en banc*. . . . [A]ll members of the court should participate in the decision of each case. The court should not sit in panels or divisions, whether fixed or rotating, or delegate its deliberative and decisional functions to officers such as commissioners.<sup>33</sup>

Despite the philosophy of the ABA Standards, there is no doubt that the Minnesota Supreme Court must resort to various expedient measures to enable it to dispose of its increasing workload. The court has adopted virtually the entire range of techniques designed to separate for judicial review only those cases deserving of the consideration that is contemplated in the "pure" appellate model, and to dispose of the remainder by summary means.<sup>34</sup> In his 1980 State of the Judiciary message, Chief Justice Robert J. Sheran explained in detail how the court will deal in the future with its growing caseload:

Beginning with the term commencing in September, 1980, it is our intention to hear all arguments *en banc*. We anticipate that approximately 160 cases will be heard orally and the rest will be considered nonorally. The decision whether to afford oral argument in civil cases will be made at the time of the prehearing conference. In criminal cases it will be made by the court as soon as the briefs are filed.

This is not the ideal way for a Supreme Court to dispose of its caseload, but we feel it is the best way, given a volume of cases that is increasing at an annual rate of nearly 12 percent. If the legal profession and the public are satisfied with the approach which we are inaugurating in the coming term, we in-

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33. ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.01(a) (Approved Draft 1977) [hereinafter cited as STANDARDS RELATING TO APPELLATE COURTS].

34. See notes 14-18, 30 *supra* and accompanying text. The court will continue to use such techniques in the future. See Chief Justice Robert J. Sheran, State of the Judiciary Message 1 (June 19, 1980) (presented to Minnesota State Bar Association Convention) (on file at William Mitchell Law Review office).

tend to keep abreast of the caseload by assigning significant responsibility to professional staff working under supervision of the judges. No case will be decided without being considered by all of the judges, but the detailed examination of the record, the analysis of legal authorities, and to some extent the expression of the views of the court will be handled by staff. If that is acceptable to the legal profession and the public, we can live with it. However, it is my impression that they will ultimately insist upon an intermediate court. In the meantime, it is important that everyone understands the situation.

The strength of our current system is that it funnels all appeals, except those from county courts, to one Supreme Court. But the volume of cases is so large that one court is forced to do the work of two simply to remain current and must of necessity increase its dependency on staff, diverting, in effect, much of our workload to persons who, though extraordinarily qualified and law trained, are not elected judges.<sup>35</sup>

In at least two instances, the court has adopted rules that operate to conserve judge time while placing reasonable limits upon a litigant's unrestricted access to appellate review. Rule 134.02 of the Minnesota Rules of Civil Appellate Procedure restricts the time allotted to arguments of counsel;<sup>36</sup> Rule 128.01 attempts to limit the volume of briefs filed with the court, restricting, for example, the statement of the legal issues involved to "a concise statement . . . omitting unnecessary detail."<sup>37</sup>

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35. See Address by Chief Justice Robert J. Sheran, *supra* note 34, at 4-5. The rules were not changed to accord with the court's intention until January 1, 1981. See Finance and Commerce, Dec. 12, 1980, at 12, col. 2.

36. See MINN. R. CIV. APP. P. 134.02. The rule provides:

Except as provided in Rule 134.07, the appellant shall be entitled to a total of 45 minutes in en banc hearings and to a total of 30 minutes in division hearings, and the respondent to 30 minutes in en banc hearings and to 20 minutes in division hearings, for oral argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary by motion filed in advance of the date fixed for hearing.

*Id.* Oral arguments may be precluded entirely in certain types of cases. See *id.* 134.07(1).

37. See *id.* 128.01(2). Rule 128.01 provides:

The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A concise statement of the legal issue or issues involved, omitting unnecessary detail. Each issue shall be stated as an appellate court would state the broad issue presented. Each issue shall be followed by a concise statement how the trial court decided it.

(3) A statement of the case and the facts. A statement of the case shall first

### 1. *Restricting Oral Arguments*

The Minnesota Supreme Court discourages oral arguments in minor or routine cases;<sup>38</sup> these matters are determined on the briefs submitted by the parties. As of September 1980, this "nonoral" calendar was expanded significantly; as noted above, a maximum of only 160 cases are set for oral argument, with the remainder assigned for nonoral disposition. The thrust of the new policy is to establish a maximum number of cases to which the supreme court will afford full-scale appellate review during the course of a year, and to divert the remainder of the cases, along with special term matters,<sup>39</sup> to the Supreme Court Commissioner, who will be responsible for dispositions by means of summary proceedings and orders without opinions, as well as performing research on special

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be presented identifying the trial court and the trial judge and indicating briefly the nature of the case and its disposition in the trial court. There shall follow a statement of facts relevant to the grounds urged for reversal, modification, or other relief. The facts must be stated fairly, with complete candor, and as concisely as possible. Where it is claimed that a verdict, finding of fact, or other determination is not sustained by the evidence, the evidence, if any, tending directly or by reasonable inference to sustain the verdict, findings or determination shall be summarized. Each statement of a material fact shall be accompanied by a reference to the record, as provided in Rule 128.04, where such fact appears.

(4) An Argument. The argument may be preceded by a summary introduction. The argument shall contain the contentions of the party with respect to the issues presented, the reasons therefor, and the citations to the authorities relied on. Each issue shall be separately presented. Needless repetition shall be avoided.

(5) A short conclusion stating the precise relief sought.

(6) The appendix required by Rule 130.01.

*Id.*

38. *See id.* 134.07(1) (oral argument not allowed in appeals from municipal court, clerk's taxation of costs, or orders involving only questions of practice or forms or rules of pleading).

39. In addition to the regular calendars, the supreme court has a special term calendar. This calendar is heard bi-monthly by the Special Term panel, the chief justice and two associate justices. Necessary research is performed by the Court Commissioner. This calendar is designed to handle specific questions or designated applications for relief. These matters include:

- (1) Petitions for Writ of Mandamus and Prohibition;
- (2) Petitions for Permission to Appeal;
- (3) Motions for Summary Disposition;
- (4) Application for Release Pending Appeal;
- (5) Petitions for Discretionary Review of Non-Appealable Interlocutory [sic] Orders;
- (6) Motions to Dismiss Appeals;
- (7) Motions to Reduce or Increase a Supersedeas Bond;
- (8) Motions to Remand;
- (9) Motions to Stay Proceedings; and
- (10) Motions Particularized to a Specific Action.

G. LANG & J. MARSHALL, *supra* note 26, at 27-28.

term matters.<sup>40</sup>

Whether this procedure will affect the desired result of conserving the court's judicial resources so that they may be focused upon the disposition of the most important cases is unknown. It is questionable whether the nonoral calendar has in the past significantly improved the court's ability to handle its caseload, simply because the amount of judge time devoted to oral arguments is small.<sup>41</sup> A further decrease in the number or length of oral arguments may result in relatively insignificant timesaving for the same reason.

The larger question is whether it is desirable to discourage oral argument by using a nonoral calendar. This procedure violates the American Bar Association Standards Relating to Appellate Courts. Section 3.35 provides that parties should be permitted oral argument unless the court concludes "that its deliberation would not be significantly aided by oral argument."<sup>42</sup> The Commentary to the section states:

Oral argument is normally an essential part of the appellate process. It is a medium of communication that is superior to written expression for many appellate counsel and many judges. It provides a fluid and rapidly moving method of getting at essential issues. It contributes to judicial accountability, enlarges the public visibility of appellate decision-making, and is a safeguard against undue reliance on staff work. Oral argument should not ordinarily be allowed on applications for discretionary review or on motions or other procedural matters. When an appeal is considered on its merits, however, oral argument should never be discouraged routinely and should be denied only if the court is convinced that the contentions presented are frivolous or that oral argument would not otherwise be useful. The court should recognize that discouraging oral argument can lead counsel to underestimate its importance.<sup>43</sup>

The Commentary to the section recognizes that some appellate courts have become so overburdened that they have "felt compelled to deny opportunity for oral argument in a substantial pro-

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40. *See id.* at 25-27.

41. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 19 (1976) [hereinafter cited as P. CARRINGTON]. "[I]t is unlikely that any American appellate court spends more than 15% of its working time engaged in oral argument and for many, the figure must be much less." *Id.*

42. *See* STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.35.

