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## Caseload Explosion: The Appellate Response, 16 J. Marshall L. Rev. 1 (1982)

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## ARTICLES

### CASELOAD EXPLOSION: THE APPELLATE RESPONSE

RICHARD HENRY MILLS\*

[Omit from the reports all] cases wherein there is solemnly and long debated matter whereof there is now no question at all and cases merely of iteration and repetition.

—Sir Francis Bacon,  
Lord Chancellor of England  
to King James I.\*\*

The concern of Viscount St. Albans (Bacon's peerage title) has been shared by many in our profession over these three centuries. On the contemporary appellate scene, the bar and bench are cogently aware of the immense amount of material that has been published concerning the caseload explosion. Legions of administrative reports, law review articles, and formal addresses before legal gatherings have underscored the virtual avalanche of appeals that has inundated reviewing courts in both the state and federal systems.<sup>1</sup> In his "State of the Judiciary" address for the year 1980, the Chief Justice of the United States Supreme Court noted that "[t]he federal appellate courts have

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\*\* F. Whitehair, *Opinions of Courts: Fifth Circuit Acts Against Unneeded Publication*, 33 A.B.A.J. 755, 844 (1947).

1. Legal commentators have written graphically of this "explosion of lawsuits." See, e.g., Marcus, *Judicial Overload: The Reasons and the Remedies*, 28 BUFFALO L. REV. 111 (1979) [hereinafter cited as Marcus]. The contributing causes to the caseload explosion and backlog are myriad but one judge believes there are five primary factors: (1) the need to resolve problems; (2) governmental social policies and regulations that have grown more numerous and complex; (3) the difference between the market rate of interest and the legal rate of interest which encourages delay in the payment of judgments, often manifested by the taking of an appeal; (4) "devotion to the billable hour concept" which has encouraged delays and increased the costs of major litigation; and (5) the failure of many courts to enforce proper levels of lawyer performance. Nelson, *Why Are Things Being Done This Way?*, 19 JUDGES' J. 13, 15 (1980) [hereinafter cited as Nelson].

increased their filings over the last year by 15%," and that the current appellate caseload "is 100% over the appellate caseload of just ten years ago."<sup>2</sup>

Indeed, the United States Supreme Court's caseload increased from approximately 400 cases in 1900 to 4,000 in 1980—a 1000% increase in 80 years.<sup>3</sup> In 1950, the Court of Appeals for the Ninth Circuit had a backlog of 250 cases waiting to be heard. In 1960, the figure was 400, in 1970, it was 500, and in 1980, it was 4,500.<sup>4</sup>

State appellate court caseloads for the past 20 years have been increasing at the staggering rate of at least 11% annually.<sup>5</sup> Reports and studies from the National Center for State Courts and the Administrative Office of the United States Courts reflect a massive upsurge in appeals in both state and federal reviewing courts. The caseload since 1960 in the federal circuit courts of appeals increased 418.6%, while caseloads in state courts of last resort increased from a low of 132% (Kentucky) to a high of 560% (Nevada). Equal or greater increases were reflected in statistics for the intermediate appellate courts of the various states. For the period 1960-1975, the number of cases in California courts of appeal increased 367%, New Jersey's appellate division caseload increased 439%, and the New York appellate divisions' caseload increased 330%.<sup>6</sup>

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2. Burger, *State of the Judiciary Address* (1981).

3. McLaughlan, *An Exploratory Analysis of the Supreme Court's Caseload from 1880-1976*, 64 JUDICATURE 33 (1980). Between 1951 and 1971, the number of new cases filed in the United States Supreme Court jumped from 1,200 to 3,600. In 70 years (1902-1972) the total number of cases filed in federal district courts rose nearly 500%, and in the single year 1974-75, the district court caseload increased by 11.7%. See Marcus, *supra* note 1, at 113.

4. Nelson, *supra* note 1, at 13. In his 1982 *State of the Judiciary Address*, Chief Justice Burger said that "federal case filings continued to mount," with court of appeals filings having increased by nearly 14%. He stated that statistical projections indicate that "Court of Appeals case filings will rise between the judicial years 1975 and 1983 by 80 percent." Burger, *State of the Judiciary Address* (1982).

5. Flango & Blair, *Creating An Intermediate Appellate Court: Does It Reduce the Caseload of a State's Highest Court?*, 64 JUDICATURE 75 (1980) [hereinafter cited as Flango & Blair].

6. 1979 Annual Report of the Director, Administrative Office of the United States Courts, Table 1, at 3; Wasey, Marvell & Aikman, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES, NATIONAL CENTER FOR STATE COURTS (1979).

"There seems to be rather general agreement among lawyers who follow the work of the [Minnesota Supreme] Court that the caseload battle has recently reached a crisis stage." Wolfram, *Notes from a Study of the Caseload of the Minnesota Supreme Court: Some Comments and Statistics on Pressures and Responses*, 53 MINN. L. REV. 939, 941 (1969) [hereinafter cited as Wolfram]. Statistics in Hawaii indicate that enough appeals are filed in a single year in the Supreme Court of Hawaii to occupy that court for two years. Levinson, *Appellate Caseload in Hawaii*, 13 HAWAII B.J. 3

## THE NEED FOR STATE APPELLATE COURTS

United States Circuit Judge Frank M. Coffin has written that "[t]he appellate tradition dates back some 4000 to 6000 years to several highly developed civilizations in that fecund area of the world we call the Near East."<sup>7</sup> Until 1958, however, only 13 states had established intermediate appellate courts.<sup>8</sup> As the caseloads of various state courts of last resort became more intolerable, those states without intermediate reviewing courts began looking long and hard at this alternative. As one high court jurist phrased it: "I have personally concluded that creation of an intermediate appellate court is the alternative most likely to meet the Court's increased caseload problem as well as insure that the law-stating function of the Court is not diluted."<sup>9</sup> Another state chief justice pointed out that "[t]rial courts cannot be created and litigation at the trial level multiplied without a corresponding effect in increased work on the appellate level."<sup>10</sup> He, too, recommended an appellate court for the State of Wisconsin, and that recommendation became a reality.

Commentators generally agree that the best means available for clearing appellate congestion—while still preserving the cardinal role of the highest court—is the creation of an intermediate court of appeals. The proper relationship of a court of appeals to a supreme court in a two-tier system of appellate review has been rather saliently described as follows: "The intermediate appellate court is assigned the function of correcting mis-

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(1977). In Virginia, one study showed that over a period of ten years the percentage increase in cases reaching the Virginia Supreme Court of Appeals was nearly six times as large as the percentage increase in cases concluded by the trial courts (232% compared with 41%). Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 6 (1971) [hereinafter cited as Lilly & Scalia]. The number of cases docketed in the Supreme Court of Iowa more than doubled over a ten year period. Stuart, *Iowa Supreme Court Congestion: Can We Avert a Crisis?*, 55 IOWA L. REV. 594, 596 (1970). In California, a special state bar committee on appellate courts concluded: "If we continue the present system without appreciable changes, it will be hopelessly mired down in its own workload, or must be expanded to such huge size that it will be unworkable." Leavitt, *The Yearly Two Foot Shelf: Suggestions for Changing Our Reviewing Court Procedures*, 4 PAC. L. J. 1, 2 (1973) [hereinafter cited as Leavitt].

