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# THE PROBLEM OF DELAY IN THE COLORADO COURT OF APPEALS

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In the past two decades, state appellate courts have experienced a dramatic increase in both caseload volume and delay. In many jurisdictions, average case processing times are no longer a matter of days but are measured in terms of months and years.

Delay is more than a statistical curiosity. Courts render decisions which may permanently alter the quality of individuals' lives. Appellate courts often determine whether a person will be compensated for injury or loss, released from custody, or incarcerated for a lengthy period of time. Lives may be seriously disrupted as individuals, unable to plan for the future, await the final disposition of their cases.

Although the existence of delay in state court systems has been generally recognized,[1] its causes are still primarily a matter of speculation. Similarly, solutions offered[2] remain largely untested, their effects largely unknown.

This article assesses the impact of volume and delay in the Colorado Court of Appeals. The court is one of eleven, across the nation, examined by the staff of the Appellate Justice Improvement Project, a research effort conducted under the auspices of the National Center for State Courts.[3] Project findings are based on data from a sample of 863 cases filed during 1975 and 1976. Additionally, judges and members of the court staff were interviewed

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1. See notes 4-12, 15-21 *infra* and accompanying text.

2. *Id.*

3. Besides the Colorado Court of Appeals, the courts studied in the project were: the Florida Supreme Court; the Florida First District Court of Appeal; the Illinois Appellate Court, First District; the Indiana Court of Appeals; the Montana Supreme Court; the Nebraska Supreme Court; the New Jersey Superior Court, Appellate Division; the Ohio Court of Appeals, Eighth District; the Oregon Court of Appeals, and the Virginia Supreme Court. The studies are published individually by the National Center for State Courts, Williamsburg, Virginia. The entire study is hereinafter cited as Volume and Delay Staff Study Series.

to provide information on the operation of the court. Thus, both quantitative and qualitative data are used to explain the phenomena observed.

The article focuses on the rules and procedures of the court of appeals. It notes delay has been a problem, locates the primary source in the predecision phase of the appellate process, and explores the causes for excessive case processing time. Suggestions for alleviating the delay problems are also offered.

## I. ASSESSING APPELLATE COURT DELAY

Previous studies have dealt extensively with the sources of delay in appellate courts and courts in general. These studies have suggested a myriad of responses available to courts challenged by expanding caseloads and unacceptable case processing times. Although the scope of prior efforts to identify the loci of delay has varied, the conclusions of these studies have, for the most part, isolated three potential sources:

1) Caseload; i.e., appellate courts simply do not have the personnel or resources to keep up with increasing case volumes:
> When all is considered, there is little that can be done about volume. The tide of affairs which produces litigation and appeals is largely beyond our control. . . . In the end, if appellate justice is to be provided, there is no alternative to the erection of a judicial system of a size sufficient to accommodate the needs of all citizens seeking just decisions.[4]
2) Inefficiency; i.e., judges and other appellate court personnel do not use their time effectively. Courts are poorly organized and inadequately administered. Even if appellate court resources were increased, litigants would still encounter substantial case processing time delays;[5] and
3) A combination of both groups 1 and 2 above. There are too many cases, courts lack sufficient resources and are poorly organized and administered.[6]

As might be expected, suggested solutions to appellate delay vary with the perceived source of the problem. A recent survey[7] has classified solutions into two general categories. Adding resources is the response recommended for a burdensome caseload, and restructuring existing resources is the response to inefficiency. The first category takes a volume oriented approach to delay while the second seeks to directly attack delay.

### A. *Volume Oriented Approach to Delay*

Solutions placed in the "adding resources" category are volume ori-

4. P.D. CARRINGTON, J. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 136 (1976).
5. *See, e.g.*, O'Connell, *Streamlining Appellate Procedures*, 56 JUDICATURE 234 (1973).
6. *E.g.*, J. OSTHUS & S. SHAPIRO, CONGESTION AND DELAY IN STATE APPELLATE COURTS (1974); THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (H. Jones ed. 1965).
7. S.L. Wasby, T.B. Marvel, and A.B. Aikman, Volume and Delay in State Appellate Courts: Problems and Responses, chs. IV-V (1979) (published by National Center for State Courts).