43. *Id.*, Commentary, at 56.

portion of the cases before them."<sup>44</sup> The Commentary suggests that, although this practice may be "unavoidable,"<sup>45</sup> it should be "treated as a symptom of the need to restructure the court's organization or jurisdiction. In any event, the practice should be adopted only as an extreme measure when other means of keeping the court abreast of its caseload are insufficient."<sup>46</sup>

One other, perhaps less obvious, claim expressed by commentators in favor of retaining oral arguments is that they fulfill an important function for the appellate court as an institution. Hearing the adversaries not only serves to acquaint the appellate tribunal with both sides of the controversy, but also gives the losing party the satisfaction of knowing that the determination was an informed one, and that the legal process is an orderly, rational way for the resolution of disputes.<sup>47</sup>

## 2. *Limiting Briefs*

In addition to reducing the amount of time devoted to oral argument, a court might choose to limit the volume of appellate papers filed. The Minnesota Supreme Court has sought by appellate rule to restrict briefs and records to concise statements of dispositive issues.<sup>48</sup> In addition, the court has established procedures that allow the judge and the parties participating in prehearing conferences in civil cases to determine which portions of the trial transcript will be used for appellate review.<sup>49</sup>

Another practical, yet undesirable, technique would be to fix an absolute number of pages for appellate briefs—a measure endorsed by the ABA Standards.<sup>50</sup> While it is possible that a supreme court rule might reduce the length of appellate briefs, it is equally likely that a page limitation would stimulate requests from counsel to waive the limit in individual cases. The ministerial duty of reviewing these requests would consume additional judge time.

The most radical proposal that has been made in this area is to eliminate briefs in favor of oral argument. In 1975, the Arizona

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44. *See id.* at 56-57.

45. *See id.* at 57.

46. *Id.*

47. *See* P. CARRINGTON, *supra* note 41, at 10.

48. *See* note 37 *supra* and accompanying text.

49. MINN. R. CIV. APP. P. 110.02(1).

50. *See* STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.31, Commentary, at 48.

Court of Appeals experimented with simulated panels of appellate judges to decide seventy-five civil appeals based solely upon oral arguments and short memoranda prepared by staff. No transcripts or written briefs were prepared. The National Center for State Courts, which conducted the experiment, concluded that "a majority of cases could be decided by a summary procedure shortly after trial using minimal written materials, but with the support of staff memoranda and extensive oral argument."<sup>51</sup> Despite the apparent success of the technique, the methodology of the Arizona experiment has not been implemented in Arizona or elsewhere. The Commentary to the ABA Standards is critical of this approach:

In the American appellate courts briefs are the primary vehicle for communicating the parties' contentions to the court. Appellate procedure in some common law countries relies on oral argument to acquaint the appellate court with the case and briefs are rarely used. Although this procedure has certain attractions, it is time-consuming and imprecise, especially when the appeal involves detailed references to the record below or references to a large number of legal authorities. There is no reason to suppose that real improvement in the quality and efficiency of appellate litigation can be achieved by eliminating written briefs in favor of wholly oral presentations. Good briefing practice can fully achieve the purpose of acquainting the court quickly and completely with the issues it must decide.<sup>52</sup>

Although commentators note the utility of dispensing with briefs in those cases that may easily be resolved by oral argument and reference to relevant points in the trial transcript, they emphasize that this approach is appropriate "where the issues are simple or routine, involving only well-settled issues of law and their application to relatively uncomplicated factual situations."<sup>53</sup>

### *3. Reducing the Number of Written Opinions*

A major part of an appellate judge's time is devoted to writing opinions.<sup>54</sup> Consequently, techniques that could be employed to reduce the number of opinions, or their length or complexity,

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51. E. JACOBSON & M. SCHROEDER, REDUCING THE TIME AND COST OF THE APPELLATE PROCESS: ARIZONA APPELLATE PROJECT REPORT 19 (1976).

52. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.31, Commentary, at 48.

53. P. CARRINGTON, *supra* note 41, at 27. These are characteristics of cases typically handled by intermediate appellate courts, rather than state supreme courts.

54. *See* P. CARRINGTON, *supra* note 41, at 32.

would necessarily allow judicial resources to be devoted to the most important cases with the greatest precedential value.

Before discussing the various ways of reducing the number of appellate opinions, it is necessary to emphasize the importance of written opinions in the appellate process. The written opinion is the tangible product—some claim the indispensable product—of an appeal to a high court. Just as oral arguments provide an important service to appellate justice by forcing judges to compare and test their thinking in a direct way with one another and with learned counsel, the preparation of opinions requires the author to demonstrate total familiarity with the issues and to give reasons for particular determinations. Together, oral arguments and written opinions assure litigants that the court actually has considered the merits of their appeals. Professor Carrington eloquently emphasizes the linkage between oral arguments and appellate opinions and highlights their importance in the appellate process:

[Oral argument] is an important assurance, both in fact and in appearance, that decisions are made collectively, because it is the occasion when all the judges responsible for the decision address themselves together and in public view. Oral argument gives to litigants the assurance that the judges themselves are making the decisions. . . .

. . . .

The integrity of the process requires that courts state reasons for their decisions . . . . Furthermore, litigants and the public are reassured when they can see that the determination emerged at the end of a reasoning process that is explicitly stated, rather than as an imperious ukase without a nod to law or a need to justify . . . . The pressures of heavy workloads have led some appellate courts to overreact by curtailing too sharply the explanation that accompanies the decision. Some have adopted the practice of issuing curt or perfunctory rulings that say nothing more than “Judgment affirmed.” These and other cryptic styles of judgment orders tend to give an impression of an imperious judiciary that acts without the need to justify its judgments.<sup>55</sup>

Despite the crucial importance of appellate opinions, differences in the importance, difficulty, and precedential value of appeals may appropriately be reflected in the opinions that are produced. The ABA Standards, for example, recommend that the court “give its decision and opinion in a form appropriate to the complexity

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55. *Id.* at 17, 31-32 (footnote omitted).



and importance of the issues presented in the case."<sup>56</sup>

The most obvious approach in disposing of routine or less important cases is to allow the appellate court to decide these matters either without preparing an opinion or without publishing it. While the ABA Standards recognize that oral opinions may be appropriate in cases that are orally argued, the propriety of announcing decisions from the bench depends upon whether there was extensive oral argument and an opportunity for the judges to confer prior to rendering judgment.<sup>57</sup> Oral opinions, which are the norm in England,<sup>58</sup> are common in the Second Circuit Court of Appeals and in the Oregon Court of Appeals. In the Second Circuit, oral decisions from the bench constituted 612 of the 977 decisions rendered in 1979, while signed opinions declined in 1979 to 294 from 349 the previous year.<sup>59</sup> In the Oregon Court of Appeals, 450 of the 2,669 cases were decided from the bench in 1978, while 810 were decided by opinions, including 558 per curiam and memorandum decisions.<sup>60</sup> In the Second Circuit, cases decided orally are followed by summary orders in almost every instance. The processing time for all appeals in the Second Circuit is approximately six months.<sup>61</sup>

Although the oral decision procedures in the Second Circuit and the Oregon appellate court appear to expedite decisions, such a practice would violate the expectations of the litigants, the trial bar, and trial court judges throughout Minnesota.

A less radical alternative to deciding cases without opinions is to limit the number of published opinions. The theoretical advantages of this approach are that unpublished opinions need not be as carefully researched and written as those designed for a wider audience since they have no precedential value and are of interest only to the parties. For example, the facts of the case need not be exhaustively stated in the opinions since the parties are undoubtedly familiar with the cause of the dispute. Similarly, it is claimed that the writing style may be more informal, and the use of cita-

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56. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.36(b).

57. *Id.*, Commentary, at 60.

58. *Id.* at 59.

59. I. KAUFMAN & R. LIPSCHER, UNITED STATES COURTS: SECOND CIRCUIT REPORT 34 (1979). The remaining 71 cases were per curiam decisions.

60. STATE COURT ADMINISTRATOR, STATE COURTS OF OREGON, TWENTY-FIFTH ANNUAL REPORT RELATING TO JUDICIAL ADMINISTRATION IN THE COURTS OF OREGON 19 (1978). The remaining 851 cases were either consolidated (154) or dismissed or transferred (697).

