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TOWARD ORALLITY AND VISIBILITY IN THE APPELLATE PROCESS

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In many American appellate courts a marked effect of the large and rapid rise in the volume of appeals has been the increasing reliance upon briefs as the means of communication from the advocates to the court, with a corresponding diminution in the role of oral argument. The appellate process has thus become increasingly a paper process. Appellate courts, already well-screened from lawyers and the public, are becoming ever more invisible to the world outside.

Resistance to this trend on the part of the bar and many appellate judges has developed in the form of efforts to restore oral argument to the process and bring a larger measure of visibility to appellate courts' work. How this objective can be accomplished amidst the relentless pressure of evergrowing dockets presents a formidable challenge.

This article undertakes to describe the developments beginning in the late 1960's that brought about the shift away from oral argument and the corresponding loss of visibility. The piece suggests reasons for apprehension among the bench and bar and then describes the developments, experiments, and ideas aimed at greater orality. It concludes with a description of an appellate process designed to combine optimally oral presentation and other procedural features.

I. THE SHIFT TO PAPER: LOSS OF ORALITY AND VISIBILITY

Although it is difficult to say with certainty where the movement away from oral argument and toward the paper process began, it is probable that it was in the United States Court of Appeals for the Fifth Circuit in the late 1960's. That court, then the largest of the federal appellate courts, was being severely pressured by the increase in its caseload. To ward off inundation, the court devised an internal procedure whereby each appeal would be screened by judges. Those cases having certain characteristics identified by the court in what was to become famous as its Local Rule 21 would be disposed of on the briefs and the records by a three-judge panel without oral argument and without a full written opinion.[1]

For decades, of course, much appellate business has been disposed

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1. For a description of the Fifth Circuit's then new internal procedures see Bell, *Toward*

of on written submissions alone. Where the court's jurisdiction is couched in discretionary terms, as, for example, in the U.S. Supreme Court certiorari jurisdiction,[2] the court acts on the papers and denies review without opportunity for oral argument. Also, in appeals on the merits, lawyers have long been entitled to waive argument. What was novel in Local Rule 21 was the concept that in an appeal of right—in the first level of review above the trial court—the court itself would decree that no oral argument could be presented and that the case would be decided solely on the briefs.

This pioneering step by the Fifth Circuit was soon being discussed in judicial circles throughout the country.[3] Its apostles were eager to spread this gospel of the new appellate order. It was advanced primarily on the grounds of necessity.[4] The premise relied upon for this argument was difficult to dispute. If heavily burdened appellate courts, confronted with ever-rising caseloads, continued to hear oral argument in every case in which argument was requested by one of the parties, the courts' backlogs would become unmanageable. But there were also those who argued that the procedure had much to commend it on its merits.[5] The argument here was that appeals differ greatly in their complexity and difficulty, that appeals do not all deserve identical treatment by the appellate court; according to the argument, internal processes could be tailored to the relative ease of decision; an appeal, it

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a More Efficient Federal Appeals System, 54 JUDICATURE 237 (1971). The Fifth Circuit's Local Rule 21 reads as follows:

> *Rule 21. Affirmance without opinion.* When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
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> In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21. . . ."

2. 28 U.S.C. § 1254 (1966).

3. *See, e.g.*, Christian, *Using Prehearing Procedures to Increase Productivity*, 52 F.R.D. 55, 55-57 (1971). *See also* Murphy v. Houma Well Service, 409 F.2d 804, 805 (5th Cir. 1969) (noting that "the need for exercising judicial inventiveness to increase productivity and expedite disposition" is shared among the nation's courts of appeals); Huth v. Southern Pacific Co., 417 F.2d 526, 527 (5th Cir. 1969) (explaining the Fifth Circuit procedure for the benefit of "the Bar of this Court, the Federal Judiciary across the nation, scholars and others interested in judicial administration").

4. Christian, *supra* note 3, at 55-57; Murphy v. Houma Well Serv., 409 F.2d at 805; Huth v. Southern Pac. Co., 417 F.2d at 527.