ented. Although differing in the degree to which volume is emphasized, they are all designed to decrease the ratio of cases to personnel. They assume if more people are available to handle fewer cases, the time required to process cases will decrease appreciably. Examples of such solutions include: more judges;[8] more law clerks, central staff, and administrative personnel;[9] establishing intermediate appellate courts;[10] transferring appeals from mandatory to discretionary jurisdiction,[11] and unitary review in criminal cases.[12]

A problem with volume oriented solutions is they require enlisting the aid of other governmental units. Constitutional and statutory provisions define the scope of the court's legal and geographic jurisdiction. Caseloads will increase if jurisdiction, or the population the courts serves, expands. The resources needed to meet greater demands on the court might include a larger budget, more judges and support staff, and better facilities. The authority to allocate such resources, however, generally lies with state legislatures, and not the courts.

The Colorado Court of Appeals is an intermediate appellate court. It hears appeals from district court judgments and directly reviews decisions of the Industrial Commission and other specialized boards.[13] The court was created on January 1, 1970, to expedite the processing of civil appeals. On July 1, 1974, its jurisdiction was expanded to include criminal cases. At the same time, the court was increased in size from six to ten judges, at which size it remains today.

The caseload of the court of appeals has expanded dramatically in recent years, and not all of the increase is explained by the modification of jurisdiction. The data on which this study is based was drawn from cases filed during calendar years 1975 and 1976. In FY 1975, 858 appeals were filed, an increase of 414 cases, or 93%, over FY 1974.[14] Though some 283 of these cases were criminal appeals, civil appeals increased by almost 30%.[15] The court's caseload continued to increase in FY 1977 and FY 1978, with 1,128 and 1,119 filings, respectively.[16]

Volume oriented delay has not yet become a major problem in the Colorado Court of Appeals. The number of filings-per-judge was 86:1 in 1975 and 92:1 in 1976. This compares favorably with caseloads of over 200 filings-per-judge in other state appellate courts.[17]

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8. *See* CARRINGTON, MEADOR, & ROSENBERG, *supra* note 4, at 137.

9. *Id.* at 113.

10. *See* R.A. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 66 (1976).

11. *See* ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS, § 3.10 & Commentary (1977).

12. *See* D.J. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS 178-84 (1973); Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 54 B.U. L. REV. 485 (1974).

13. COLO. REV. STAT. § 13-4-102 (1973 & Supp. 1979).

14. OFFICE OF THE ST. COURT ADM'R, ANNUAL STATISTICAL REPORT OF THE COLORADO JUDICIARY 56 (1979).

15. *Id.*

16. *Id.*

17. *See* Volume and Delay Staff Study Series, *supra* note 3 Filings-per-judge ratios in some of the other sample courts were:

A volume oriented approach to delay in the Colorado Court of Appeals indicates there is a reasonable balance between the quantitative demands placed on the court and the existing resources able to meet those demands. Caseloads, themselves, are not a major source of delay. However, if individual cases are processed inefficiently, delay will be a direct result.

### B. *Delay Directed Approaches*

When inefficiency is perceived to be the source of appellate delay, proposed solutions are concerned with the restructuring of existing resources. This may involve caseflow management,[18] pre-argument settlement conferences,[19] case screening,[20] abbreviated briefs,[21] use of panels or divisions,[22] and memoranda[23] or unpublished opinions.[24] Such solutions can be viewed as more specifically delay directed.

Delay directed solutions do not assume large case volume is necessarily the only, or even primary, cause of delay. They emphasize delay must be attacked directly by implementing procedural changes that would reduce the case processing time of various phases of the appellate process. Delay directed solutions can be considered elements of a case management system, whereby an appellate court controls and monitors its caseload from lower court judgment to mandate.

The rules and procedures of the Colorado Court of Appeals are its primary means of directing delay. In examining the appellate process, procedures were divided into two general categories. The pre-decision phase marks the interval between entry of the lower court judgment and the receipt of all documents necessary for the appeal. The decision phase marks the interval between perfection of the appeal and the appellate decision.

### C. *Colorado Appellate Procedures*

#### 1. The Pre-Decision Phase

Notices of appeal were filed in the district court within thirty days of the

| | 1975 | 1976 |
|---|---|---|
| New Jersey Superior Court, Appellate Division | 207:1 | 230:1 |
| Virginia Supreme Court | 218:1 | 239:1 |
| Florida First District Court of Appeal | 333:1 | 375:1 |
| Oregon Court of Appeals | 256:1 | 308:1 |

18. *See* M. SOLOMON, CASEFLOW MANAGEMENT IN THE TRIAL COURT 4 (ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION SUPPORTING STUDIES No. 2, 1973).