61. I. KAUFMAN & R. LIPSCHER, *supra* note 59, at 32.

tions, if any, may be less precise. The Commentary to the ABA Standards favors the use of unpublished opinions:

[R]outine publication of all opinions involves substantial expense and results in publication of many decisions that are of little interest or use to anyone other than the immediate parties. The total cost includes not only printing, distribution, and storage, but also, ultimately, the rapidly increasing expense of legal research resulting from the proliferation of published reports. Where the point is reached in an individual jurisdiction that these costs outweigh the value of routine publication of all appellate opinions, procedures should be adopted that limit publication to those opinions having some apparent precedential significance.<sup>62</sup>

While it is not the practice in Minnesota for the supreme court to announce its decisions from the bench, the court does make extensive use of summary procedures. For example, Rule 133.01(1) of the Minnesota Rules of Civil Appellate Procedure enables the court to “summarily affirm . . . reverse . . . remand or dismiss an appeal or other request for relief upon grounds proper for remand or dismissal . . . .”<sup>63</sup> Further, Rule 136.01(2) allows these summary opinions “where the Supreme Court determines that a detailed opinion would have no precedential value, the Supreme Court in its discretion may enter the following summary opinion: ‘Affirmed (or reversed or other appropriate direction for action), pursuant to Rule 136.01(2).’”<sup>64</sup> The supreme court relies heavily upon summary proceedings; in 1973, for example, 686 cases were filed, of which 303, or 44%, were disposed without hearing; in 1977 (the latest year for which complete statistics are available) 1,065 cases were filed, of which 638, or 60%, were disposed without hearing.<sup>65</sup> It is clear that the percentage of hearings relative to filings decreased dramatically between 1973, when 56% of the cases filed received hearings, and 1977, when only 40% were heard.<sup>66</sup> These statistics indicate a definite trend toward increasing the number of summary dispositions of cases, with fewer cases likely to receive hearings. This trend will undoubtedly continue in the future if, as

62. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.37, Commentary, at 63-64.

63. MINN. R. CIV. APP. P. 133.01(1).

64. *Id.* 136.01(2).

65. *See* Appendix, table 4 and accompanying text.

66. Letter from Gregory A. Lang, Judicial Planning Committee Staff Attorney, to Justice Lawrence R. Yetka (Apr. 8, 1980) (on file at William Mitchell Law Review office). *See* Appendix, table 4 and accompanying text.

expected, filings increase at an approximate 12% rate, while the number of hearings remains constant at approximately 160 per year.

The most radical departures from traditional appellate process in the preparation of opinions are the delegation of this function to staff and allowing decisionmaking and subsequent drafting of opinions by one or two judges.<sup>67</sup> The Minnesota Supreme Court relies heavily upon its central staff for the preparation of draft opinions and summary orders.<sup>68</sup>

#### 4. *Increased Use of Staff*

The work of the supreme court is facilitated by the commissioner's office, which has primary responsibility for case management and dispositional functions. This office is staffed by the commissioner, three assistant commissioners, and a law clerk, all of whom are attorneys. The commissioner and staff perform legal research and sometimes propose disposition in special term matters and cases calendared for nonoral consideration.<sup>69</sup>

It is generally recognized that the assistance of a central legal staff can be of significant benefit to an appellate court if properly used.<sup>70</sup> Section 3.62(b) of the ABA Standards Relating to Appellate Courts summarizes the current thinking regarding the appropriate duties of the central staff:

(b) Central Legal Staff. Appellate courts may . . . employ legal assistants to serve as a central legal staff for the court as a whole, under the supervision of the presiding judge and in accordance with regulations governing the court's internal operating procedures. . . . The duties of a central legal staff may properly include:

(1) Monitoring and reviewing cases coming before the court to assure compliance with procedural rules, and making recommendations for disposition of routine procedural matters in accordance with criteria established by the court;

(2) Preparing case summaries, including procedural history, facts, and principal issues and authorities, for the court's use in managing its caseload and conducting its deliberations;

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67. Address by Chief Justice Robert J. Sheran, *supra* note 34, at 4-5.

68. See note 35 *supra* and accompanying text.

69. NATIONAL CENTER FOR STATE COURTS, STUDY OF THE APPELLATE SYSTEM IN MINNESOTA 34 (1974).

70. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.62; Note, *An Intermediate Appellate Court—Does Utah Need One?*, 1979 UTAH L. REV. 107, 115.

(3) Reviewing all matters presented *in propria persona* and taking measures necessary to put them in correct and intelligible form;

(4) Supplementing the research of the judges' individual law clerks; and

(5) Acting for the court in supervising preparation of complex records . . . .<sup>71</sup>

The Commentary to this section suggests the obvious risks of relying upon a central legal staff:

[J]udicial responsibility may be diffused among the staff to the detriment of the appellate process. If a court employs a central staff, it must be continually alert to the risk of internal bureaucratization and guard against any tendency to rely on staff for decisions that should be made only by judges personally.<sup>72</sup>

The ABA Standards recognize that employing a professional staff instead of, or in addition to, law clerks, and vesting these individuals with rather broad authority in assisting the court in reviewing briefs, preparing memoranda, and drafting proposed opinions eventually will tend to blur the distinction between judges and staff. When the court begins to realize that many of its responsibilities have been delegated to staff, and that both staff attorneys and judges become habituated to these roles, it must recognize that an experienced cadre of para-judges has been created who, except for differences in their status outside of the immediate court environment and the size of their paychecks, are virtually indistinguishable from the judges who employ them. As one commentator notes:

It is a fact of institutional life that practical power does not always reside at the seat of theoretical authority, or, conversely, that subordination in principle does not preclude supremacy in fact. "Advisory" power tends to become "decisory" power, whenever the purpose of conferring the power is to save the time of the advisee and the advisee cannot review the advice rendered without the expenditure of considerable time. . . . Awareness of this danger is perhaps accountable for the fact that in most quarters the extensive use of supreme court commissioners is regarded as a temporary expedient to solve an extraordinary overload, rather than a permanently desirable

71. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.62(b).

72. *Id.*, Commentary, at 98-99.

feature of the appellate system.<sup>73</sup>

The fundamental concern about central legal staff is that commissioners may usurp the judicial function in such a way that these nonjudges actually are deciding appeals and issuing opinions without the guidance, supervision, and control of the court which they serve. It is axiomatic, therefore, that to substitute commissioners for judges is no solution to an overwhelming appellate workload. One commentator has noted that "[t]he most important challenge which may be leveled at [the commissioner] . . . plan is that litigants are entitled to a decision made by judges, not by assistants of the court."<sup>74</sup>

### 5. Use of Judicial Panels

Another method recently used in attempting to increase judicial efficiency has been to delegate cases to one- and two-judge panels, except when the presiding judge orders three judges to hear the matter or when the issues raised are of public importance, special difficulty, or have precedential significance.<sup>75</sup> In Wisconsin, certain cases, such as those involving municipal ordinances, traffic regulations, or misdemeanors are normally heard by one court of appeals judge, although any party to the appeal may request that the case be heard by a three-judge panel, in which case the chief judge of the court of appeals either grants or denies the request.<sup>76</sup>

While these measures can be used to increase appellate court productivity, the arguments against their use are powerful. Decisions made by one or two judges greatly increase the danger of inconsistent decisions within a court. In addition, as the Commentary to the ABA Standards notes, "[t]he basic concept of an appeal is that it submits the questions involved to collective judicial judgment, and does not merely substitute the opinion of a single appellate judge for that of a single trial judge."<sup>77</sup>

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73. Lilly & Scalia, *supra* note 31, at 3. For similar expressions of concern about the commissioner system see CITIZENS STUDY COMMITTEE ON JUDICIAL ORGANIZATION, REPORT TO GOVERNOR PATRICK J. LUCEY 78 (1973) [hereinafter cited as CITIZENS STUDY COMMITTEE ON JUDICIAL ORGANIZATION]; COLORADO LEGISLATIVE COUNCIL, REPORT TO THE COLORADO GENERAL ASSEMBLY: INTERMEDIATE COURT OF APPEALS FOR COLORADO 38 (1968) [hereinafter cited as REPORT TO THE COLORADO GENERAL ASSEMBLY]; Note, *supra* note 70, at 107, 115.

74. REPORT TO THE COLORADO GENERAL ASSEMBLY, *supra* note 73, at 38.

75. N.J. CT. R. APP. PRAC. 2:13-2(b).

76. See WIS. STAT. ANN. § 752.31(1)-(4) (West 1980).

77. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.01, Commentary, at 9.

One-judge and two-judge opinions, or the deciding of appeals by nonjudges, destroys the institutional function of a supreme court. Professor Carrington observes:

If each judge is effectively to apply a personal imprimatur to the decision, he must have at least the opportunity, and must present the appearance, of doing individual thinking and evaluating. Yet the functions of the appeal are adequately served only if the decision is a joint decision based on shared thinking. It is both a source of institutional coherence and an assurance of correctness that the appellate decision be the result of a collaborative effort.<sup>78</sup>

Thus, it is apparent that proposed techniques aimed at increasing judicial efficiency not only fail in their purpose, but give rise to additional problems as well.