5. *See, e.g.*, Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, 274-89 (1973).

was thought, should get as much judicial attention as it deserved, but no more. It was thus asserted that many appeals could be decided soundly and fairly without oral argument. The idea spread in the early 1970's, and many appellate courts throughout the country began to incorporate into their processes the selective use of the briefs-only, no-oral-argument procedure.[6]

It is noteworthy that this development came about entirely from within the appellate courts. Unlike many procedural reforms in Anglo-American history, this alteration in procedure did not stem from the urgings of lawyers or from public pressure. Indeed, lawyer unhappiness and outright hostility to the cutting off of oral argument was apparent from the outset.[7]

II. ANXIETIES AND REACTIONS

Another development that appeared on the appellate scene at the same time intensified lawyer uneasiness. This was the advent and rise of central staff attorneys. The pioneer in the use of central staff by appellate courts was the Court of Appeals of Michigan.[8] It quickly developed the largest and most effectively organized staff of any appellate court in the United States. In that court, however, the installation of a central staff of attorneys was not coupled with any diminution in the role of oral argument. These two innovations in appellate courts need not be linked: a court can reduce oral argument and shift to a largely paper process without any central staff; on the other hand, a court can have a central staff and yet adhere to the traditional process employing oral argument. Credit for melding the two belongs to the Court of Appeal for the First Appellate District of California.[9]

As is the case with many new ideas, viewed retrospectively they

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6. The Fourth, Sixth, and Seventh Circuits enacted local rules dispensing with oral argument for frivolous appeals and cases in which the court was without jurisdiction. The D.C., First, Third, Fifth, Eighth, Ninth, and Tenth Circuits devised rules authorizing the court to decide any case without oral argument if the judges decided that oral argument was unnecessary. Haworth, *supra* note 5, at 265-67.

7. *See, e.g.*, P. CARRINGTON, D. MEADOR & M. ROSENBURG, JUSTICE ON APPEAL 16-24 (1976). Where argument would require lawyers to travel significant distances to attend the proceeding, however, lawyer response to curtailing oral argument was favorable. Lawyers have responded in opinion polls that they would favor long distance electronic arguments rather than face-to-face confrontation where travel is a significant factor. *Id.* at 20-21. For a description of the effects of high case volume on the availability of oral argument, see R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 23-26 (1981).

8. D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 9-11 (1974); Lesinski & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals*, 26 VAND. L. REV. 1211, 1213 (1973).

9. D. MEADOR, *supra* note 8, at 11-12; Christian, *supra* note 3, at 55-57.

seem simple and obvious: if each of these two new developments by itself could expedite appellate business and assist overburdened judges, then together they would have a magnified impact. Indeed, the total benefit for the appellate court might even exceed the sum of the two parts. Thus, in the California court a central appellate staff was assigned the function of identifying the cases appropriate for decision on the briefs alone;[10] this staff-screening function relieved the judges of that burden, one that the Fifth Circuit plan required them to carry. In addition to freeing the judges from the screening task, the central staff also prepared a research memorandum to assist the judges in understanding the case more quickly, and the staff also prepared drafts of short proposed opinions by which the judges could dispose of the cases. This is the model that was in turn tested and demonstrated further in the Appellate Justice Project sponsored by the National Center for State Courts from 1972 to 1974.[11] It became the basic model copied widely by busy appellate courts—especially intermediate appellate courts—throughout the country. By the end of the 1970's such internal processes and central staff work had become generally accepted as permanent and essential parts of contemporary American appellate courts.[12]

In the meantime, the introduction of central staff attorneys into appellate courts exacerbated the anxiety felt by the bar over the erosion of oral argument. Many lawyers perceived that the presence of staff attorneys created a risk that the judges themselves might give too little attention to the cases.[13] In fact, staff attorneys were intended to strengthen the process by helping busy judges grasp more readily the key points in an appeal; experience has shown that central staff accomplishes this objective and that in many instances the quality of appellate adjudication improved through the use of central staff.[14] Nevertheless, in the minds of many laywers, apprehension about the loss of visibility was intensified by concern over whether the cases were actually being decided by staff attorneys and rubber-stamped by the

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10. *See* Chapper, *Fast, Faster, Fastest: Appellate Courts Develop Special Track to Fight Delay*, Judges' J., Spring, 1981, at 50, 55.