7. F. COFFIN, *THE WAYS OF A JUDGE* 17 (1980).

8. Flango & Blair, *supra* note 5, at 77.

9. Richardson, *Remarks on Alternative Proposals to Remedy Appellate Court Congestion in Hawaii*, 14 HAWAII B.J. 56 (1978). One of the members of the highest court of Idaho has proposed that "[a]n intermediate court of appeals [could] clear Idaho's congested dockets." Donaldson, *A Crisis in the Idaho Court System: An "Appealing" Remedy*, 13 IDAHO L. REV. 1, 5 (1976) [hereinafter cited as Donaldson].

10. Hallows, *The Case for an Intermediate Appellate Court*, 44 WIS. B. BULL. 15, 16 (1971).

takes . . . 'whereas the highest court is assigned as its primary function the obligation of law development, of resolving conflicts among lower courts, of teaching the other courts and lawyers and public about the law.'"<sup>11</sup> In the last 20 years, a surprisingly sizeable number of states have responded to logic and the pressure of increasing caseload volume. Today, a total of 32 states have established intermediate appellate courts.<sup>12</sup>

#### GRAPPLING WITH WAYS TO EXPEDITE

Despite the increased caseload, the intermediate appellate courts must get about the business at hand: resolving disputed actions of trial courts. And they must do it *faster* than they have in the past.<sup>13</sup> The business-as-usual approach cannot keep pace. The "old way" simply must be replaced or supplemented by new means and procedures. Let us, then, examine some of the more

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11. Labbe, *The Case Against a Separate Court of Criminal Appeals*, 27 LA. B.J. 93 (1979). This was the very concept that the American Bar Association Commission on Standards of Judicial Administration had in mind when it drafted these comments:

Where a Supreme Court by reason of workload is unable to perform both of its principal functions, some additional mechanism of appellate review becomes necessary. This situation has long since prevailed in states with large population, and is becoming increasingly prevalent in states of smaller population. The immediate necessity for an intermediate appellate court may be met or postponed by such devices as use of per curiam and memorandum decisions in cases having limited general significance, by limiting oral argument in appropriate circumstances, and by improved efficiency in management of the highest appellate court's work. On the other hand, such expedience as dividing the highest appellate court into panels, using commissioners to hear cases, or eliminating oral argument dilute the appellate function, particularly that of developing the law. Adding additional judges to a highest court may actually slow down its operation rather than speeding [sic] it up. Hence, when improvement in efficiency of operation in the highest court cannot be achieved without dilution of the appellate function, the appropriate solution is the creation of an intermediate appellate court. Since there seems little prospect for a long run decline in the volume of appellate litigation, once the surge of appellate cases has been felt in a state having only one appellate court, steps should be taken forthwith to establish an intermediate appellate court rather than temporizing with substitute arrangements.

A. B. A. COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, COURT ORGANIZATION § 1.13 (1974) (commentary). See also Donaldson, *supra* note 9, at 5.

12. Osthus & Stiegler, *State Intermediate Appellate Courts*, June AM. JUDICATURE SOC'Y 2 (1980) [hereinafter cited as Osthus & Stiegler]. Intermediate appellate courts exist in 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, Tennessee, Texas, Washington, and Wisconsin.

13. For a comprehensive study and analysis of endemic delay in the state appellate process, see generally MARTIN & PRESCOTT, *APPELLATE COURT DELAY*, NATIONAL CENTER FOR STATE COURTS (1981).

logical and successful variations in appellate practice around the country.

### *Judges First*

Delay problems in appellate courts are primarily the judges' responsibility. Although the blame is frequently placed elsewhere, judges have the *authority* and the *means* to reduce excessive delays in the disposition of cases.<sup>14</sup> Appellate judges possess the authority to enforce time limits against attorneys who do not comply with the rules. Thus, the amount of delay is in direct proportion to what the judges of a particular court will tolerate.

Initially, the members of a particular court must recognize their responsibility for reducing delay. They must then adopt one of the procedures available to carry out that obligation—whether it be case management techniques, rule amendments, shortening time deadlines for filing, eliminating or shortening oral arguments, writing fewer opinions for publication, producing more memorandum and *per curiam* opinions, or ruling from the bench. As the National Center for State Courts has put it: "By and large, all a delay reduction effort needs is a decision by the judges to conduct it and a decision about which elements of the decision-making procedure can be curtailed."<sup>15</sup>

### *Two-Judge Panels*

As long as there is an explosion in litigation, an increase in appeals is going to follow as the night does the day. Simply adding more judges to the mix can not increase judicial efficiency. "[I]ncreasing the number of judges as a tool for judicial reform is a finite palliative."<sup>16</sup>

In 1978, the New Jersey Supreme Court's committee on the appellate division closely examined the caseload explosion problem. Its "pivotal recommendation" was that dispositions in appropriate appellate cases be made by two-judge panels. The key would be to screen pending appeals for cases that are "uncomplicated, clear-cut, non-controversial and relatively unimportant to the public" at large.<sup>17</sup> This proposal was duly adopted

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14. See generally AMERICAN BAR ASSOCIATION COMMITTEE ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.52 (Approved Draft 1977) (standards of timely disposition).

15. Marvell, *Appellate Court Delay Reduction: Judges First*, III APPELLATE COURT ADMINISTRATION REVIEW 28, 30 (1980-81).

16. Handler, *Justice at the Intermediate Appellate Level: The New Jersey Appellate Division*, 10 SETON HALL L. REV. 58, 62 (1979).

17. *Id.* at 65.

by the New Jersey Supreme Court and incorporated in its rules.<sup>18</sup> Subsequent statistics from New Jersey indicate that there is no necessity for appellate cases to be heard by three judges. In the 1978-79 term of the appellate division, 74% of the cases were designated as two-judge appeals, and 26% were reserved for three-judge panels. It is noteworthy that the appellate division disposed of almost 2,400 more cases than it did the year before, and more than two-thirds of them were two-judge dispositions.<sup>19</sup>

### *Commissioners*

In the last part of the 19th century, 19 states established Court Commissioners primarily to reduce overcrowded appellate dockets. New York, in 1869, provided for five commissioners, appointed by the governor, who sat as a separate court of appeals panel. Their opinions had the full force of a court of appeals decision, and in two years the appellate backlog was overcome. The system then lapsed into disuse. Ohio, in 1875, created a similar commission of five commissioners, and that custom existed until 1879. Indiana and Texas followed suit in 1881, Ohio and Missouri in 1883, California in 1885, Colorado and Kansas in 1887.<sup>20</sup>

The function of an appellate court commission has been described as:

A careful and impartial collation of the facts and points in a case, with references to the transcript for the verification thereof, made by men skilled in that service, and entirely unbiased and uninterested in the cause, accompanied by an expression of opinion as to the law and reference to the authorities to sustain it, as well as a reference to the authorities claimed to be adverse to such opinion.<sup>21</sup>

Appellate court commissions were used in two ways. In the first, commissioners sat with the court, had no vote, and were then assigned to draft opinions. These dispositions were submitted to the judges and, when ultimately released, were the opinions of the court. In the second method, three or more commissioners would sit as a separate panel, hear cases, draft opin-

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18. *Id.*

19. *Id.* at 75-76.