### *C. Limiting the Number of Appeals*

Another alternative for making a court more productive so that it may handle a growing number of appeals is to impose limitations upon the types or volume of appeals that the court will consider.

The Minnesota Constitution provides in article VI, section 2 that “[t]he supreme court . . . shall have original jurisdiction in such remedial cases as are prescribed by law, and appellate jurisdiction in all cases . . . .”<sup>79</sup> The constitutional grant of appellate review to the supreme court has not been interpreted by the court to mandate review in all cases appealed to it. The most cogent opinion on this matter, and one which is often cited for this proposition, is *In re O’Rourke*,<sup>80</sup> in which Mr. Justice Peterson, speaking for a unanimous court, stated the holding of the case:

We hold that the Minnesota Constitution does not, either expressly or by necessary implication, guarantee to the individual a right of appeal to this court. . . . It does declare in broad terms the structure, the rights and powers, and the duties and obligations of the supreme court. It does not declare, in any terms directed to the individual, that any person dissatisfied by the decision of an inferior court shall have an appeal to the supreme court.<sup>81</sup>

Subsequent citations to *O’Rourke* have echoed the court’s deter-

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78. P. CARRINGTON, *supra* note 41, at 9.

79. MINN. CONST. art. VI, § 2.

80. 300 Minn. 158, 220 N.W.2d 811 (1974).

81. *Id.* at 164-65, 220 N.W.2d at 815.

mination that its appellate jurisdiction is discretionary.<sup>82</sup> In *State v. Wingo*,<sup>83</sup> for example, the court noted that “[t]he basic thrust of *O’Rourke* is that this court has constitutionally independent authority to review determinations by the other state courts and that we need not grant an appeal of right to every aggrieved litigant.”<sup>84</sup>

Because appellate review in Minnesota is not an absolute right, the question arises whether the court should, as *O’Rourke* implies that it could, become a tribunal that allows review only upon application, such as by writ of certiorari.

In Wisconsin, the Citizens Study Committee on Judicial Organization, in its 1973 report to the Governor, emphatically rejected this alternative:

One . . . proposal would eliminate the right of appeal from trial court decisions and permit review only upon granting of a writ of *certiorari*. This would mean, of course, that some litigants who feel they have been wronged in the trial court will not have even one review. Such a proposal would impair the effective fulfillment of the first and second functions of an appellate court structure—providing a check on arbitrary trial court decisions, and a review of decisions made hurriedly during trial. Moreover, it has been a traditional tenet of American jurisprudence that litigants should have the opportunity for one meaningful review of the final trial court decision in their case.<sup>85</sup>

While recognizing that there is no absolute constitutional right to appellate review of trial court decisions, the Commentary to the ABA Standards Relating to Appellate Courts nonetheless emphasizes that appellate review is a “fundamental element of procedural fairness” that “should be accorded an aggrieved party to a trial court proceeding.”<sup>86</sup>

Nevertheless, if the Minnesota Supreme Court or legislature should decide to restrict the right to appeal, there are two primary

82. See *State Dep’t of Pub. Safety v. Ogg*, 310 Minn. 433, 439-40, 246 N.W.2d 560, 564 (1976) (in denying direct appeal, court relied upon its inherent ability to control appellate jurisdiction); *State v. Reys*, 302 Minn. 38, 42, 223 N.W.2d 780, 784 (1974) (court’s inherent power of review not conditioned by statutory limitations).

83. 266 N.W.2d 508 (Minn. 1978).

84. *Id.* at 511 (footnote omitted).

85. CITIZENS STUDY COMMITTEE ON JUDICIAL ORGANIZATION, *supra* note 73, at 78.

86. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.10, Commentary, at 48. Of course, the argument implicit in this Article is that, even assuming that appellate review is granted, the burden imposed on the supreme court by its caseload threatens to make such review insubstantial.

techniques for doing so. The most frequently employed technique is to allow an appeal only if it involves some minimum amount of money.<sup>87</sup> The other approach is to provide a system of discretionary review.<sup>88</sup>

The ABA Standards recommend that appellate review be allowed in certain cases, generally those in which the amount in controversy is insubstantial, only if they are certified for review by the trial judge and granted leave by the appellate court.<sup>89</sup> These proposals, in addition to violating the generally accepted view that any litigant ought to be accorded appellate review, erroneously assume that there is a correlation between the amount in controversy and the significance of the legal issues involved. Moreover, in a practical sense, the cost of taking an appeal is a substantial disincentive to appellants whose disputes involve minor sums.

The alternative approach would be to expand the Minnesota Supreme Court's discretionary review. One informed commentator has observed that this is an appropriate remedy only if the time spent in screening the case would be substantially less than that which would be required to grant the appeal.<sup>90</sup>

This alternative type of discretionary jurisdiction exists in the states of Virginia and West Virginia, where there are virtually no appeals as of right. In Virginia, for example, three-judge panels consider petitions for appeal, which are granted if the panel concludes either that there was a substantial possibility of injustice below or that the appeal presented a major question of law.<sup>91</sup> In the event that the petition is granted the case is heard by the court en banc.<sup>92</sup> This enables the court to dispose of the bulk of its enormous caseload without the need for a full hearing and a written opinion.<sup>93</sup> Commentators, in noting the diminishing number of en banc hearings in the Virginia court, argue that its workload is so great that its vitality as a supreme court is threatened:

If one really believes that review of a single trial judge's de-

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87. *See id.*, § 3.80, Commentary, at 109-10.

88. *See* Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 911-13 (1971).

89. *See* STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.80; ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO TRIAL COURTS §§ 2.74-.75, at 129-31, 135-36 (1976).

90. Hufstедler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 588-89 (1969).

91. *See* Lilly & Scalia, *supra* note 31, at 3, 13-14.

92. *See id.*, at 18.

93. *See id.*



termination does not need to be provided unless his errors are immediately apparent, or unless the legal issue involved is of concern to the society at large; and if one is further willing to have this new philosophy of review introduced without any express popular or legislative approval; then the Supreme Court of Virginia is facing no docket crisis. For it can avoid a heavy backlog by being more and more cursory in its "merits" examination of petitions for appeal, and if necessary it can abandon the "merits" standard entirely and exercise its discretion on the basis of the societal importance of the issue. . . . But if, on the other hand, one feels that no man's property or liberty should be disposed of by the unappealable determination of a single individual; or if one is merely unwilling to see the previous right to a merits review gradually slip away almost by accident, without even a word of debate concerning its worth; then the moment seems critical indeed.<sup>94</sup>

It is not an exaggeration to state categorically that the existence of a single appellate court in Minnesota that would operate solely by granting review to some small percentage of the cases appealed to it would demean the appellate process. Litigants would be denied access to the supreme court simply because the court is so overburdened that it must reject otherwise meritorious petitions solely to keep its docket relatively current.

An alternative method of reducing the number of appeals to the supreme court would be to divert more appeals to the district court. Article VI, section 3 of the Minnesota Constitution provides that "[t]he district court has original jurisdiction in all civil and criminal cases and shall have appellate jurisdiction as prescribed by law."<sup>95</sup> Minnesota Statutes section 484.01 states that the appellate jurisdiction of the district court includes "every case in which an appeal thereto is allowed by law from any other court, officer, or body."<sup>96</sup>

The major burden of this appellate work comes from county courts or municipal courts. Minnesota Statutes sections 484.63 and 487.39 provide that such appeals are taken to the district court, where they are heard by three-judge panels whose members are appointed by the chief judge of the district.<sup>97</sup>

Statistics indicate that the volume of appeals to the district

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94. *Id.* at 16.

95. MINN. CONST. art. VI, § 3.

96. MINN. STAT. § 484.01 (1980).

97. *Id.* §§ 484.63, 487.39.

courts from county courts is growing, although the number of hearings seems to be remaining relatively constant and the number of cases decided without hearing and cases dismissed is generally increasing.<sup>98</sup>

It has been suggested that the appellate workload of the district court should be increased by directing appeals from administrative agencies to district appellate panels. The total number of appeals from administrative agencies to the Minnesota Supreme Court totaled only twenty-one in 1967;<sup>99</sup> by 1973, the number of writs of certiorari granted by the supreme court from Workmen's Compensation and Tax Court decisions alone had grown to fifty-two, thirty-three of which were heard by the court that year, ten resulting in signed opinions, while twenty-three received per curiam treatment.<sup>100</sup> By 1978 these filings had climbed to 146, with 63 hearings, 13 signed opinions, and only 8 per curiam decisions.<sup>101</sup>

While the number of appeals to the supreme court from administrative agency decisions is growing, the number of these filings, hearings, and decisions relative to the total number of filings, hearings, and decisions in the supreme court remain fairly insignificant. For example, in 1970, although there were 146 administrative agency appeals, there were 1,206 supreme court filings; agency appeals thus constituted a mere twelve percent of the court's filings.<sup>102</sup> It may be concluded, therefore, that routing appeals from administrative agencies to the district courts would be of some minimal benefit to the supreme court, but doing so would add significantly to the appellate burden of the district courts. The district courts had 508 appeals in 1978; adding the 146 administrative agency appeals that year would have increased the district court appellate workload by nearly twenty-nine percent.