11. This project is reported in D. MEADOR, *supra* note 8, *passim*. The courts involved in the project were the Supreme Courts of Nebraska and Virginia, the Appellate Court of Illinois, First District, and the Appellate Division of the Superior Court of New Jersey.

12. The concept of central staff attorneys was formally endorsed in ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS, Standard 3.62(b) (1977). For a description of by-then accepted usages of staff attorneys, see Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A. L. REV. 465, 469-475 (1976). *See also* D. STERN, *supra* note 7, at 27-30.

13. *See* Cameron, *supra* note 12, at 475-77.

14. *See* D. MEADOR, *supra* note 8, at 130-31.

judges.[15] Some judges shared in the apprehension over what they perceived to be a threat to the judicial process.[16]

It did not allay these anxieties for proponents of staff assistance to say that judges in the main are conscientious and will not abdicate their judicial responsibility. There is no evidence that any judge has failed to give to each case the attention it deserves. Here again one senses the continued vitality of the notion that justice must satisfy the appearance of justice, that justice must be seen to be done as well as in fact to be done.

Bar attitudes concerning the value of oral argument were reflected in a study in three circuits sponsored by the Commission on the Federal Court Appellate System (the Hruska Commission). The study found that 90% of the lawyers surveyed believed that oral argument is helpful to judges in deciding cases and to lawyers in addressing issues of concern to the judges.[17] The most impressive professional pronouncement on the subject came through a 1974 resolution of the House of Delegates of the American Bar Association to the effect that oral argument be retained.[18]

Although bar resistance to the disappearance of oral argument may have been influenced in part by the traditional aversion of lawyers to any change in familiar and long-established procedures, there is at bottom something more fundamental. Deep within the Anglo-American legal psyche, mixed in with notions about the opportunity to be heard and the concept of due process, is the idea that a litigant and his lawyer should be able to face their judges and communicate directly to them.[19] Nothing else affords the same assurance that the judges in fact

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15. Cameron, *supra* note 12, at 476.

16. Higgenbotham, *Bureacracy: The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 264-65, 271 (1980); Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60, 62 (1982); McCree, *Bureaucratization of Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787-90 (1981); Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648, 653-56 (1980).

17. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 47 (1975).

18. The Resolution reads as follows:

> *Be It Resolved*, That the American Bar Association express its opposition in an appropriate manner to the rules of certain United States Circuit Courts of Appeals which drastically curtail or entirely eliminate oral argument in a substantial proportion of non-frivolous appeals and, *a fortiori*, to the disposition of cases prior to the filing of briefs.

HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES: ABA ANNUAL MEETING, REPORT NO. 134, at 6 (1974).

19. English legal history is replete with the phrase "hear and determine" in reference to the duties of commissions, justices of the peace, and judges to adjudicate controversies. Haworth, *supra* note 5, at 303-04. The earliest uses of the phrase, dating back to 1285, were in

have been confronted with the theories and arguments of the parties and have put their minds to the case. The acceptability and the integrity of the judicial process may be heavily affected by such assurance, and only the visible, orally presented appellate proceeding can provide it. In addition, a proceeding in open court affords the judges an opportunity they would not otherwise have to interrogate counsel and to clarify points that may have been left unclear by the one-way communication of a brief. Thus what is at stake in this controversy over the trend toward a paper appellate process may be nothing less than the soundness of appellate decisionmaking and, ultimately, public support for law as enunciated through appellate decisions.

The difficulty of effectuating the ABA position unqualifiedly has been that the position does not altogether take into account the contemporary realities of appellate business. The fact is that the appellate courts were—and many still are—in a state of near crisis as a result of the unprecedented volume of business. Adoption of measures expedient—if not altogether sound—has been imperative to prevent unacceptable backlogs from accumulating and to afford the courts some hope of keeping reasonably abreast of the never-ending caseflow.