19. *See* Goldman, *The Appellate Settlement Conference: An Effective Procedural Reform?* 2 STATE COURT J. 3, 4-8 (1978).

20. *See* Haworth, *Screening and Summary Procedures in the United States Court of Appeals*, 1973 WASH. U.L.Q. 257.

21. *See* D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 101 (1974).

22. *See* L.M. HYDE, METHODS OF REACHING AND PREPARING APPELLATE COURT DECISIONS 6-8 (1972).

23. *See* English, *Crisis in Civil Appeals*, 50 CHI. B. REC. 231 (1969).

24. *See* COMM. ON USE OF APPELLATE COURT ENERGIES, ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 2 (1973).

entry of final judgment,[25] unless an extension was granted by the trial court.[26] Appellant's attorney also filed, within ten days of the notice of appeal, a designation of record with the clerk of the trial court.[27]

The record was due in the trial court forty days after its designation.[28] The trial court could grant one extension of up to fifty days for filing the record.[29] Subsequent extensions could be[30] and were granted by the court of appeals. When the record was filed with the clerk of the court, appellant's counsel was required to file a designation of parties and to pay a docketing fee.[31]

Once the record was received by the court of appeals, the attorneys were mailed a notification of record filing.[32] The appellant was then required to file his brief within forty days of notification.[33] The appellee's brief was due thirty days thereafter, and the appellant's reply brief, if any, fourteen days later.[34] Extensions to the briefing schedule were granted by the clerk of the court.[35]

Once all briefs were received, the case was designated "at issue." Unless a staff attorney reviewed the case, it was then considered ready to be scheduled for oral argument.

2. The Decision Phase

The court of appeals sits in three panels of three judges each. The chief judge acts as substitute panel member when an absence occurs through illness, vacation, or disqualification. These panels rotate every four months so that, each year, each judge sits with every other judge.

Whenever a court sits in panels, differences in the resolution of some legal questions are bound to arise. To identify interpanel conflicts, the court conducts a weekly all-court conference. All opinions to be issued are distributed to the members prior to the conference. In this way, all judges are kept informed of each panel's decisions. The conference, thus, allows any conflicts to be readily identified.

The chief judge assigns cases to the panels. No individual assignments are made until after oral argument, which is scheduled automatically in most cases. The three division judges normally decide informally among themselves as to particular writing assignments.

Draft opinions are circulated among panel members for final approval.

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25. COLO. APP. R. 4(a); *see id.* 3(a).
26. *Id.* 4(a).
27. *Id.* 10(b). Adoption of a pre-argument settlement conference procedure in 1976 changed this process slightly. Designation and preparation of the record could be deferred pending the conference. *See id.* 33 and text accompanying notes 52-54 *infra*.
28. COLO. APP. R. 11(a).
29. *Id.* 11(d) (ninety total days can be allowed for filing record).
30. *Id.*
31. *Id.* 12(a).
32. *Id.* 12(e).
33. *Id.* 31(a).
34. *Id.*
35. *See id.* 26(b) (appellate court may grant time extensions for good cause shown but not for filing notice of appeal).

Once approved, opinions are distributed to the entire court. At the weekly all-court conference, the court reviews all opinions proposed for publication. It also reviews any opinion not proposed for publication which the author or another judge wishes discussed. This review is directed at both the form and substance of the opinion.

## II. STATISTICAL ANALYSIS OF APPELLATE DELAY

### A. *General Framework*

To determine if delay exists and in turn to identify its causes, one must first measure case processing time. In this study, case processing time is defined as the number of days that elapse between judgment in the initial forum, usually a trial court, and the date a final mandate is issued by the appellate court. This is not the interval which the courts, themselves, tend to regard as the appellate case processing time. They customarily measure from the time of the filing of the appeal to the release of the opinion. This study uses a more comprehensive time frame because it represents the total time the litigants are involved in the appeal and thus is the basis by which they assess appellate delay.

In addition, a comprehensive time frame views the appeals process as a system whose efficient operation is dependent on the actions of a variety of actors. It emphasizes the important roles played by lower court judges and clerks, attorneys, appellate court judges and their staff, and, where applicable, supreme court judges and their support personnel.