An alternative approach, advanced principally by Judge John

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98. See Memorandum from Michael Johnson, Research Associate, Judicial Planning Committee, to Laurence C. Harmon, State Court Administrator (July 17, 1980) (statistics regarding appeals from county to district court in 1976-1979) (on file at William Mitchell Law Review office).

99. See BIENNIAL REPORT, *supra* note 8, at 23 app. There were 17 appeals taken from the Workmen's Compensation Commission. In the same year, three appeals were taken from the Tax Court and one appeal was taken from the Commerce Commission. See *id.*

100. See G. LANG & J. MARSHALL, *supra* note 26, app. A.

101. See *id.*

102. See *id.*

A. Spellacy of the ninth judicial district,<sup>103</sup> would increase the exclusive jurisdiction of the county courts to include civil cases in which the amount in controversy could be as much as \$10,000<sup>104</sup> and would repeal the concurrent jurisdiction of district and county courts in cases involving trust estates, family court matters, actions to quiet title, and actions to enforce support payments, placing these matters within the exclusive jurisdiction of the county courts. In addition, the Spellacy proposal would allow agency appeals from district court appeals panel determinations only “with leave” of the supreme court.

Apparently, the objective of the Spellacy proposal is to increase the appellate capacity of the three-judge district court panels by augmenting the exclusive jurisdiction of county courts and thereby reducing the district court workload. The amount of relief that would be accorded the district courts and the capacity of the county courts to dispose of additional cases is too speculative to allow for an analysis of the merits of the proposition; in any event, it has so far attracted little support.

The other possible use of trial court judges to provide appellate review—panels of district judges—has been considered and rejected by the Judicial Council Sub-Committee on Excessive Appellate Caseload:<sup>105</sup>

Expansion of the appellate jurisdiction of the District Courts . . . involves a constitutional problem. Article VI, Section 1 of the Constitution provides:

“The judicial power of the state is hereby vested in a supreme court, a district court, . . . and such other courts, . . . *with jurisdiction inferior to the district court* as the legislature may establish.”

Thus, while there is no doubt that the Legislature could create an appellate division of the District Court . . . it is very doubtful that the jurisdiction of such an appellate division of the District Court could include the power to review decisions of a single judge District Court, since an appellate function is higher than the trial function.<sup>106</sup>

103. Proposed bill to the Minnesota Legislature by Judge John A. Spellacy (1975) (drafted but never introduced) (on file at William Mitchell Law Review office).

104. Except for cases involving title to real estate, the current jurisdictional limit in county court is \$5,000 exclusive of interests and costs. MINN. STAT. § 487.15 (1980).

105. See BIENNIAL REPORT, *supra* note 8, at 22 app. The judicial council was created in 1937 “for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the state, and of all matters relating to the administration of said system and its several departments.” MINN. STAT. § 483.01 (1980).

106. See BIENNIAL REPORT, *supra* note 8, at 22 app. (emphasis in original).

The subcommittee noted that such an appellate division of the district court could provide only insubstantial relief to the supreme court, for example, by disposing of administrative agency and lower court appeals.<sup>107</sup> Although this approach is fraught with constitutional uncertainty, it would provide the only readily apparent means of intermediate review using existing judicial personnel without the necessity of a constitutional amendment.<sup>108</sup>

The ABA Standards recognize the validity of an appellate division of the trial courts. Section 3.00 of the Standards Relating to Appellate Courts provides as follows:

(b) Trial Court Appellate Section.

In court systems having more than one trial court level, an appellate section of the trial court of general jurisdiction may be established to hear appeals on the record from the trial courts of limited jurisdiction.<sup>109</sup>

It is clear from the terms of this section, and its accompanying Commentary, that the review contemplated is limited to appeals from courts of limited jurisdiction to courts of general jurisdiction, as is the case presently in Minnesota.<sup>110</sup>

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107. *See id.*

108. The most obvious objection to this approach is that the judges of the trial court are already inundated with trials. It is questionable whether a substantial number of appellate cases could be handled by trial judges.

109. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.00.

110. *See* MINN. STAT. § 487.39 (1980). Two states have panels of trial court judges as their intermediate appellate courts. In New Jersey, the court of general jurisdiction, the superior court, is divided into three divisions, one of which is called the "appellate" division. N.J. CONST. art. 6, § 3. The chief justice of the New Jersey Supreme Court assigns judges of the appellate division, *id.* § 7, and appoints its presiding judge, who is responsible for appellate administration. The court may sit in panels of two or more judges as the chief justice determines and the court sits in various parts of the state. N.J. CT. R. APP. PRAC. 2:13-1 to -2.

In New York, the courts of general jurisdiction are called supreme courts. N.Y. CONST. art. 6, § 7; N.Y. JUD. LAW § 140-b (McKinney 1968). Intermediate courts are called "appellate divisions" of the supreme court. *See* N.Y. CONST. art. 6, § 4. The state is divided into four judicial departments and the appellate division is located in a city, county, or borough in each of the departments. *Id.*; N.Y. JUD. LAW §§ 70, 75 (McKinney 1968). Justices are elected to the supreme court, but the Governor of New York appoints from those elected the ones who serve in the appellate division. The Governor also appoints the presiding justice of each division. N.Y. CONST. art. 6, § 4; N.Y. JUD. LAW § 71 (McKinney 1968).

Two of the departments have seven justices each; the others have five. Four justices constitute a quorum; the concurrence of three is required for a decision. N.Y. CONST. art. 6, § 4; N.Y. JUD. LAW § 82 (McKinney 1968). The Governor is empowered to make temporary appointments to the appellate divisions in the event of the absence or inability of any justice to perform his duties. Similarly, the Governor may, at the request of the appellate division, make temporary appointments of additional justices when additional man-

Finally, another device sometimes used to reduce appellate workload is the discouraging of appeals by sanctioning attorneys or litigants for bringing "meritless" appeals that have little chance of success.<sup>111</sup> The report of the subcommittee considering the workload of the District of Columbia Court of Appeals noted that one such sanction is to award the appellee damages or double costs.<sup>112</sup> Aside from the philosophical criticisms of this approach,<sup>113</sup> the determination of whether an appeal has been brought frivolously or is likely to be unsuccessful obviously is extremely difficult, and may be viewed by the unsuccessful litigant as arbitrary. A further, practical objection is that the "meritless" appeals are those most likely to be disposed of summarily, requiring minimal court time. It may be that the assessment of whether to sanction an appellant for bringing such an appeal would require more judge time than to decide the case on the merits by summary affirmance.<sup>114</sup>

#### IV. CREATION OF AN INTERMEDIATE APPELLATE COURT

The previous section analyzed various administrative and structural measures that could be taken to alleviate the caseload pressures and delays that hamper the effectiveness of the supreme court. The implicit assumption underlying the proposals is that the supreme court is already so burdened that appellate review is likely to be insubstantial or virtually nonexistent in many cases. Some measures fail to provide meaningful relief for the caseload and delay problems; others violate concepts of fairness to the public by limiting opportunities for appeal. All of the alternatives are therefore unacceptable.

This section examines the one measure not previously discussed: the creation of an intermediate appellate court. At present, thirty-three states have instituted intermediate appellate court struc-

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power is necessary for the speedy disposition of its workload. N.Y. CONST. art. 6, § 4; N.Y. JUD. LAW § 71 (McKinney 1968).

111. For a discussion of this approach, see Note, *Disincentives to Frivolous Appeals: An Evaluation of an ABA Task Force Proposal*, 64 VA. L. REV. 605 (1978).

112. See SUBCOMMITTEE ON THE WORKLOAD OF DISTRICT OF COLUMBIA COURT OF APPEALS, DISTRICT OF COLUMBIA JUDICIAL PLANNING COMMITTEE, DISTRICT OF COLUMBIA COURT OF APPEALS: WORKLOAD PROBLEMS AND POSSIBLE SOLUTIONS 99 (1979) [hereinafter cited as DISTRICT OF COLUMBIA JUDICIAL PLANNING COMMITTEE].