20. *The Office of Commissioner of the Michigan Court of Appeals and Its Role in the Appellate Process*, 48 F. R. D. 355, 356 (1969).

21. *Id.*, quoting *People ex rel Morgan v. Hayne*, 83 Cal. 111, 23 P. 1, 5 (1890).

ions, and submit them to the full court for approval or rejection.<sup>22</sup>

It has been said that the function of the commissioner may vary considerably in different jurisdictions. For instance, in Michigan, a commissioner's role is primarily to recommend action on discretionary matters such as the granting or denial of applications for leave to appeal. These recommendations contain a full statement of the facts and law involved, are circulated among all of the members of the court, and if there is any disagreement, the matter is referred to the entire court.<sup>23</sup> But in Missouri, we find the opposite extreme; commissioners hear arguments and write opinions in cases before the court, although their dispositions are technically only recommendations that must be approved by the Missouri Supreme Court.<sup>24</sup>

There are a number of functions on a reviewing court that lie between routine matters that either the clerk of the court or law clerks can attend to, and those that demand the personal attention of at least one of the members of the court. These are matters, of course, which may be performed by commissioners, such as reviewing applications for original writs, petitions for leave to appeal, or *certiorari*. The commissioners may also be used to perform functions that can readily be reviewed by the court. Just as it is not uncommon in many courts for an initial working draft of a disposition to be prepared by a law clerk, a commissioner can function in much the same way. As long as the holding of the disposition and the legal reasons ascribed thereto are duly received, passed upon, and adopted by the court, there is no risk of *de facto* delegation of judicial authority. The submitted disposition is readily reviewable by a justice or a panel at the expenditure of but a fraction of the time expended by the commissioner.<sup>25</sup>

It has been suggested that the Virginia Supreme Court of Appeals:

might consider the use of the commissioner to write certain opinions. When a particular disposition and the reasons for it have been decided upon in conference, it would not appear to be necessary in every instance that one of the justices devote himself to the time-consuming literary effort of couching the opinion in the appellate language.<sup>26</sup>

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22. 48 F. R. D. at 356-57. Florida, Idaho, Illinois, Indiana, Kentucky, Minnesota, Mississippi, Missouri, Montana, Oregon, South Dakota and Texas have used the former method. California, Colorado, Idaho, Kansas, Nebraska, New York, Ohio, Oklahoma and Texas have used the latter system at various times. *Id.*

23. *Id.*

24. Lilly & Scalia, *supra* note 6, at 29.

25. *Id.* at 32-33.

26. *Id.*



A variation of the commissioner system can be found in Minnesota where a state statute provides for the appointment by the Minnesota Supreme Court of one of its retired members as a commissioner "to aid and assist in the performance of such of its duties as may be assigned to him with his consent."<sup>27</sup>

### Central Staff

The paramount work priority of an appellate judge is, of course, to make decisions—to *decide* cases. The manner in which those decisions are communicated is of secondary priority. This is particularly true where crushing caseloads are prevalent. The in-chamber mechanics of articulating a disposition—whether by full-blown opinion, short memorandum, or one-line order—are those time-consuming matters that demand assistance. It is a universal acknowledgement "that judges, like other professionals in short supply and heavy demand, must spend their productive hours free of the menial work which is properly assignable to their assistants."<sup>28</sup>

It would seem axiomatic that a judge should be able to turn to someone on his staff to research a point inadequately covered by the parties, check a report of proceedings to find testimony on a given point, perform research on a key issue, or provide the judge with a working draft of a disposition based on a cardinal point raised on appeal.

If our reviewing court judges are to do the job we expect of them—maintaining quality with ever-increasing caseloads—we must strengthen their professional staffs and encourage the delegation of nondecisional work. Of a future Solomon, it might admirably be said, "none of the losers like his decisions, but they all agreed his facts were accurate. What a staff he must have."<sup>29</sup>

The primary responsibility of a law clerk is to act as the right arm of the judge, and a close working relationship is the day-to-day norm. But the central staff attorney is actually a law clerk at large to the court as a whole. Professor Meador has defined a central staff attorney in this way:

[A] staff attorney is a legally trained person working for and assisting an appellate court as a whole. Various titles are used: research attorney, commissioner, *pro se* clerk, staff law clerk, and pool aide. If such persons in fact provide professional assistance for the court as an entity, they are staff attorneys, as that term is used in this report. A law clerk and staff attorney are both lawyers providing professional legal help to appellate judges in the decision of cases.

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27. MINN. STAT. § 490.025, subd. 5 (1967), *quoted in* Wolfram, *supra* note 6, at 963 n. 12.

28. Leavitt, *supra* note 6, at 16.

29. *Id.* at 17.

But the former works exclusively for a single judge in whatever way the judge wishes to use him; the job is highly personal. The latter has no special relationship to any individual judge but rather works for the court or a panel within it as a collective unit; the staff responsibility is institutional. This is a key distinction in understanding the roles of the central staff.<sup>30</sup>

Chief Justice Cameron of the Arizona Supreme Court wrote: "[f]inding that increasing the number of law clerks per judge does not result in a corresponding increase in efficiency, appellate courts have turned recently to the central staff as a method of increasing the court's productivity."<sup>31</sup> He correctly points out that: "the central staff is more important in preparing the information that will be considered by the court in reaching a decision, while the law clerk is more important in justifying that decision after it is made."<sup>32</sup>

Central staff can be used in numerous ways and its functions may be quite varied. For instance, time saving steps can be made in the areas of "screening," preparation of predecision memoranda for the court's guidance, preparation of memos in motion practice, and opinion drafting in frivolous appeals, unpublished memorandum decisions, and even portions of major published opinions upon occasion. As Professor Meador has noted:

Appellate courts which have established central staffs have used the staff attorneys largely for research and preparation of memoranda on appeals which have been completely briefed. Staff memoranda are often prepared in such a way that with small changes the judges can convert them into per curiam opinions if they deem such dispositions appropriate.<sup>33</sup>

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30. D. MEADOR, *APPELLATE COURT: STAFF AND PROCESS IN THE CRISIS OF VOLUME 17* (1974) [hereinafter cited as *CRISIS OF VOLUME*].

The duties of staff attorneys should be defined in institutional terms. In contrast, the duties of a law clerk are defined by the personal desires of the judge for whom he works . . . . Thus with proper organization the positions of law clerk and staff attorney do not overlap. They are not mutually exclusive; they are complementary. A busy appellate court needs both.

*Id.* See also Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255, 264 (1975) [hereinafter cited as *Appellate Case Management*].

31. Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A.L. REV. 465, 468 (1976) [hereinafter cited as *Cameron*].

32. *Id.* at 469.

33. *Appellate Case Management*, *supra* note 30, at 266.

A staff memorandum can assist the court in several ways. It enables a judge to get a quick profile of the appeal; it accelerates his understanding of the essential features of the case. He can then dig into the record and briefs to whatever extent he thinks desirable on selected points. The net effect is to expedite the mental operations involved in assimilating key information and reaching a conclusion on the issues presented. In short, the memorandum contributes to reducing the

### Screening

"Screening," in the classic sense of Professor Meador's definition, is the "process which occurs in an appellate court, prior to any attempt to decide the merits of an appeal, whereby a tentative decision is made as to the decisional process through which the case will thereafter proceed to disposition."<sup>34</sup> It is a procedural method whereby each case is briefly examined, prior to its being considered by all the judges of the decisional panel, for the purpose of routing it through one of two or more different types of decisional processes. It is only through screening that the concept of differentiated case management is significantly applied. The screening must take place early in the appellate process if there is to be an identification of cases that will be treated differently, and it can be done either by a judge or a legal professional on the court's staff.