Table 1 presents a data summary of the number of days required by the Colorado Court of Appeals to process cases through the entire appellate system, from lower court judgment to mandate. On the average, a total of 431 days were required to process cases. Oral argument cases took longer, averaging 475 days while non-oral argument cases averaged only 315 days.[36]

TABLE 1

TOTAL AVERAGE CASE PROCESSING TIME

| Total Processing Time: | Mean | Median | Standard Deviation | N |
|---|---|---|---|---|
| All Cases | 431 days | 418 days | 194 days | 660 |
| Oral Argument Cases | 475 days | 431 days | 183 days | 482 |
| Non-Oral Argument Cases | 315 days | 286 days | 174 days | 177 |

Although total case processing time is a useful measure of the appellate system's overall performance, the time interval was divided in order to isolate specific problem areas. The division corresponds to the pre-decision and decision phases of the Colorado appellate process but with several refinements. The time between the appeal's decision and the issuance of a mandate, Step 3, was evaluated independently, and, in cases having oral argument, the decision phase was further divided into two parts: step 2A is

36. When compared with other jurisdictions studied, the Colorado mean case processing time, for both oral and non-oral argument cases, is about average. *See generally* Martin & Prescott, *State Appellate Courts: The Problems of Delay*, 4 STATE COURT. J. 9, 10 (1980).

the time between perfection of the appeal and date of oral argument; step 2B the time between oral argument and the date the decision is announced.

B. *Existence of Delay in the Court of Appeals*

Information presented in Table 2 points to step 1, the pre-decision phase, as a particular area of concern in the Colorado process. The interval between trial court judgment and receipt of all necessary documents by the appellate court averaged 47% of the total case processing time. In contrast, the proportionate time figures for the decision and mandate phases were 36% and 17%, respectively, for oral argument cases and 32% and 16% for cases submitted on the briefs.

TABLE 2

STEPS AS A PERCENTAGE OF TOTAL CASE PROCESSING TIME

| STEP 1 | STEP 2A | STEP 2B | STEP 3 | TOTAL DAYS |
|---|---|---|---|---|
| ORAL ARGUMENT CASES: | | | | |
| 1 = 224 days<br>47% | 2A = 106 days<br>22% | 2B = 69 days<br>14% | 3 = 81 days<br>17% | 480 days<br>(N = 446) |
| NON-ORAL ARGUMENT CASES: | | | | |
| 1 = 227 days<br>52% | 2A & B = 141 days<br>32% | | 3 = 71 days<br>16% | 439 days<br>(N = 51) |

A lengthy preparation phase is not a phenomenon unique to the Colorado appellate system. Analysis of case data from other courts included in the study revealed that, for oral argument cases, the average elapsed time during this phase ranged from a low of 153 days in the Oregon Court of Appeals,[37] to a high of 383 days in the Illinois Appellate Court, First District.[38] Although the specific number of days differed from court to court, in all but one of the courts, pre-decision processing time represented the largest percentage of total case processing time.[39]

Whether a given case processing time is acceptable or not (whether or not it constitutes "delay") is largely a perceptual matter. A year to complete an appeal may be acceptable to some individuals but not to others, or may be acceptable in one state but not in another. More objective criteria for

37. J.A. Martin & E.A. Prescott, Volume and Delay in the Oregon Court of Appeals 32 (1980); see note 3 *supra*.

38. J.A. Martin & E.A. Prescott, Volume and Delay in the Illinois Appellate Court, First District 36 (1980); see note 3 *supra*.

39. Pre-decision time ranged from 41% of the total appellate process in the Florida Court of Appeal to 62% in the New Jersey Superior Court. Volume and Delay Staff Study Series, *supra* note 3.

The exception was the Ohio Court of Appeals, Eighth District. In Ohio, the appellate rules provide that all issues raised on appeal must be addressed in the opinion. Writing time is substantial. Consequently, the judges arbitrarily limit the number of cases to be heard at each session of oral argument, causing more cases to come to issue than can be heard by the court. The largest percentage of time elapses in this period, not in the materials preparation phase. *See* J.A. Martin & E.A. Prescott, Volume and Delay in the Ohio Court of Appeals 39 (1980).

determining the acceptability of case processing time, however, are available. The court of appeal's own rules governing time requirements and the standards advanced by the American Bar Association[40] are used in this study's examination of the Colorado appellate process.