This tension between expedience necessary to survival, on the one hand, and the ideal process, on the other, yielded a fresh insight: a central difficulty with the traditional American appellate process, in the context of high volume, is its redundancy in requiring both written and oral submissions. Each of these is a form of communication from the lawyers to the judges. At least in some cases, it seems entirely unnecessary for both forms of communication to be employed. The point is that an advocate must communicate to the judges the key facts in support of his position, the pertinent legal authorities, and the reasons why the advocate asserts that the court should decide the case in favor of his client. In many cases all of this can be effectively communicated in either written form or oral form, but both are not necessary. One virtue of the move toward briefs, exemplified in the Fifth Circuit's Local Rule 21, is that it implicitly recognized this proposition. Its solution was to dispense with the oral medium of communication and rely upon the written. The still newer insight that emerged out of bar reactions to that development was that a move in just the opposite direction might be more desirable in some types of cases, i.e., that the written form of

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connection with trial court proceedings, "where one would expect most of the proceedings to be oral." *Id.* *See also* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 273 (7th ed. 1966) (describing the court of oyer and terminer whose function was to "hear and determine particular offences and trespasses"); 4 W. BLACKSTONE, COMMENTARIES 255. *But see* Haworth, *supra* note 5, at 304-05 n. 250-52.

communication be dispensed with and reliance placed instead upon the oral submission.

That idea began to be discussed seriously in the United States in the 1970's.[20] Since then it has been tinkered with in various experiments and demonstrations, but it has not been widely accepted in practice.

III. IDEAS AND EXPERIMENTS

The idea of emphasizing oral argument and deemphasizing briefs developed through a decade-long series of proposals and projects. The most significant of these are described below. In addition to these, there were numerous unpublished and undocumented discussions of the idea throughout the decade of the 1970's.

A. *The Hufstedlers' Proposal*

In the early 1970's, Seth and Shirley Hufstedler put forward a set of proposals for revamping the appellate pyramid in California.[21] They were among the first to articulate the distinction, which later became familiar, between review for correctness and review for institutional purposes. They argued that procedures in these two types of review can properly differ from one another.

Review for correctness would be the first level of review and would be available as a matter of right to losing litigants immediately following the trial court's decision. This is the type of review typically provided by an intermediate appellate court; it is assumed to involve little making of precedent. The procedures to be employed at that level, according to the Hufstedlers, should be relatively informal and expeditious. They would resemble procedures typically employed in connection with new trial motions more than traditional American appellate procedures.[22]

The appellant would file a document setting forth the points to be asserted on the appeal, a summary of the facts, and the essence of the legal argument. The appellee would file a similar statement in response. The case would then come on promptly for oral argument, through which the issues would be fully explored. The court would render its decision, either orally or in writing, immediately or within a

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20. *See infra* notes 21-23, 30-47 and accompanying text.

21. Hufstedler & Hufstedler, *Improving the California Appellate Pyramid*, 46 L.A. B. BULL. 275 (1971); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, *passim* (1971).

22. Hufstedler, *supra* note 21, at 911.

short time. A transcript of the record would be prepared only to the extent that the resolution of one or more issues in the appeal required it.

In short, this proposal deemphasizes reliance on formal written briefs and accentuates the role of oral argument. It also assumes that the appellate process can function effectively in many cases with little or no transcript of the record. It stresses informality and expedition at the first level of appellate review. This proposal was a significant factor in bringing about the Arizona project described below.

B. *Lessons from England*

In England orality has always dominated the appellate process. Throughout history, face-to-face oral presentation by lawyers to judges has been the near-exclusive means of communicating the arguments of counsel to the court.[23] The practice continues today in the Court of Appeal and in the House of Lords.[24] If there is any doubt as to whether such a procedure can work, the doubter need only spend some time sitting in on the public sessions of those courts.

The procedure for handling criminal cases in the Court of Appeal affords the best model for potential American adaptation.[25] The Criminal Division of the Court of Appeal sits in three-judge panels. Each panel hears and decides approximately four or five cases daily. The judges do little of their case-deciding work in private: their work in considering the arguments of counsel, analyzing the facts and the law, conferring with each other, reaching a decision, and stating their opinions is all carried on in the open courtroom before the lawyers and any spectators who may be present.

Although there are no briefs in the American sense, English judges do not come to the oral hearing cold. In criminal cases, there is a previous written communication from the appellant's counsel. It takes the form of a statement of "grounds for appeal." This statement, typically one or two pages, succinctly sets out the key points to be argued. In other words, the errors claimed by defendant's counsel are set forth with a capsuled legal argument. Key statutes and cases may be cited. This statement serves to notify the staff lawyers and the judges as to the issues to be argued on appeal. The record in a criminal appeal typically consists of the trial court papers, which, in American terms, would

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23. *See supra* note 19 and accompanying text.