Meador urges that

[i]f screening is to be assigned to a staff attorney it should be the responsibility of a single member of the staff. This makes it more likely that the screening criteria will be applied uniformly and that a higher degree of consistency will be attained. The staff director is typically the staff member who does the screening. This is desirable because it permits him to maintain an overview of the total flow of cases and to control the routing of cases to the staff for which he is responsible. . . . Since screening tentatively dispatches a case along a particular decisional path, it is important that the judges themselves control the policies which govern this initial routing action.<sup>35</sup>

Appellate screening, in its contemporary concept, gained prominence from a procedure begun in the Fifth Circuit in 1968. Every appeal was screened initially by a judge, with every judge of the court participating and sharing the burden. Judge Griffin Bell explained that the system was grounded on the premise that frivolous and unsubstantial appeals exist on any reviewing court's calendar and oral argument is unnecessary in most of

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judge's decisional time. . . . The memorandum [also] serves as a safeguard against judicial oversight or misunderstanding. It furnishes the judges with a thorough scrutiny of the facts and the law by a disinterested attorney who shares the court's vantage point. It may also mitigate the consequences of deficient advocacy, since staff attorneys can take note of significant errors not mentioned in the briefs and can undertake research beyond that revealed in the briefs. The memorandum can thus reinforce the justice and soundness of appellate decisions.

*Id.* at 267-68.

34. CRISIS OF VOLUME, *supra* note 30, at 31.

35. *Appellate Case Management*, *supra* note 30, at 271. "When the California Court of Appeal, First District, created a central staff in 1970 to prepare memoranda and draft per curiam opinions, the court assigned the screening function to the staff director under criteria fixed by the judges." *Id.* at 270.

those cases, while in others, only limited argument should be permitted. The chief judge appoints panels of the court to review pending cases for assignment or disposition. The panel may then, *sua sponte* or by suggestion of a party, conclude that a case does not justify oral argument and place it on a "summary calendar." Parties or their counsel are so notified. Under this screening procedure, cases are classified by four categories: frivolous cases, cases of substance but where oral argument is unnecessary, cases for which limited argument is indicated, and cases for argument. If the panel determines that a case is either frivolous or does not warrant oral argument, such a case goes on the summary calendar for disposition without oral argument and a summary opinion is prepared and issued if there is no dissent. Three safeguards have been built into this system: (1) the transfer to the summary calendar is a judicial determination; (2) such transfer is only accomplished if the panel is unanimously of that view; and (3) the summary opinion must be unanimous. The experience of the federal Fifth Circuit would indicate that the screening process has been a very useful tool for a busy court in need of maximum efficiency. Summary opinions have accounted for over one-third of that court's dispositions and increased the productivity of all of its judges in a substantial way.<sup>36</sup>

Justice McCormick of the Supreme Court of Iowa has suggested that screening begin with the docketing of the appeal. Under this model, the appellant's docketing statement is reviewed by a screening panel of judges. One calendar would deal with cases requiring full briefing and arguments, another would list cases for limited argument and reduced briefing time. A third calendar would encompass those cases to be submitted to a special three-judge panel "which, on the basis of memoranda prepared by the parties and staff, either assigns a case for full briefing or, by unanimous agreement, decides the merits of the case without further briefing."<sup>37</sup>

The screening by central staff in Arizona normally

notes lack of jurisdiction, . . . recommends which cases should be treated by memoranda decisions that remain unpublished and have no precedential value, suggests the amount of time which should be allotted to oral argument, and notes other cases of a similar nature pending in [that] court or the court of appeals. By this process the staff . . . is able to point out other actions in the Ari-

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36. Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237, 239-43 (1971). Both the Sixth and Tenth Circuits also have screening procedures with certain variations.

37. McCormick, *Appellate Congestion in Iowa: Dimensions and Remedies*, 25 DRAKE L. REV. 133, 154 (1975).

zona Supreme Court or the court of appeals involving the same point of law or the same party in a related matter. This allows us to consider more than one case at the same time, and we will frequently group the matters and assign them to one judge, achieving a considerable saving of judicial manpower with no concomitant sacrifice in the quality of the judicial product.<sup>38</sup>

### *Accelerated Docket*

The Colorado Court of Appeals, in May 1978, initiated an accelerated docket plan for civil cases, and since then about 44% of all civil actions have been handled under this procedure.<sup>39</sup> Each lawyer must file preliminary statements within 30 days after the notice of appeal is filed with the court, and from these the court decides whether the issues can be resolved without a transcript, by the use of only a portion of a transcript, or from an agreed statement of facts. A case may be selected for the accelerated docket from these categories and a shortened briefing schedule is ordered. The appellant is usually given a 15-day period to file an opening brief and the appellee a similar time to file an answering brief. If the appellant desires to file a reply brief, a shortened time is allowed. Briefs are limited to a maximum of 20 pages, and if requested by either counsel, oral arguments are limited to 15 minutes per side.<sup>40</sup> During the first year of this experiment, the Colorado intermediate reviewing court was able to dispose of most of these cases by written opinion within six months of filing, and in many cases, within four months. The possibility of including criminal cases is being explored, as well as appeals from actions of governmental agencies.<sup>41</sup>

### *Pre-Argument Conferences*

Another appellate tool is the pre-argument conference, which may take several forms. The Minnesota Supreme Court, in 1976, introduced mandatory prehearing conferences to decrease the caseload.<sup>42</sup> This was not a new idea, of course, since federal trial courts have used pretrial conferences under Rule 16 of the Federal Rules of Civil Procedure since 1938. Although this type of conference has been used by state trial courts for many years, its use in appellate courts is much more recent. The Court of Appeals for the Second Circuit, in 1974, became the first

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38. Cameron, *supra* note 31, at 470-71.

39. Pierce, *Appellate Reform in Colorado*, 20 JUDGES' J. 33, 33-34 (1981).

40. *Id.*

41. *Id.*

42. Note, *The Minnesota Supreme Court Prehearing Conference—An Empirical Evaluation*, 63 MINN. L. REV. 1221, 1223-24 (1979).

federal appellate court to experiment in this area.<sup>43</sup>

In essence, the Minnesota system involves the following procedure. A prehearing statement is served along with the notice of appeal. The respondent then files a return statement; any trial briefs or other documents relative to the issues raised on appeal are also required to be filed. Attorneys are required to come to the conference with full authority to settle and in some cases, clients themselves are required to attend the conference. The conference is conducted by either a member of the court or an officer appointed by the court; matters discussed at the conference are held in strictest confidence, and if a justice of the court conducted the conference, he is excluded from later consideration of the case on its merits. Although the primary focus is on a voluntary settlement solution, limitation and clarification of issues are also considered.<sup>44</sup>

The overriding purpose of the prehearing conference, of course, is to encourage parties to resolve their disputes before submission on the merits, and thus reduce litigation. In the first year that this procedure was used in Minnesota, the judges enjoyed an average of 30.1% settlement of all the cases they preconferenced.<sup>45</sup>

In writing upon appellate procedures, U. S. Circuit Judge Leventhal pointed out that pre-argument conferences are used primarily

in cases which are amenable to settlement—appeals involving personal injuries, property damage, employment, or contract disputes—where the cost of monetary awards and of continued litigation are readily calculable. Cases seeking injunctive relief or raising substantial questions of administrative law are generally deemed unsuited for pre-argument conferences. . . . There are, however, possible reforms in pre-argument procedure that may help to clarify issues and consolidate the record. If the matters involved are relatively ministerial, though important, a staff assistant may seek to affect agreement among counsel.<sup>46</sup>

The Appellate Division of the New York Supreme Court, in 1974, instituted a civil appeals management program in which opposing counsel in certain types of appeals were directed to appear for the purpose of discussing the possibility of settlement, the limiting of issues, and other matters which might as-

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43. *Id.*

44. *Id.* at 1227-29.