An examination of the components of total case processing time confirms that problems associated with preparation and transmittal of documents to the court of appeals are a major source of delay. Table 3 compares average case processing time from different steps in the appellate process with a time requirement specified in the court rules and the standards established by the American Bar Association. Specifically, 66% of all cases processed exceeded the maximum time prescribed by the court rules for perfecting an appeal.[41] Approximately 80% of the Colorado cases exceeded the ABA standard.[42]

In addition, in 76% of the cases, filing the appellant's brief took longer than the forty days prescribed by the court rules.[43] Filing the appellee's brief took longer than the thirty days specified by the court rules in 66% of the cases.[44]

The decision phase of the appellate process appears to be a relatively minor source of delay. Data presented in Table 3 reveal that an average of 113 days elapsed between the date when cases were ready to be heard and the date of oral argument. This waiting time is relatively short compared with other courts included in this study.[45]

The court of appeals has no rules specifying how fast cases should be decided after oral arguments have been heard although there is an informal policy that majority opinions are due ninety days after argument.[46] However, the ABA standards[47] do provide some guidance. Data presented in Table 3 for the decision phase reveal that 28% of all oral argument cases had decisions announced by the court in a period of thirty days or less after oral argument while 55% were completed in the sixty day maximum time period established in the ABA standards. Moreover, 74% of the oral argument cases were heard within ninety days after materials had been filed, while over 85% were completed within 120 days.

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40. ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS (1977) [hereinafter ABA STANDARDS].

41. The total time limit prescribed for the pre-decision phase by the Colorado Court of Appeals is 164 days. See notes 25-34 *supra* and accompanying text. This time limit does not reflect changes made in 1976 to accomodate pre-argument settlement conference procedures. See text accompanying notes 52-54 *infra*.

42. *See* ABA STANDARDS, *supra* note 40, §§ 3.13, 3.52.

43. See note 33 *supra* and accompanying text.

44. See note 34 *supra* and accompanying text.

45. Only the Oregon Court of Appeals, the Montana Supreme Court, and the Nebraska Supreme Court had waiting averages of less than 100 days. Martin & Prescott, *supra* note 36, at 11; *see* Volume and Delay Staff Study Series, *supra* note 3.

46. Interviews with Harry S. Silverstein, Chief Judge Colorado Court of Appeals, in Denver (July-Aug., 1978).

47. *See* ABA STANDARDS, *supra* note 40, § 3.52.

TABLE 3

COMPARISON OF STEPS IN CASE PROCESSING TIME WITH COURT RULES AND ABA STANDARDS, IN DAYS

| ALL CASES | Mean | Median | Court Rule | % Cases above Court Rule | ABA Standards | % Above ABA Standards | N |
|---|---|---|---|---|---|---|---|
| Step 1: Trial Judgment to Materials Received | 217 | 198 | 154 | 66 % | 130 civil/ 110 criminal | 75 % 88 % | 688 |
| Step 1A: Record Received to Appellant Brief | 98 | 69 | 40 | 76 % | 30 civil/ 20 criminal | 87 % 92 % | 648 |
| Step 1B: Appellant Brief to Appellee Brief | 50 | 35 | 30 | 66 % | 30 civil/ 20 criminal | 79 % 86 % | 591 |
| Step 1C: Lower Court Judgment to Transcript | | | Insufficient Data | | Not Given | — | — |
| Step 1D: Lower Court Judgment to Appellant Brief | 191 | 169 | 110 | 77 % | Not Given | — | 639 |
| ORAL ARGUMENT CASES | | | | | | | |
| Step 2A: Materials Received to Argument | 113 | 103 | Not Specified | — | Not Given | — | 499 |
| Step 2B: Oral Argument to Decision | 73 | 58 | Not Specified | — | 30 Average/ 60 Maximum | 72 % 45 % | 506 |
| NON-ORAL ARGUMENT CASES | | | | | | | |
| Step 2: Materials Received to Decision | 142 | 136 | Not Specified | — | 30 Average/ 60 Maximum | 98 % 93 % | 59 |
| ALL CASES | | | | | | | |
| Step 3: Decision to Mandate | 82 | 39 | Not Specified | — | Not Given | — | 541 |

In cases submitted without oral argument, decision time is measured between the date all materials were filed and the date when the court announced a decision. Table 3 indicates non-oral argument cases were generally processed more quickly than oral argument cases, but the specific times involved were usually in excess of the ABA standards. Only 2% of the cases involved decision processing times of less than the thirty day average recommended by the ABA, and only 7% fell below the sixty day maximum standard. Moreover, only 67% of the non-oral argument cases were processed in under 120 days.