113. See, e.g., STANDARDS RELATING TO APPELLATE COURTS, *supra* note 33, § 3.10, Commentary, at 17-18.

114. See DISTRICT OF COLUMBIA JUDICIAL PLANNING COMMITTEE, *supra* note 112, at 99-100.

tures.<sup>115</sup>

Creating an intermediate appellate court appears, at first, to be an illusory solution. Most of the supreme court's caseload would merely be diverted to a different court; naturally, the supreme court's filings and case processing times would drop. This reduction, however, would be matched by an increase in filings and delay in the intermediate appellate court. This first impression, however, is misleading. The creation of an intermediate court would more than merely relocate the supreme court's burden. Its benefits are four: First, the new court would assure high quality appellate justice because judges, not appointed staff, consider and decide cases. Second, it would enable appellate disputes to be resolved with dispatch. Third, the geographic accessibility of the appellate process could be increased if the intermediate appellate court were to sit in various locations throughout the state. Fourth, it would permit more litigants to appeal.

The current method of considering cases in the supreme court relies heavily on support staff.<sup>116</sup> As we have seen, only 160 cases each year will receive the full attention of the entire bench, while the remainder, estimated to be more than 1,100 in 1980, will be researched, considered, and preliminarily decided by support staff. Of course, the court will review each case, but in reality, this will probably mean that judges will review only the conclusions that the staff has drawn, not the briefs or transcripts that provided the basis of those conclusions. Furthermore, because of the size of the caseload delegated to the staff, those reviews may very well become cursory approvals. As a result, appointed staff will have the power and authority of supreme court justices without corresponding accountability. This potential transfer of decisionmaking au-

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115. See M. OSTHUS, *STATE INTERMEDIATE APPELLATE COURTS* 17 (rev. 1980) (publication of American Judicature Society); Marvell & Kuykendall, *Appellate Courts—Facts and Figures*, *STATE COURT J.*, Spring 1980, at 11. The states with intermediate appellate courts are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Washington, and Wisconsin. Four states—Alabama, New York, Pennsylvania, and Tennessee—have two intermediate courts.

116. "If the legal profession and the public are satisfied with the approach which we are inaugurating in the coming term, we intend to keep abreast of the caseload by assigning significant responsibility to professional staff working under supervision of the judges." Address by Chief Justice Robert J. Sheran, *supra* note 34, at 4-5.

thority weakens the integrity of the appellate function.<sup>117</sup> If an intermediate appellate court with appellate jurisdiction over all trial courts is created, these expediencies need not be employed by the supreme court. The supreme court could grant discretionary review only to those cases heard by the intermediate court that deserve the bench's full attention due to the significance of the questions involved, precedential value, or complexity. The cases not included in the 160 selected for full review by the supreme court would be considered by the judges of the intermediate appellate court rather than assigned for disposition by staff. This will assure that each case is given substantial consideration by elected members of the judiciary. Quality appellate justice thus will be preserved for all cases. The high court justices can focus on the development of the law, as they do now, but, just as importantly, the other cases will also be assured satisfactory consideration.

The ABA Standards set forth two functions for appellate courts: review of the proceedings of the trial courts and formulation and development of the law.<sup>118</sup> The Commentary declares that if the volume of appeals is such that the state's highest court cannot satisfactorily perform these functions, a system of intermediate appellate courts should be organized, enabling the highest court to concentrate on developing the law.<sup>119</sup> Statistics gathered during the Judicial Planning Committee's study demonstrate that the Minnesota Supreme Court is unable to perform both functions satisfactorily. Too few cases receive full consideration by the court.<sup>120</sup> Too many cases are considered administratively rather than judicially—justice is diminished by such a system. Justice can be assured only by creating an intermediate appellate court that redirects judicial work to judges and enables the supreme court to develop the law.

An intermediate appellate court would enable all appellate disputes to be resolved with dispatch. The existing caseload pressure and delay in the supreme court would be reduced by transferring

117. See notes 69-74 *supra* and accompanying text. See also P. CARRINGTON, *supra* note 41, at 44-48.

118. STANDARDS RELATING TO COURT ORGANIZATION, *supra* note 21, § 1.13. "The reviewing function is normally performed at the instance of a party aggrieved by the result in the trial court, and is in any event performed chiefly for his benefit. The function of developing the law is performed for the benefit of the community at large." *Id.*, Commentary, at 34.

119. *Id.*, Commentary, at 35.

120. G. LANG & J. MARSHALL, *supra* note 26, at 52-53.

all first appeals to the intermediate appellate court. There would be no absolute right of appeal beyond the intermediate appellate court; the high court's jurisdiction would be entirely discretionary. The supreme court would be required to process all of its existing backlog of cases, but its caseload, although increased by requests to appeal from the intermediate appellate court, would, over time, be reduced to a fraction of its present volume.<sup>121</sup>

The precise impact of this substantial reduction in filings is uncertain, but information from other states indicates that the creation of an intermediate court not only reduces the caseload, but significantly reduces delay.<sup>122</sup> Although filings of first appeals in the intermediate appellate court will total, at least, the number previously filed in the supreme court, the intermediate appellate court will be capable of processing its caseload quickly. The intermediate court, because of its very nature, would be able to employ several procedures to expedite its caseload that would be inappropriate for a high court. For example, to increase the number of oral arguments possible and to decrease decision time, the court could sit in three-judge divisions.<sup>123</sup> It is not essential that an intermediate court sit en banc or in conference to review and decide all appeals. The policy-setting function of developing the law, which requires the participation of an entire bench, is reserved for the highest court. The intermediate appellate court would concentrate, instead, upon an expeditious appellate review of trial court proceedings. The reasons previously discussed as to why a court sitting in divisions could not substantially increase its efficiency<sup>124</sup> do not apply to an intermediate appellate court. In the event that conflicting decisions are filed, further review is available in the supreme court. Therefore, numerous panels of three or more judges could be established to process the intermediate court

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121. For example, a decrease in filings occurred after the creation of an intermediate court in Maryland (904 filings in 1966 to 569 filings in 1967), Oregon (629 in 1968 to 458 in 1969), and Washington (673 in 1969 to 376 in 1970). Clark, *American Supreme Court Caseloads: A Preliminary Inquiry*, 26 AM. J. COMP. L. 217, 218 (Supp. 1978). See Flango & Blair, *Creating an intermediate appellate court: Does it reduce the caseload of a state's highest court?*, 64 JUDICATURE 75, 77-80 (1980).

122. The reduction in caseload may only be a temporary one, as in Arizona, Colorado, New Mexico, Oregon, and Washington, where the number of cases filed in the supreme courts began to increase five or six years after the establishment of the intermediate appellate court. However, there may be a reduction in case processing time, as in Maryland, New Mexico, and Oregon, where an intermediate appellate court is used. See Flango & Blair, *supra* note 121, at 80-81.

123. See G. LANG & J. MARSHALL, *supra* note 26, at 54-55.

124. See notes 75-78 *supra* and accompanying text.



caseload. The Wisconsin Court of Appeals, for example, processes first appeals in an average of approximately two months.<sup>125</sup> The Minnesota Supreme Court's dispositional time now averages fifteen months; a dispositional time of only two months would be a worthwhile goal.

The flexibility of an intermediate court would enable it to expand in size as the appellate caseload grows. Additional judges can be added to the court when it becomes evident that the caseload is increasing beyond the ability of the court to maintain an acceptable dispositional time. Also, because the court can sit in divisions, it is not hampered by the problems encountered by a high court when it adds new judges.<sup>126</sup> Creation of an intermediate court would also provide easier geographical access for litigants as well as provide speedier disposition of its cases. As a consequence, appeals would become less expensive and would result in an increase in the number of appeals from trial court decisions. Litigants would not be discouraged from filing appeals because of excessive cost and delay.

Opponents of an intermediate appellate court generally cite three main arguments against the creation of an intermediate court.<sup>127</sup> One is the increased cost to the litigants. The second is the increased cost to government. The third is that the certainty of precedent may be undermined.

The first argument—increased cost to litigants—is based on the assumption that most appeals will not end in the intermediate court, that a second appeal, to the supreme court, will be necessary to obtain final resolution. Litigants, it is conceded, will receive a quicker, less expensive resolution from the intermediate court, but it is argued that this advantage will be offset by the increased cost of an appeal to the supreme court. Therefore, the conclusion advanced is that an intermediate appellate court is not worth the cost to litigants.