45. *Id.* at 1239.

46. Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432, 445 (1976) [hereinafter cited as Leventhal].

sist in disposition.<sup>47</sup> The appellant was required to file a pre-argument "statement," as well as to certify that arrangements had been made with the court reporter for payment for transcripts (a precaution intended to eliminate frivolous appeals). If a pecuniary solution appeared feasible, then a case would be scheduled for conference. These informal conferences tended to encourage settlements or agreements to submit the case on stated facts, and both limited and clarified issues. In matrimonial cases, the attorneys were also directed to bring their respective clients to the conference. New York found that the investment of an appellate judge's time in conducting pre-argument conferences was more than offset by the appellate caseload reduction caused by withdrawn appeals and settlements. The statistics are extremely impressive: one judge conferenced 468 appeals, 50% of which either settled or were withdrawn; another judge conferenced 1,016 cases and disposed of 43%; and a third judge handled 935 cases, disposing of 47%.<sup>48</sup>

The Colorado Court of Appeals, in 1976, began regular use of pre-argument settlement conferences for civil appeals.<sup>49</sup> During that year, such conferences were held in 535 cases. Conference procedures can have the positive effect of streamlining the pre-decision phase of the appellate process. After attorneys file pre-argument statements, cases are randomly assigned to a "reviewing judge." While the settlement conference is in progress, preparation of the record is suspended, and if no settlement is achieved, the pre-argument judge enters orders pertaining to the filing of the record and briefs. Most of the Colorado judges support the conferences and note that higher dismissal rates under the pre-argument settlement conference system reflect an increase in the number of settlements.<sup>50</sup>

### *Reduce Oral Arguments*

One appellate court jurist has charged that

[i]n the United States, oral argument at the appellate level has fallen into disrepute. A growing number of appellate courts either limit oral argument or dispense with it entirely. This low opinion of oral argument is attributable to two factors: First, the quality of appellate advocacy is generally poor because rigid time limitations allow little opportunity for its development, and second, the present

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47. Birnbaum & Ellman, *Pre-Argument Settlement Process in an Intermediate Appellate Court: The Second Department Experience*, 43 BROOKLYN L. REV. 31, 33-46 (1976).

48. *Id.*

49. Martin & Prescott, *The Problem of Delay in the Colorado Court of Appeals*, 58 DEN. L. J. 1, 12-13 (1980).

50. *Id.*

heavy reliance upon written briefs makes oral arguments superfluous in most cases.<sup>51</sup>

Although numerous legal commentators and some judges consider oral argument in every case both indispensable and perhaps an end in itself, others argue that there are only two instances where oral argument is necessary: (1) where a judge of the reviewing court requests it, or (2) where an attorney demonstrates that his brief cannot adequately cover his position. But why should not the written briefs suffice? The briefs frame the issues, they should exhaustively and persuasively discuss those issues, and they should be presented in a form that can be scrutinized judicially.

Perhaps the real solution lies in selectivity. If oral argument becomes a matter of judicial discretion, rather than of right, courts will be able to resolve doubts about the sufficiency of a brief by directing the litigants to appear for oral argument. On every issue where a judge has questions, the opportunity for face-to-face, verbal exchange clearly should be available. The court will thus enjoy the opportunity to explore all aspects of an argument, examine ambiguities in the facts, and clarify questioned theories.<sup>52</sup>

To justify elimination of oral argument, judges must be thoroughly conversant with their calendar and the cases for which they are responsible. If any judge is not, a three-man court may be dominated by the judge assigned to write the opinion. This situation cannot be eliminated through oral argument which, inevitably, is more scanty than a written brief. Perhaps the real answer is to cut down the reviewing court's workload to afford an opportunity for conscientious judges to devote their primary efforts to the more complex appeals that merit in-depth consideration. Such a procedure has been suggested by Jack Leavitt, former consultant to the California Judicial Council.<sup>53</sup> He writes:

Having litigants mail in briefs and distantly await a mailed-out decision, without ever personally confronting their adversaries or their judges, does seem to be robotizing justice. Admittedly, the further we remove our judges from the people and events which constitute a lawsuit, the more doubtful we become that the law has relevance to human problems. Yet we must remember that the parties have already had their traditional chance to look a judge (and, on request, a jury) in the eye and plead their case with all the personality and psychic factors available to enhance their facts. That showmanship—a vital part of all litigation in the earlier

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51. Jacobson, *The Arizona Appellate Project: An Experiment in Simplified Appeals*, 23 U.C.L.A.L. REV. 480, 484 (1976).

52. Leavitt, *supra* note 6, at 18-19.

53. *Id.* at 20-21.



phases—must recede on an appeal, if only because the reviewing court's work has become otherwise unmanageable. However therapeutic oral argument may be, the time it demands from the court outweighs the benefits it produces. Public displays of attention unfortunately must yield to the more productive work of reaching a sound decision in a timely manner.<sup>54</sup>

### *Reduce Length and Publication of Opinions*

Statistics reflect the well-founded concerns created by the deluge of published opinions. From 1790 to 1840, 50,000 decisions were reported in the United States. During the next fifty years there were 450,000, and 1,250,000 in the fifty years ending in 1940. And in the twenty years from 1940 to 1960 between 600,000 and 700,000 more opinions were added to the shelves.<sup>55</sup> The Court of Appeal, Criminal Division, in England in 1970 heard some 8,500 criminal appeals, which figure exceeded the volume of civil and criminal caseloads of the United States Courts of Appeals for that year. Yet of that number, only 15% of the opinions were published.<sup>56</sup>

Professor Chanin has compared the special screening procedures of the federal circuits with those of a few state reviewing courts which have adopted rules for limiting opinion writing or opinion publication. She argues that states should first "enact more specific laws regarding writing and publication of the opinions," and, wherever possible within a constitutional framework, those states "should consider and adopt restrictive plans of writing and publication similar to those adopted by most of the federal appellate courts."<sup>57</sup>

She concludes that: "[A] well-defined plan limiting publication of opinions could reduce the present chaotic volume of published decisions to a cohesive body of law and could reduce the burden of the unlimited proliferation of decisions."<sup>58</sup>

Certainly an inherent quality of older opinions is their brevity, while the average opinions today are distressingly lengthy.<sup>59</sup>

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54. *Id.* at 21-22.

55. Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 L. LIBR. J. 362 (1974).

56. *Id.* at 363.

57. *Id.* at 375.

58. *Id.*

59. A study of 5,900 opinions over a 100-year period revealed that state supreme courts are writing longer and more elaborate opinions, are citing more and more cases and law reviews, are filing more dissents and separate concurrences, and appear to cling to 19th-century style, departing from it as little as they can and only when they must. Friedman, Kagan, Cartwright & Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981).

In the first volume of the California Reports, the average length of the first ten opinions is 2-1/2 pages, while in a single volume of California 2d, the first ten opinions average 6-1/2 pages. Moving up to a random selection of California 3d, an equal number of opinions leap-frogged to about 12-1/2 pages in length. The opinions of the California Courts of Appeal have kept a similar pace. As one California appellate judge put it:

If carried to its logical conclusion, given our propensity to spew out endless legal essays on every imaginable esoteric subject, opinions will soon be hundreds of pages in length and the law will be lost in a welter of words. Already legal research has become a mini nightmare. The future bodes chaos.<sup>60</sup>

In Iowa in recent years, the length of judicial opinions has doubled. The Iowa Reports reflected—after a random analysis—that Iowa Supreme Court opinions averaged from 1.8 pages in length during 1877-78 to 4.5 pages in 1951. Since 1966, the length of opinions increased, on an average, to about 9.5 pages.<sup>61</sup>

Although a change in the prolixity of opinion writing is feasible, it will not be an easy row to hoe. The reasons for long opinions are deep-seated in an occupational hazard endemic to reviewing court judges:

Short opinions are possible but devastating to one's reputation as a legal scholar. A short opinion's author is looked upon as a judicial eccentric. Nevertheless, opinions are useless unless they will be read and can be understood. Many of our current elephantine offerings are simply not read because of their size and, if read, are so prolix they are impossible to understand. Thus, the unduly long opinion not only loses its audience, it loses its focus.<sup>62</sup>

The conclusion seems inescapable that full-blown written opinions in routine cases should be abandoned. Judge Harold Leventhal of the Court of Appeals for the District of Columbia has observed that: "[l]ess argument and opinion time for the cases that warrant less yields more time for the hard cases that require more."<sup>63</sup> He reminds us that in England, reasons for an appellate court's rulings are given in open court and that only opinions of general legal significance are published. A mere 10-15% of criminal appeals are reported, and even those are sub-

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60. Gardner, *Toward Shorter Opinions*, 55 CAL. ST. B.J. 240 (1980) [hereinafter cited as Gardner]. For a 111-page opinion in a state appellate court, see *Miller v. DeWitt*, 59 Ill. App. 2d 38, 208 N.E.2d 249 (1965). And for a federal trial court opinion of 171 pages, the reader is directed to *Vuyanich v. Republic Nat'l Bank of Dallas*, 505 F. Supp. 224 (1980). For a good "law review article" of 72 pages, turn to *Zenith Radio Corp. v. Matsushita Electric Indus. Co.*, 478 F. Supp. 889 (1979).

61. Beatty, *Decision-Making on the Iowa Supreme Court—1965-1969*, 19 DRAKE L. REV. 342, 343 (1970).

62. Gardner, *supra* note 60, at 244.

63. Leventhal, *supra* note 46, at 435.

stantially edited so that only significant issues are actually published.<sup>64</sup>

The D.C. Circuit rules have permitted judgments without published opinions since 1968 and these account for over half of that court's dispositions.<sup>65</sup> Judge Leventhal enthusiastically endorses the use of summary dispositions:

They expedite the process and help delay the swelling of law libraries. Some brief indication of reasons can be retained, enough to serve the appearance of justice and the reality of consideration. Writing takes more time than reading. Indeed, opinions are estimated to account for approximately 48 per cent of the case time and 30 per cent of the total time of a federal appellate court. It bears repetition that summary dispositions, preferably with some citation or indication of reasons, for the bulk of cases means that opinion time can be devoted to the cases that really require extended reflection and analysis.<sup>66</sup>

In the New York Court of Appeals, if a case is determined to have very little precedential value, a short memorandum opinion is filed, with few, if any, citations. If the disposition may significantly affect those other than the parties to the case, the decision may be handed down in a *per curiam* opinion, not of extended length, but at least with a few citations included. The fully developed and traditional opinion, however, is reserved for cases involving new law or new application to old principles.<sup>67</sup> One judge of that court has said that he strives to "use citations precisely but sparsely," and leaves it to "law reviews and text writers to collect the authorities."<sup>68</sup> He does not see the function of an opinion as a crutch for research.

Since an intermediate reviewing court does not have the final legal word in a jurisdiction, the expeditious disposition of cases should be its emphasis. Although a court's opinion should set forth its reasoning, it should be done briefly. Like Illinois, the State of Oregon has an appellate public defender who handles 90% of all criminal appeals.<sup>69</sup> Many of those appeals have little merit and possess no precedential value. Many of the Oregon appeals, however, are decided after oral argument by a brief oral statement recited from the bench. All that appears in the case reports is "affirmed from the bench."<sup>70</sup> As one judge of the Oregon intermediate reviewing court succinctly put it: "Our job

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64. *Id.* at 439 n. 29.

65. *Id.*

66. *Id.* at 441 (footnote omitted).

67. See Jones, *Cogitations on Appellate Decision-Making*, 52 N. Y. St. B. J. 216 (1980).

68. *Id.* at 216.

69. Schwab, *Court Modernization*, 50 WIS. B. BULL. 9, 10 (1977).

70. *Id.* at 10.

is to get on with it . . . ."<sup>71</sup>

The state constitution in California requires that opinions of the courts of appeal be written, stating the reasons for the disposition, but it does not specifically require that all opinions are to be published.<sup>72</sup> The rules of court in California require publication of opinions only in cases where new rules of law are established, where accepted or existing rules of law are modified, where the cases deal with a question of continuing public interest, or where they openly criticize existing law.<sup>73</sup> A majority of the deciding panel determines whether a specific opinion will be published or not. Indeed, only a small percentage are approved for publication. In 1976, only 15.7% of the majority opinions were published throughout all five districts, and the remainder were nonpublished opinions that may not be cited as precedent.<sup>74</sup> In an intriguing analysis, Professor Noonan posits whether we need appellate opinions at all. He says: "Suppose all we had were the facts of the case and the decision, or the

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71. *Id.* at 11. One observer of the appellate scene suggests that *litigants* and their attorneys should have more control over the reviewing process. Since they participate at the trial level in framing pleadings, findings of fact, conclusions of law, judgments, orders, etc., they should have a similar hand in the reviewing procedures. He states:

Why then—when the same amount of money, property or punishment is at issue as it was earlier in the litigation—do we keep the parties from sharing in the appellate proceedings except as recognized advocates? . . . [M]ost cases should receive only memorandum opinions which list the points raised and note in whose favor the issues were resolved. Speed will be the key virtue. For impatient parties who prefer an even speedier decision, the appellate court should accept a waiver of written opinion in exchange for an accelerated place on the calendar . . . . For those parties who rate content as more important than speed, a full written opinion would be served when all the litigants requested it in their briefs.