The large average of 142 days may reflect problematic aspects of the scheduling procedure in effect during the period when data for this study were collected. Non-oral argument cases were assigned the next available spot on the court's calendar and considered in sequence. Consequently, non-oral argument cases often waited in the same scheduling queue with oral argument cases.

Finally, Table 3 reveals that the time between announcing decisions in the court of appeals and issuing mandates averaged eighty-two days. The eighty-two day average is perhaps misleading because it had been inflated by cases which took an extraordinarily long period of time. The 39 day median more accurately reflects post-decision time for the majority of cases. For example, 44% of all cases decided by the court exhibited times between decision and mandate of less than thirty days, and 60% took less than sixty days. Twenty-two percent exhibited post-decision times of between 60 and 120 days. The remaining 12%, cases which took over 120 days, were almost exclusively those in which petitions for certiorari were filed with the Colorado Supreme Court.

## III. THE CAUSES OF APPELLATE DELAY

### A. *Sources*

The case processing time data indicated there was delay in the Colorado appellate process, especially in the pre-decision phase. Sources of delay can be found in the interactions among the organizational aspects of a court, the activities of the persons in that court, and the cases filed in it. These elements are explored to identify the causes of delay in the Colorado Court of Appeals.

#### 1. Inter-Court Relations

The lack of efficient coordination between trial and appellate courts is a significant factor at the pre-decision phase. The court of appeals was restricted in managing its caseload at this crucial stage because the first five months of the appellate process were in the hands of the lower courts.[48] Trial court clerks failed to monitor the flow of case materials to insure that the time limits fixed by the appellate rules were met. As a result, the preparation and filing of records and transcripts were frequently delayed.

Trial judges may be contributing to the problem by not consistently following any established policies governing the granting of extensions for filing notices of appeal, records, and transcripts. They are apt to accord little priority to monitoring preparation of the record, feeling their active involvement with the case ended when judgment was entered.

A more basic problem is the conflicting goals of the trial and appellate courts when a record is delayed by a tardy court reporter. The appellate court may want the record prepared promptly at whatever cost, even removing the reporter from the courtroom if necessary. The trial judge, however, has a vested interest in keeping that reporter in the courtroom to prevent delay in the processing of his docket. Trial judges, then, are not want to pressure reporters to prepare transcripts diligently.

48. Notices of appeal are filed with the trial court. Trial courts are also responsible for preparation of the record, and trial judges may grant extensions for the filing of the notice of appeal and transcript. See text accompanying notes 25-29 *supra*.

2. Brief Filing

The late filing of briefs and other documents by attorneys is another prime source of delay. Delay in preparing the transcripts and lower court records undoubtedly accounted for some of the time between judgment and the filing of the appellant's brief. Clearly, attorneys would have difficulty trying to prepare briefs without having full information available concerning proceedings in the lower court.

Excessive brief time is probably not a result of attorneys preparing exceptionally long or complex briefs. On the contrary, briefs filed with the court of appeals are short and rarely exceed the page limits specified in its rules.[49] The excessive average brief preparation time may reflect, in part, the fact that a significant number of briefs took an extraordinarily long time to file, thereby dramatically skewing the average.

3. Case Characteristics

Relationships between case characteristics and case processing time in the court of appeals were examined in depth. Civil appeals constituted 70% of the total case load, with commericial and property cases being most common. The remaining 30% of the caseload consisted of criminal appeals, principally robbery, burglary, assault, theft, and narcotics cases. Private attorneys represented over one-half of all the litigants in the court of appeals. The Public Defender's Office represented 21% of all the appellants, and the Attorney General's Office represented 34% of all appellees, making those bodies significant forces in the Colorado appellate system.

Generally, no significant relationship was found between case characteristics and case processing time. Case processing time did not significantly vary with the type of appellants and appellees involved in the case, the type of attorneys, the subject matter, the issues raised as grounds for appeal, or the source of appeal.