24. *See* D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND, 93-95 (1963).

25. These procedures are described in detail in D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS (1973).

include the indictment, the instructions to the jury, and the verdict. All of these papers initially go to the Registrar of Criminal Appeals.

The Registrar's office employs a large number of staff attorneys working exclusively on criminal cases. That office may call for additional portions of the record, including the transcript of testimony of one or more witnesses. With all necessary papers in hand, a staff attorney prepares a memorandum on the case, similar to the kind of research memorandum prepared by an American central staff attorney. Each of the three judges sitting on the case has all of the papers in the case, including the staff memorandum, prior to oral argument.[26] The custom is for the judges to read those papers shortly prior to the argument.

An oral presentation of counsel in the Court of Appeal in England is unlike oral argument typically heard in an American court. To understand the procedure, an American must think of the proceeding as a combination of oral argument by counsel and conference of the judges among themselves. There is no fixed time limit on the argument; it proceeds as long as the judges find argument useful. It is an informal give-and-take, with the judges asking probing questions. The argument may be interrupted from time to time while the judges confer among themselves or read portions of authorities cited by counsel. Every issue in the case is explored until the judges are satisfied that they have heard sufficiently from counsel for both sides. They then confer among themselves on the bench for a few minutes. At the conclusion of that conference one of the judges states the reasoning and conclusion of the court. Each of the other two judges may then add whatever supplementary comments or line of reasoning he cares to make. Thus, within the space of an hour or a bit more the entire case is heard, considered, and finally decided.[27]

Of course it is necessary to bear in mind that circumstances in England differ from those in the United States. In England there is no federal system; the judges need deal only with the law of a single jurisdiction. The body of relevant case law is smaller in England. Key precedents on any given issue are likely to be fewer in number than in the United States. The bar is a more cohesive, better disciplined, more homogeneous body than the bar in the United States. This holds true as well for the judges themselves, all of whom have been former barristers in the very bar that appears before them. All these factors make it

26. For a set of these papers taken from an actual appeal see *id.* at 204-25.

27. For a verbatim transcript of an oral hearing in the English Court of Appeal and a copy of the Court's decision in the case see *id.* at 226-51.

somewhat easier for this style of appellate procedure to function more effectively in England than in the United States.

Interest in possible American adaptations of at least some features of this English procedure was heightened as a result of the American Bar Association meeting in London in 1971 and the publication in 1973 of an examination of English criminal appeal practice that also put forward suggested American reforms.[28] Among those suggestions was the idea of a shift to oral argument as the principal means of communication to the court in routine criminal appeals. This idea was discussed within the Advisory Council for Appellate Justice and was identified in a special report of the Council, issued in 1973, as deserving further study.[29]

C. *The Arizona Experiment*

Putting together some of the key features of the Hufstedlers' proposal and the English appeals practice, judges and lawyers in Arizona organized an experimental, simulated appellate process. The experiment was monitored and evaluated under the aegis of the National Center for State Courts.[30] More than three hundred lawyers participated in the project in Phoenix and Tucson.

The objective was to test the feasibility of the presentation and decision of appeals with a short written memorandum from counsel, a staff attorney's memorandum, and oral argument but no transcript of the trial testimony. In order to use as much as possible of existing procedures and to avoid added burdens on the lawyers for the parties, the argument of new trial motions in the trial court was taken as the setting for the project. In each case in which a new trial motion had been made and was to be argued orally, a panel of three lawyers was assembled to sit and hear the argument along with the trial judge. This panel of three lawyers was the simulated appellate court. A staff attorney was engaged to prepare a memorandum on each case in the style used by staff counsel in appellate courts. This memorandum was made available to the lawyer panel prior to the oral argument. The three lawyers simulating the appellate court could question the advocates freely; there was no time limit fixed for the proceeding. At the conclusion the

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28. D. MEADOR, *supra* note 25.