This argument, however, ignores the experience of other states that have instituted intermediate appellate court systems. Obviously, cases not appealed to the supreme court do not entail increased cost to litigants; statistics indicate that in other states

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125. See G. LANG & J. MARSHALL, *supra* note 26, at 55.

126. See notes 21-32 *supra* and accompanying text.

127. See, e.g., Halladay, *Minnesota Does Not Need An Intermediate Appellate Court*, 7 WM. MITCHELL L. REV. 131 (1981); Norberg, *Some Second And Third Thoughts On An Intermediate Court Of Appeals*, 7 WM. MITCHELL L. REV. 93 (1981).

review is requested in less than half of the intermediate court cases.<sup>128</sup> Second, increased cost is not a serious factor for those cases not granted a second review; statistics indicate that in other states few cases are granted further review.<sup>129</sup> Third, if it is apparent that a second appeal will be necessary because of the constitutional or state-wide import of the issues, the case can be transferred to the supreme court prior to disposition in the intermediate court. In this manner, such cases need receive only a single review—in the supreme court.

Increased cost to litigants, therefore, is not a significant feature of an intermediate court system. Nonetheless, it may be a real problem in the four to twelve percent of the cases that are granted second appeals. The first cost, aside from the initial appeal in the intermediate court, is the petition to appeal in the supreme court. This petition would, most likely, require filing of the brief and transcript used in the intermediate court and a supplemental brief detailing the necessity of a second review. The supreme court, without oral argument, could review the request and determine its validity without filing a written opinion. This process, ideally, would be completed within a few months. If the petition is granted, the court might request additional briefs and oral arguments to be scheduled.

The question is whether this additional cost, incurred by only a few appellants, would be offset by the benefits of an intermediate appellate court that would accrue to all litigants. All litigants would be assured of an expeditious judicial determination of their cases. All litigants would be able to argue their case orally and receive a written opinion. Such improvements, despite the possibility of a second appeal, warrant the creation of an intermediate appellate court.

The second argument against an intermediate court—increased cost to the government—is a more serious problem. An intermediate court would require more judges, more staff, and more office space, all of which cost money. There are several responses to this argument, however. One is that the quality of justice in Minnesota should not be undermined by cost considerations. An orderly society depends on a system of justice that resolves disputes. If

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128. See Marvell, *The Problem of Double Appeals*, 2 APPELLATE COURT AD. REV. 23, 24 (1979).

129. Between 8% and 25% of the total number of intermediate appellate court decisions filed are actually granted an appeal. See Flango & Blair, *supra* note 121, at 76-77.

that system is weakened, solely for economic reasons, a serious threat to society is posed. If the court is not respected, there are few rational alternatives for the orderly resolution of disputes.

A second response to the increased cost argument is that the court system is a service entity—not a profit-making organization. The focus of inquiry into the cost should be a cost-benefit analysis, not a simplistic look at total expenditures. With the increased cost, litigants will receive a judicial determination of their cases. They will receive a thorough—not cursory—review of their cases with less delay. They will obtain a higher quality of appellate review and encounter fewer impediments in obtaining it. These benefits outweigh the costs.

The third argument against the creation of an intermediate court is that it will undermine the certainty of precedent. Opponents maintain that decisions of the intermediate court remain subject to review by the supreme court and, therefore, are never final. As a consequence, they posit, attorneys and their clients can never be certain of their legal position on an issue that has been resolved by an intermediate court panel. Further, the fact that the intermediate court may sit in panels will arguably lead to a proliferation of conflicting decisions and differing rulings by different panels.

It must be acknowledged that a certain degree of uncertainty is inherent in an intermediate court environment. By firmly establishing the jurisdiction of the intermediate court and by providing an able judiciary, however, such problems can be minimized. The concern that panels could render conflicting opinions can be addressed in one of two ways. First, because the intermediate court, although sitting in panels, is but one court, it will be subject to internal organizational procedures that could be developed to prohibit such conflicting opinions. This could be accomplished by the use of a review panel of judges or by a central staff who could review opinions prior to their release. A second and perhaps more common method would be to provide that conflicting opinions issued by panels would be subject to mandatory and immediate review by the supreme court. The problems of uncertainty of precedential value could thus be alleviated.

## V. CONCLUSION

This Article has attempted to illustrate the workload and delay problems that presently face the Minnesota Supreme Court, and

the possible alternative solutions available for their alleviation. The inescapable conclusion is that the creation of an intermediate court of appeals is the one remedy that can resolve the appellate workload and delay problems without undermining the integrity of the appellate process. The other available solutions exact too great a toll on the appellate function to be feasible. Other panaceas are illusory—they do not provide the promised relief. Creating an intermediate court of appeals will, however, afford the necessary relief by reducing delay in appellate dispositions and by enabling the supreme court to focus on the development of the law. An intermediate court will also ensure a higher quality of appellate justice and will increase accessibility to appellate court review. In short, the creation of an intermediate court of appeals will benefit the litigants, the bench, and the bar.

APPENDIX: STATISTICS ON WORKLOAD AND DELAY<sup>130</sup>

Despite analytical obstacles<sup>131</sup> to a clear understanding of an appellate court's workload, some illuminating statistics are detailed in this Appendix.

The Minnesota Supreme Court's caseload is shown in Table 1, which divides the filings into nine categories of appellate subject matter. The table illustrates that the number of filings nearly doubled between 1973 and 1978. It also shows that although each category had a marked increase, the increase was not uniform across categories. For example, the number of civil case filings increased 38%, while Petitions for Review filings increased fourfold. It also shows that increases within categories were not uniform. For example, criminal filings ballooned in 1975, receded in 1976, then returned to the higher 1975 level in 1977 and 1978.

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130. The Minnesota Supreme Court workload data analyzed in this Appendix were compiled from the Register of Actions maintained by the Clerk of Court. Filings, collected for the years 1973-1978 capture all cases filed with the court in those years. The data were classified by case type in the following nine broad categories: civil, criminal, petitions for leave to appeal, workers' compensation, tax, economic security, writs of prohibition, writs of mandamus, and miscellaneous. The miscellaneous category includes disciplinary matters, certified questions, election contests, license proceedings, utility-rate review, and requests for authority to transact certain business. The number of appeals filed and the number of opinions issued are the primary indicators used to quantify the court's workload. The delay data were also gathered from the Clerk's Register of Actions. Those cases filed in 1977 that were granted hearings and disposed by opinions were analyzed to determine case processing delay.

131. An appellate court's activities are difficult to measure qualitatively. This Appendix, therefore, does not attempt to measure time devoted or effort expended by individual justices to process appeals. Rather, it assesses the workload by measuring the number of matters filed and disposed, and the delay by measuring the time between filing and disposition.

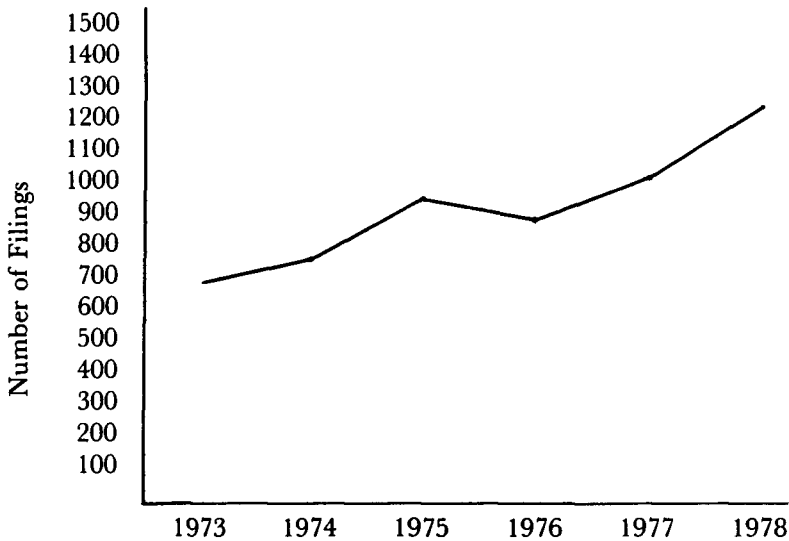
Limiting the measures of appellate activity to workload and delay does not resolve all the problems associated with the study of appellate activities. Those terms engender different perceptions and expectations from judges, lawyers, and litigants. Neither term, nor its components, has a universal definition. For example, if an appeal is dismissed, should it be considered a filing? If it is a motion for rehearing, should it be counted? This Appendix defines filings as all matters recorded in the Register of Actions in the Office of the Clerk of the Minnesota Supreme Court. This definition does include motions for rehearing and dismissed appeals, but it excludes many special matters not recorded in the Register. Individuals also differ on the definition of delay or case-processing time. This study measures case-processing time from the filing of the notice of appeal to the issuance of the opinion or other final disposition.