A noteworthy exception was criminal cases. Criminal appeals, especially those involving the Public Defender's Office, averaged ninety processing days longer than other cases. Criminal appeals, although a minority of the total caseload, may have been a major source of excessive brief preparation time.

4. Court Rules and Procedures

The rules and procedures of the Colorado Court of Appeals has occupied a central position in this study of delay. Conceptually, rules are an expression of the court's goals; procedures are means to implement those goals. The rules also serve as a benchmark for assessing the performance of the court: Are the participants meeting the time requirements set by court rule?

Data generally indicated the court was operating efficiently at the deci-

49. J.A. Martin & E.A. Prescott, Volume and Delay in the Colorado Court of Appeals 24 (1980); see note 3 *supra*.

sion stage of the appellate process. Cases were being decided, opinions assigned and written, decisions announced, and mandates issued in a relatively short period of time. However, the court's rules for filing pre-decision materials were not being consistently followed.

Delays in the preparation of trial materials and attorneys' briefs resulted in the routine granting of time extensions by the court of appeals. On the average, 2.5 motions for time extensions were requested per appeal, many to file the same document. Such requests were granted 99.5% of the time. Among the eight sample courts for which information was available, only the Illinois Appellate Court [Chicago] exceeded Colorado with 3.5 average extensions per case.[50]

Most requests for extensions were for the filing of briefs. There was no uniform policy for enforcing the rules requiring the prompt preparation and submission of briefs. Sanctions against dilatory attorneys were rarely, if ever, imposed. Briefs from the Public Defender's Office were, particularly, chronically overdue, but the court perceived it was bound by constitutional mandates not to dismiss these appeals, no matter how delayed the brief.[51]

### B. *Procedural Responses to Perceived Delay Problems*

The court's own perception of delay can affect the processing of appeals. This perception may be either of specific cases which are considered to require a fast disposition, or of the caseload as a whole. In the former instance, the perception of urgency can prompt special treatment of the cases in question. In the latter, the perception of systemic delay can prompt both increased individual productivity, and reexamination and possible revision of the appellate system. The Colorado Court of Appeals has modified a number of procedures since the statistics for this study were gathered.

#### 1. Pre-Argument Settlement Conferences

In 1976, the court began the routine use of pre-argument settlement conferences[52] for civil appeals, a practice which continues at the present time. During 1976, pre-argument settlement conferences were held in 535 cases.[53] Most conferences were conducted at the court's headquarters in Denver, but conferences have been held around the state, especially when several can be scheduled in one location.

Conference procedures can have the positive effect of streamlining the pre-decision phase of the appellate process. After filing the designation of parties, attorneys file pre-argument statements. Upon receipt of these documents, cases are randomly assigned to a "reviewing judge." During the settlement conference process, preparation of the record is suspended. If there is no settlement, the pre-argument judge enters orders regarding filing of the record and briefs.

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50. J.A. Martin & E.A. Prescott, *supra* note 38, at 9.

51. *See* COLO. CONST. art. II, §§ 6, 16, 25; Haines v. People, 169 Colo. 136, 454 P.2d 595 (1969). *See also* Anders v. California, 386 U.S. 738 (1967); Griffin v. Illinois, 351 U.S. 12 (1956).

52. COLO. APP. R. 33.

53. Statistics provided by the Colorado Court of Appeals.

To date there has not been any structured evaluation of the conference procedure. However, statistics and records were kept by each of the judges on dispositions through the settlement conference procedure. Most of the judges indicate support for the conferences. They note higher dismissal rates[54] in recent years reflect an increased number of settlements.

2. Staff Attorney Processing

Since August, 1977, the court has employed two staff attorneys to assist in the disposition of appeals. These staff processing procedures can result in greater time efficiency at the decision phase of appeals.

The staff attorneys screen cases once they are perfected and prepare research memoranda. Once the research is complete, the cases are assigned to a division, usually in lots of three, so that there is one staff attorney case per judge. The division to which the case is assigned reviews the memorandum and, if the preliminary work is satisfactory, notifies the attorneys for the parties that oral argument is not deemed necessary. Attorneys may, of course, insist that oral argument be scheduled despite the court's request for waiver. If there is no argument, the case will then be assigned to a judge for opinion.