29. COMMITTEE ON CRIMINAL APPEALS, ADVISORY COUNCIL ON APPELLATE JUSTICE, EXPEDITING REVIEW OF FELONY CONVICTIONS AFTER TRIAL, FJC RESEARCH SERIES NO. 73-1, STATE COURTS WORK-IN-PROGRESS SERIES PUBLICATION NO. NCSC W0003 (Aug. 1973).

30. ARIZONA APPELLATE PROJECT REPORT, REDUCING THE TIME AND COST OF THE APPELLATE PROCESS (1976).

three lawyers constituting the panel withdrew to undertake to decide the case as though they were the appellate court.[31]

These simulated appellate panels heard a total of 75 cases. They reported that they were able to reach a decision in 75% of them but were unable to come to a decision in 25%.[32] The main reason assigned for inability to reach a decision was the lack of a transcript; the lack of the traditional written briefs was not assigned as a reason for inability to reach a decision in any case.[33]

The questionnaire responses submitted by the lawyers who acted as judges reveal the following views about the adequacy of oral argument: more than adequate 32%; adequate 48%; less than adequate 20%.[34] Oral argument in these cases was not presented in the traditional sequence; rather, the hearing was quite informal with lawyers for both sides responding to the same questions in a give-and-take fashion. The reactions of the participants suggested that this style of oral hearing was more likely to be informative for the judges and to help them gain a better understanding of the issues than the typical sequence of appellant followed by appellee.[35]

This was not an experiment focused exclusively on the presentation of an oral appeal without briefs; it also involved the absence of a transcript. Thus it is difficult to determine from overall evaluations precisely what the strengths and weaknesses would have been in a process that had a transcript but also depended heavily on oral argument with little or no briefing. In general, however, overall ratings of the procedure were favorable: highly desirable 17%; desirable 50%; undesirable 33%.[36]

The project report, prepared by the National Center for State Courts, reached the conclusion that presentation of an appeal through this process is feasible. The type of case in which it seemed most feasible was the motor vehicle tort case; it seemed least feasible in contract cases.[37]

D. *The Boulder Simulation*

The American Academy of Judicial Education conducted its first judicial writing seminar for appellate judges in Boulder, Colorado, in 1974. One afternoon was devoted to an experiment in appellate deci-

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31. *Id.* at 10.
32. *Id.* at 12.
33. *Id.* at 12-13.
34. *Id.* at 14.
35. *Id.* at 19.
36. *Id.* at 16.
37. *Id.* at 19.

sionmaking. The object was to determine whether these judges could soundly dispose of a criminal appeal on the basis of oral argument without briefs and by a decision announced immediately following the argument.[38]

Twenty-four of the 26 judges participating sat on state courts of last resort or on state intermediate appellate courts; one was a state trial judge; one was a Canadian appellate judge. Three-fourths had never participated in the decision of an appeal on the basis of oral argument without briefs.

The case was adapted from an appeal in which a state supreme court had recently affirmed a conviction for attempted rape. The papers had been edited slightly so that a single issue was posed: the legality of the warrantless seizure in the defendant's apartment of a shirt which was introduced into evidence against the defendant. This was the principal issue in the actual appeal. Each judge was provided with the following material twenty minutes before oral argument commenced: the indictment and the judgment of conviction and sentence (4 pages); a transcript containing only the testimony pertinent to the seizure issue (50 pages); a statement of points filed by appellant and a statement in response filed by appellee (2 pages); a staff attorney's research memorandum on the seizure issue posed by the parties' statements (8 pages). At the close of the twenty minutes (during which each judge studied these papers) oral argument commenced. The 26 judges sat at a table side-by-side facing counsel, but they were designated into threesomes (and one foursome) so that each judge could have the sense of being in a typical panel beside colleagues with whom he could discuss the case. The argument for each side was presented by a member of the bar experienced in criminal appeals. The attorneys were well prepared in advance.

Oral argument commenced with appellant's presentation, followed by appellee's presentation. No time limit was set. Argument was to continue as long as the judges found it helpful. Each attorney in fact consumed 34 minutes. Questions from the bench were frequent. At the conclusion of oral argument each judge immediately wrote a short per curiam opinion (specified to be not more than two pages) deciding the case for his court. He was given twenty minutes for this task.