**Table 1**  
**FILINGS: MINNESOTA SUPREME COURT**

<u>Matters Filed By Case Type</u>	<u>1973</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
1. Civil	442	451	462	462	529	611
2. Criminal	124	144	236	175	229	237
3. Petitions for Review	21	20	47	44	66	86
4. Workers' Compensation	48	75	58	52	71	93
5. Tax	4	11	13	10	16	15
6. Economic Security	4	12	15	24	16	38
7. Writs of Mandamus	6	26	20	40	38	19
8. Writs of Prohibition	17	26	65	66	70	70
9. Miscellaneous	20	18	16	32	30	38
<b>TOTAL FILINGS</b>	<b>686</b>	<b>783</b>	<b>932</b>	<b>905</b>	<b>1065</b>	<b>1207</b>

There is a national trend of increased appellate filings each year. Minnesota is rather typical, although the state is experiencing exceptional growth, as shown by the twofold increase in filings in the five-year period ending in 1978. Graph 1 illustrates this phenomenon.

**Graph 1**  
**FILINGS: MINNESOTA SUPREME COURT**



The average yearly increase in filings of supreme courts in twelve states that do not have intermediate courts has averaged from five to eighteen percent over a seven-year period, while Minnesota is experiencing an average annual growth of eleven percent. Table 2 reflects this average annual growth for each of the twelve states.

Table 2  
AVERAGE YEARLY PERCENT INCREASE IN  
FILINGS WITH THE HIGHEST COURTS OF  
STATES WITHOUT AN INTERMEDIATE  
APPELLATE COURT: 1971-1978

Arkansas	18%
Delaware	9%
Hawaii	14%
Idaho	11%
Minnesota	11%
Mississippi	6%
Montana	16%
Nebraska	5%
North Dakota	14%
Rhode Island	6%
Utah	7%
Virginia	5%

Case disposition is a second area of appellate activity that lends itself to statistical analysis. The figures in Table 3 show a disturbing pattern: the proportion of cases disposed of by written opinions in Minnesota is decreasing. In 1973, one out of two cases filed received a written opinion. In 1978, fewer than one out of three cases received a written opinion. This decrease occurred because the number of written opinions remained relatively constant despite a dramatic increase in the number of cases filed. Between 1974 and 1976, the number of written opinions increased; this was probably attributable to the increase in the number of justices. After 1976, the number of opinions issued decreased while the total number of filings continued to increase. Table 3 shows the number of cases filed, the number of written opinions (signed and per curiam) issued in each of the calendar years, and the percentage of cases receiving an opinion. Graph 2 shows the widening gap between the number of filings and opinions.

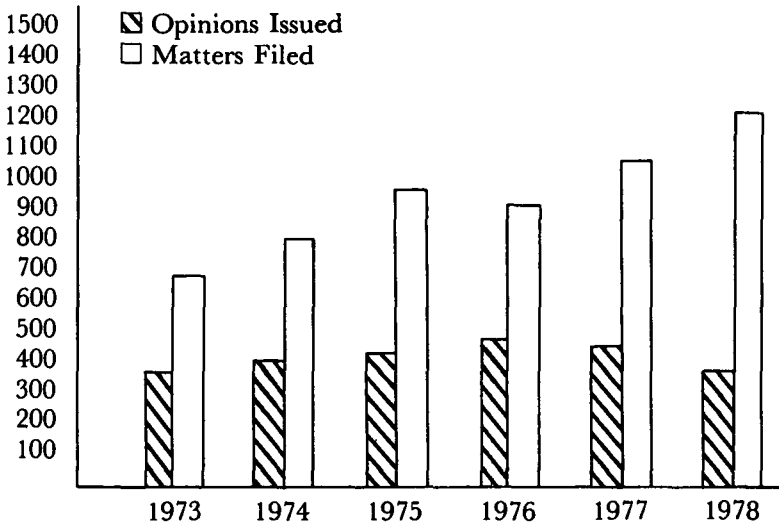
Table 3  
OPINIONS ISSUED AND MATTERS FILED IN THE  
MINNESOTA SUPREME COURT

	<u>1973</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Filings	686	783	932	905	1065	1207
Opinions Issued <sup>132</sup>	341	367	406	450	424	361
Opinions/Filings	50%	47%	44%	50%	40%	30%

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132. The figures under "Opinions Issued" represent the number of opinions issued during the identified calendar year resulting from the disposition of matters filed that year and in previous years.

**Graph 2**  
**OPINIONS ISSUED AND MATTERS FILED IN THE MINNESOTA SUPREME COURT**



Despite the annual increase in the number of cases filed, the number of hearings remained relatively constant in Minnesota, as did opinions. The number of hearings granted between 1973 and 1977 has ranged from 385 in 1973 to 427 in 1977. The average number of hearings granted per year was 428. The percentage of matters filed receiving a hearing steadily decreased from a peak in 1973 of 56% to 40% in 1977.

**Table 4**  
**HEARINGS IN THE MINNESOTA SUPREME COURT**

	<u>1973</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>
Nonoral	120	127	172	159	140
Division	230	264	235	220	225
En Banc	35	35	65	53	62
<b>TOTAL</b>	<b>385</b>	<b>426</b>	<b>472</b>	<b>432</b>	<b>427</b>
Filings	686	783	932	905	1065
Hearings/Filings	56%	54%	51%	48%	40%

The figures presented above illustrate several aspects of appellate activity. Filings almost doubled between 1973 and 1978, yet the number of opinions issued remained relatively constant. Therefore, the ratio of opinions to filings decreased while the percentage of matters disposed of without an opinion increased. This situation has prompted changes in



the court's internal operating mechanism. One change is a marked increase in the number of cases disposed of prior to hearing. In 1973, 303 cases were disposed of prior to hearing. By 1977, that figure had increased to 639. Table 5 details that shift. A second change is an increase in summary dispositions of matters prior to a hearing and after a hearing.

Table 5  
DISPOSITIONS: MINNESOTA SUPREME COURT<sup>133</sup>

	<u>1973</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>
Filings	686	783	932	905	1065
Dispositions Prior to Hearing	303	362	464	476	639
Dispositions Other than Written Opinions Following Hearing	5	11	13	41	21

The statistics in Table 5 show how the court reacted to the constant increase in case filings. It disposed of more cases prior to hearing. It disposed of more cases without a written opinion. It increased the number of summary dispositions. Those changes are a function of the magnitude and constancy of the increase in case filings. Obviously, these methods of disposition involve less judge time and fewer court resources. But it is important to recognize that they then determine the character of an appellate court. Is a court that disposes of a large part of its caseload summarily or without hearings adequately performing its functions of reviewing the proceedings of the trial court and formulating and developing the law? Do case treatment methods created in response to the quantity of cases assure the necessary quality of justice to parties on appeal?

Case-processing time, that is, delay, is a third area of appellate activity that may be analyzed statistically. Table 6 presents the average amount of time in months expended between initial filing and final disposition by written opinion for cases filed in 1977 and receiving hearings. The processing time is tabulated according to case type, manner of hearing, and type of written opinion. The range of delay varies from 13.3 months in nonoral civil appeals to 22.1 months in cases decided en banc.

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133. The figures represent dispositions of matters filed in a calendar year.

**Table 6**  
**PROCESSING TIME: 1977 FILINGS IN THE**  
**MINNESOTA SUPREME COURT—APPEALS**  
**GRANTED A HEARING AND**  
**DISPOSED OF BY OPINION<sup>134</sup>**

	<u>Average Time in Months</u>		<b>Both</b>
	<u>Civil</u>	<u>Criminal</u>	
<b><u>En Banc</u></b> -signed and per curiam opinions	15.5 (1 Pending) (35)	22.1 (10)	16.99 (45)
-signed opinions	13.9 (32)	19.3 (8)	15.0 (40)
<b><u>Division</u></b> -signed and per curiam opinions	15.1 (158)	17.5 (2 Pending) (41)	15.6 (199)
-signed opinions	15.1 (147)	17.6 (35)	15.6 (182)
<b><u>Nonoral</u></b> -signed and per curiam opinions	13.3 (34)	14.8 (67)	14.3 (101)
-signed opinions	15.8 (12)	17.5 (23)	16.9 (35)
<b>Total</b>	14.9 (227)	16.3 (118)	15.4 (345)

134. The numbers in parentheses indicate the total number of cases in that category.