Leavitt, *supra* note 6, at 23-24. Leavitt further suggests that

[t]he logistics of the decision making process should also be shifted to the litigant's typewriters. Just as trial lawyers submit proposed instructions to the judge for delivery to the jury, appellate attorneys should be deemed capable of submitting appropriate statements for a memorandum opinion or, in the event of a reversal or modification, specific directions for the trial judge to follow. Every brief should be required to have a section devoted to the litigant's recommended sample opinion, which the court could use as it saw fit—hopefully as a time-saving aid, at worst as a warning of what to avoid in a judicious presentation.

*Id.* at 25. This is an intriguing proposal—worthy of further thought and, perhaps, pragmatic experimentation.

72. CAL. CONST. art. VI, § 14.

73. CAL. CT. R. 976(b), 976(c).

74. Wold, *Going Through the Motions: The Monotony of Appellate Court Decision-Making*, 62 JUDICATURE 58, 63 (1978). For a different view, critical of memorandum, unpublished opinions—specifically under Illinois Supreme Court Rule 23—see Record, *Remedies for Backlog in the Appellate Court of Illinois*, 62 ILL. B.J. 82 (1973).

facts, the arguments and the decision. Would there be any loss?"<sup>75</sup>

## THE ILLINOIS EXPERIENCE

### *Progress Through Docketing*

Now let us focus on the Appellate Court of Illinois. To pick a single division, the court for the Fourth District in 1964 had three judges. During that year, exactly 89 cases were filed, an average of 30 cases per judge. In 1980, with five judges (another elected judge having been authorized and another assigned full-time), a total of 868 cases were filed—an average of 173.6 cases per judge. Similar substantial increases in case filings were experienced in other districts of Illinois.<sup>76</sup> The First District in Cook County saw 765 appeals filed in 1964 and experienced an explosion of 6,479 cases filed in 1980.<sup>77</sup>

It became clear during the 1970's that appellate court dispositions were not keeping pace with the rapid increase in workload. The loss of currency and the delays in finality became startling.<sup>78</sup> In 1977, following recommendations of an Illinois Supreme Court committee on appellate court administration, new management practices to expedite appeals were implemented in the appellate court for the Fourth District. The success of this pilot experience promoted, in 1979, the adoption of the new practices by the entire Appellate Court of Illinois.<sup>79</sup>

The system has become known as "Docketing Procedures." Essentially, the system works in the following manner. First, as soon as a notice of appeal is filed in the trial court clerk's office, a copy is mailed to the appellate court clerk. Within two weeks of the notice of appeal, the appellant is required to file with the appellate court a "docketing statement." This document furnishes such significant data as the names of the parties, counsel on appeal, trial counsel, the trial judge, the court reporters, the nature of the case, a brief description of the case, and a certificate by counsel for appellant that he has requested the record and report of proceedings to be prepared. A docketing order is

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75. Noonan, Book Review, 63 CAL. L. REV. 824, 825-26 (1975).

76. See ANNUAL REPORTS OF THE ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS TO THE SUPREME COURT OF ILLINOIS (1964-1980).

77. *Id.* Regarding the caseload in 1968 of the Appellate Court of Illinois, First District, see Address by Hon. R. English, *Crisis in Civil Appeals*, 50 CHI. B. REC. 231 (1969).

78. Martin & Prescott, VOLUME AND DELAY IN THE ILLINOIS APPELLATE COURT, FIRST DISTRICT—A STAFF STUDY, NATIONAL CENTER FOR STATE COURTS (1980).

79. See ILL. REV. STAT. ch. 110A, § 303 (1981).

then prepared by the appellate court clerk and signed by the presiding judge. This order sets forth a complete timetable for the appeal from the date the notice of appeal was filed to the time when a decision may be anticipated. The various fixed dates are computed on the basis of the appropriate supreme court rules and direct when various pleadings and documents are to be filed: the report of proceedings in the trial court; the record; the appellant's brief; the appellee's brief; appellant's reply brief; the month when oral argument can be expected to be scheduled; and, finally, the order states that within 60 days of oral argument a decision may be expected. There is also a *ca-veat* on the docketing order which invites emphasis. This *ca-veat* cautions all counsel to adhere to the timetable, urges that all requests for extension of time be made to the appellate court, and advises that such motions for *extension* are *not favored* and will be allowed by the court only in the most extreme and compelling circumstances.<sup>80</sup>

Prior to the new docketing procedures, the *trial court* normally had control up to the time that the record on appeal was actually filed in the appellate court. The new rules place such control squarely with the *appellate court*. Although the notice of appeal is still filed in the trial court, the minute that the copy of that notice is received by the appellate court clerk, the case is docketed in the appellate court and that tribunal takes immediate control of the case. Once a docketing order has been entered by the appellate court, that tribunal takes direct management of the case and controls the flow of any action in that appeal thereafter.<sup>81</sup> The experience has been particularly encouraging. For example, under prior methods, there was an average timelag of approximately 23 months between the filing of the notice of appeal and the disposition of the case. The average time under the new docketing procedure has dropped to approximately 8.5 to 9 months in the Fourth District.<sup>82</sup>

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80. *Id.*

81. ILL. REV. STAT. ch. 110A, §§ 309, 323 (1981).

82. Statewide, the statistics are similarly impressive. Using the time lapse of one year or less between filing and disposition as a standard, all districts of the Appellate Court of Illinois finalized 2,554 such cases in 1977 under old procedures, and 4,408 cases in 1980 under the new docketing practice. That was a 72.6% increase in expedited productivity. During those same years, the First District increased its disposition from 943 cases to 1,507 cases, amounting to a 60% increase. ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS TO THE SUPREME COURT OF ILLINOIS (1980).

### *The Need for More Innovations*

United States Circuit Court Judge John C. Godbold writes: "Courts have tended to be defensive about giving cases variable appellate treatment, but gradually it is sinking into the judicial consciousness that the reassessments forced by necessity have improved the system."<sup>83</sup> Yet as successful as the docketing procedure has proved to be in the expedition of the Illinois appellate caseload, more innovations will be necessary if the reviewing court is to keep its head above water and maintain relative currency. The statistics over the past few years have demonstrated that the increase in volume is continuing and it is not likely that appellate case filings will decrease.<sup>84</sup>

Traditionally, the path of an appeal traverses four primary routes: the record, the briefs, oral argument, and the decision. Each of these stages of the appellate process are fertile areas for modification, innovation, and restructuring.

#### *The Record*

Record preparation is frequently an expensive portion of an appeal and from a procedural standpoint it can consume the most time, delaying an appeal inordinately. Although the compilation of the common law record or case file in the trial court may be slow, it is more commonly the transcription of the court reporter's trial record that frustrates the timely filing of the report of proceedings. In Illinois, under the current docketing procedures, the potential exists for reducing delays in transcript preparation if the filing deadlines on the docketing order are firmly adhered to, with sanctions imposed for failure to comply. However, the pragmatic problems of doing this are great when a court reporter is constantly being used in the courtroom with little opportunity to prepare transcripts. The solution to this dilemma lies in equalizing the workload among all reporters within a given jurisdiction.

There are a tremendous number of cases where a complete transcript from the trial court is not required for full consideration of the issues involved in the appeal. There are numerous appellate cases where only a brief record is needed for full consideration of the case. Obviously, where a case is disposed of on the pleadings or by way of summary judgment, the record is normally a very short one. In other cases, only a small amount of

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83. Goldbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A.J. 863, 865 (1980).

84. ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS TO THE SUPREME COURT OF ILLINOIS (1980).

testimony is taken and no delay in the preparation of the transcript is justified. There are also cases in which only a certain portion of the trial proceedings need be transcribed as only that portion deals with the one or two issues presented on appeal. It is sometimes possible to encourage stipulated statements by the parties in lieu of a formal, verbatim transcript. This could be accomplished by rule of court, staff screening and selection, and accelerated handling.

### *Briefs*

At the next stage, it has been this writer's experience that on the whole most briefs are simply *too long* and go far beyond what is necessary to present the facts, issues, and legal arguments required for the appeal.<sup>85</sup> If the rule says that 75 printed pages or 100 typewritten pages shall be the maximum,<sup>86</sup> it frequently becomes the minimum. In most cases, a 40 or 50 page brief will be more than adequate. Moreover, if the briefs are shortened, is it not also logical to shorten the filing period? Instead of 35-35-14 days for appellant's brief, appellee's brief, and appellant's reply brief,<sup>87</sup> could we not experiment with 21-21-7? In addition to shortening the length of briefs and their filing periods, the format or content of briefs may well be simplified—particularly in those cases that merely apply the particular facts in the case to well-settled law. In those more simplified or easily-recognized appeals, the form of the briefs could very well be limited to a simple statement of the issues, a list of the authorities relied on, and the argument of appellate counsel.

### *Oral Argument*

Oral argument must be considered in light of the type of case on appeal. Where an appeal is relatively complex or involves novel questions or issues with far-reaching impact, then such cases should be completely and fully briefed. If the judges of the reviewing court perceive no benefit to be derived from oral argument, then the court should be free to dispense with

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85. As Justice Neely of the West Virginia Supreme Court of Appeals has said:

Long briefs are absolutely destructive to a lawyer's case. While charging by the pound for briefs may justify huge bills to clients, the short brief requires more work and is more persuasive. Judges are lazy! Judges are lazy (in case you missed it the first time)! They do not enjoy reading briefs, and when they are required to read 600 pages a week, they have inevitably developed techniques for skimming. A judge will usually read all of a 15-page brief and about 15 pages of a 100-page brief.

JURIS DR., March 1977, at 33, 34.

86. ILL. REV. STAT. ch. 110A, § 341 (1981).

87. ILL. REV. STAT. ch. 110A, § 343 (1981).



oral argument and dispose of the case on its merits through the briefs. If an appeal is adequately and properly briefed, oral argument merely affords an opportunity for an oral reiteration of what is already in the written briefs.

However, there are other cases where oral argument should indeed be encouraged. Those cases which merely require the application of well-settled law to common facts are the types of cases where limited briefing is appropriate and where short oral argument is likely to facilitate and expedite the appeal. This is so particularly in those cases where brief dispositive orders or short memorandum opinions are appropriate, or where a court may render its disposition orally from the bench immediately subsequent to oral argument.

### *Decision*

Traditionally, parties to an appeal will wait for months (and even years) to find out whether they won or lost. To most litigants it is probably immaterial as to *why* they were successful or not—they simply want to know the bottom line, win or lose. In the decided majority of cases that are appealed of right, a brief dispositive order or short memorandum opinion (or even an oral decision from the bench followed by a short order) is really all that is warranted. We have already noted the inundation of written and printed opinions on the shelves. Most of it can be measured by the ton and is of relatively little benefit to legal knowledge. Its compilation, and the lead time required for its rendition, does not significantly add to the sum of our legal learning. Most of those learned opinions could be a one-page order or a 2-3 page unpublished memorandum opinion.

Or why not give the litigants a choice? The parties could (1) waive a written opinion in return for a rapid ruling by a short memorandum disposition, or (2) suffer the delay if they want to wait for a full-blown written opinion with an in-depth analysis of the issues and reasoning for the decision. If the parties cannot agree, shuttle the case to the "slow track."<sup>88</sup>

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88. The Supreme Court of Illinois recently adopted a new Rule 311 which provides for the accelerated docket:

Any time after filing the docketed statement in the Appellate Court, the parties may agree to have their case placed on an accelerated docket. The agreement shall be in the form of a motion signed by an attorney for each party and may provide for submission of an agreed statement of facts in lieu of a record, and memoranda in lieu of formal briefs. The court may then enter an order setting forth an expedited schedule for the disposition of the appeal.

ILL. REV. STAT. ch. § 110A, § 311 (1981). A novel suggestion that should not be cavalierly rejected out of hand is for the court to require that the litigants' attorneys furnish a sample opinion as they would write it in their

### *Screening, Case Management and Use of Staff*

It is apparent that the necessary means for expediting appellate determination are screening, extensive use of central staff and tight case management. Screening by staff attorneys and law clerks at all stages of the appellate process, coupled with tight control by the court of its own order and schedule for the processing of the appeal, can assure that routine appeals are kept on track and disposed of as they should be. Perhaps Professor Meador's goal of 127 days to process the appeal<sup>89</sup> will not be met in every instance, but in the properly screened and expedited run-of-the-mill appeal, it is entirely possible.

### CONCLUSION

All intermediate reviewing courts have become high volume tribunals. The realities of increased population in a highly complex society would indicate that the avalanche of appeals will not be dissipated. It will be the procedural innovations devised and tailored by appellate courts that will determine whether or not we keep our judicial heads above the high watermark.

I have had, upon earlier occasion, the opportunity to suggest "that many of the current reviewing methods of traditional common law America are not only inadequate, but have become antiquated and anachronistic. At the very least, they have not kept pace with our transition over the past 60 years from horsepower to space shuttles, from scrivener-clerks to computers."<sup>90</sup> Unless we come to hard grips with the pragmatic problems of processing appellate cases and devise ways to greatly expedite appeals, the future of our court will simply be relegated to manhandling backlogs instead of resolving legal issues.

Attorneys and judges alike—and all court administrative and research staff personnel—must invent novel procedural tools and experiment with those already tried in other jurisdictions. By trial and error, the best of all procedures from other courts can be adopted. Pride of authorship must have no part to play and any effective procedure from one jurisdiction can be modified and altered to other appellate systems if it will further expedite appellate review. As Woodrow Wilson once said, "But why should we not use such parts of foreign contrivances as we want if they may be in any way serviceable? We are in no dan-

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case and attach it to their briefs. Leavitt, *supra* note 6, at 25. An experiment of this nature might well prove fruitful.

89. Meador, *Through the Appellate Court in 127 Days*, 20 JUDGES' J. 59 (1981).

90. Mills, *The Illinois Appellate Court: A Chronicle and Breviary of Intermediate Review*, 3 S. ILL. U. L. J. 373, 392 (1981).

ger of using them in a foreign way. We borrowed rice, but we do not eat it with chopsticks.”

I have suggested some procedures that have been found to be effective elsewhere and which should be tried in my tribunal's arena, with proper tailoring to our own fabric. I hope my colleagues and the members of our bar will critically and constructively examine those suggestions—implementing those which are meritorious and abandoning those which will not effectively further the mandate of the Illinois Constitution “for expeditious and inexpensive appeals.”<sup>91</sup>

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91. ILL. CONST. art. VI, § 16 (1970).