3. Accelerated Docket Program

In May 1978, the court of appeals began an Accelerated Docket Program[55] to expedite the processing of civil appeals. The objective of the program is to dispose of more appeals in a period of increasing case volume through shorter records, briefs, and limited, if any, oral argument. It may also help resolve appeals at reduced costs to litigants.

The Accelerated Docket Program has been applied to cases where a transcript is unnecessary or where the transcript is not more than twenty-five pages long.[56] It requires trial court clerks to foward the notice of appeal immediately to the court of appeals, a procedure which though required, was not always followed in the past. The court then sends instructions to counsel containing information about the accelerated docket and a request for the filing, within fourteen days, of a preliminary statement, the designation of parties, and the docketing fee. The preliminary statement must contain a description of the case, the listing of the issues to be raised on appeal, and a designation of the parts of the record deemed necessary to resolve the appeal.

These statements are reviewed by a staff attorney, who recommends to the accelerated docket division which cases should be so processed. Counsel are notified by a judge of the division upon approval of that recommendation.

Assignment to the accelerated docket changes the time requirements

54. *Id.*

55. COLO. APP. R. 10.1.

56. *See* Danford, *Improvements in the Colorado Court of Appeals Docket Program*, 1 APP. COURT AD. REV. 15 (1979).

during the pre-decision phase. For example, the abbreviated record and opening brief in accelerated cases are due within fifteen days and the answer brief fifteen days later. A reply brief, if any, is due within five days. No opening or answer brief may exceed twenty pages, nor may replies exceed ten pages.

The accelerated docket can also change the time standards for the decision phase of the appellate process. If the case is accelerated, the court will usually request that counsel waive oral argument although limited (fifteen minute) argument may be granted. When oral argument is waived, appeals on the accelerated docket are decided on a separate schedule. It is the intent of the judges that opinions for accelerated docket cases will issue more rapidly as well.

The court has experimented with the accelerated docket program for about two years, and at present, it appears that the court will continue to use the procedure.

## IV. CONCLUSION

The Colorado Court of Appeals has encountered numerous problems in the management of its appellate caseload. The source of lengthy case processing time is centered in the pre-decision phase of the appellate process. The court's rules specifying the time limits for perfecting an appeal were not being consistently followed by trial court clerks, court reporters, and attorneys. Extensions for the filing of transcripts, records, and briefs were granted as a matter of course.

This study indicates caseload volume, per se, has not yet become a major source of delay. Judicial workloads in the Colorado Court of Appeals are relatively light compared with other jurisdictions. It is the delay directed solutions, such as procedural modifications, that are likely to have the greatest impact on appellate inefficiencies.

There have been some procedural changes since the statistics for this study were gathered, although it is impossible to know to what degree the court has benefited. Notices of appeal are now fowarded by the trial court immediately to the court of appeals. Time extension requests are subject to greater scrutiny as the court attempts to enforce substantial compliance with court rules. In some instances, the time to file appellate documents, especially briefs, has been reduced.

All of these changes are important steps to assure the rapid processing of appellate cases. Simply focusing attention on the pre-decision phase will likely reduce elapsed time. The data from all the courts point to one critical fact: where the court chooses to ignore the process, elapsed time for that step (or those steps) lengthens dramatically.

The implementation of the Accelerated Docket Program is the most important of the changes introduced by the court. The accelerated docket provides an alternate processing track for certain kinds of civil appeals. It is in part likely to be successful because it circumvents two often-delayed steps in the appellate process: preparation of the record and the scheduling of oral

argument. Its procedure insures early communication between court and counsel and provides the court with accurate and readily accessible case-tracking information.

Further steps could be taken by the court to decrease processing time. The implementation and enforcement of rules that vest all authority for the management of appeals in the appellate court would eliminate some delay that results from the current trial-appellate court overlap. The court might also develop and implement a uniform policy with regard to time extensions.

The cooperation of counsel is vitally important to the efficient processing of appellate cases. Any procedure, no matter how carefully developed and administered, may be subverted by counsel. The court is making a sincere effort to deal with the problems of delay; the solutions it has chosen appear to effectively address the issue of lengthening processing time. But the court and the attorneys who appear before the court of appeals must work together to see that cases are processed promptly. Ultimately, it is in the best interests of both to assure that appeals are routed through the court to a swift decision.