After the judges submitted their opinions each was asked to complete a questionnaire. Some of the questions and responses were as follows:

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38. A full description of this exercise is contained in 2 ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975, MATERIALS FOR A NATIONAL CONFERENCE, SAN DIEGO, CALIFORNIA, 74-78 (1975).

	Yes	No
— Did you feel comfortable in reaching a decision, that is, were you reasonably confident that you understood the pertinent facts and legal authorities and that you had adequate time to think about the case?	22	4
— Do you think it would have been feasible to announce your decision orally from the bench immediately after the close of the argument, or within a few minutes thereafter?	24	2
— If you felt reasonably comfortable in reaching a decision through this process, do you think you could have coped adequately with the case under this kind of procedure if it had presented 3 or 4 issues instead of one?	Probably No It depends	6 4 13

In the minds of those saying "It depends," the main consideration was the complexity or the simplicity of the additional issues.

Only a small minority indicated specific concern about the process in the actual case used. The absence of written briefs was noted as a problem by only three of the 26 judges. Only two thought that oral argument was not long enough or not fully enough developed.

The 26 judges assessed the value of the staff attorney's memorandum in the process as follows: of little value (2); moderately helpful but not essential (3); quite helpful (12); essential (9).

At least in this demonstration case this variation from the conventional American appellate process proved workable. The large segments of time saved by such a process are the time consumed sequentially by the lawyers for both sides in writing briefs and the time consumed by the judges in constructing and circulating (and perhaps holding conferences on) written opinions. The intensity of judicial scrutiny seemed adequate to the legal problem presented.

Despite some qualifications and unanswered questions, this exercise suggests strongly that both an oral proceeding and a prompt decision are feasible in American appellate courts, at least in relatively uncomplicated cases. A research memorandum by a professional assistant is probably a necessary feature of such a process to assist the judges' understanding and to insure sound adjudication.

E. *The ABA Chicago Demonstration*

At the 1977 annual meeting of the American Bar Association in Chicago, the Young Lawyers Division presented a carefully designed demonstration of the presentation of an appeal through oral argument without briefs. The case was taken from an actual criminal prosecution in which there had been an appeal from a conviction. The sole issue involved on the appeal was an alleged unreasonable search by the police of the defendant's premises, and the transcript was limited to that question.[39]

The court hearing the appeal consisted of Judge Shirley Hufstedler, then on the U.S. Court of Appeals for the Ninth Circuit, the late Justice Robert Braucher of the Supreme Judicial Court of Massachusetts, and Justice Winslow Christian of the Court of Appeal of California. Counsel for the parties were Chesterfield Smith of the Florida Bar and Aubrey Daniel of the District of Columbia Bar. Prior to the oral argument a statement of points was presented by each side. The statement for each party consisted of a single page on which the party's basic contentions and supporting arguments were set out, along with citations of a few key supporting cases.

No time limit was set on the argument of either side, although because of practical constraints of program time it was understood that each counsel would be allotted approximately thirty minutes. The judges were instructed in advance as to their role in a proceeding of this sort. They were told that because there were no briefs they would be entirely dependent upon counsel's presentation in open court for full development of the legal argument and pertinent legal doctrine. The judges were also instructed to retire at the conclusion of the argument to consider whether they felt comfortable in reaching a conclusion on the merits of the case and then to report back to the audience whether they could decide the case meaningfully through this process.

The proceeding unfolded in this manner before a sizeable audience of lawyers. The judges actively questioned counsel for both sides. At the conclusion of the argument they retired to deliberate and reappeared on the bench in approximately fifteen minutes. All of the judges stated that they felt in this case they could, with confidence, reach a conclusion on the merits and that they could state reasons for the conclusion. After each judge made a statement to this effect, there were questions and comments from the audience. The entire program lasted approximately two hours. In the view of many present, it

39. No written record was made of this program and there has been no written report of its results.

demonstrated the feasibility of an exclusively oral presentation of an appeal in a relatively simple American criminal case.

F. *The California Experiment*

The Action Commission to Reduce Court Costs and Delay, created by the American Bar Association in 1979, took as one of its objectives the testing in appellate courts of a procedure that would emphasize oral argument of counsel and would deemphasize reliance on briefs. The Court of Appeal of California for the Third Appellate District, sitting in Sacramento, agreed to conduct an experiment in cooperation with the Commission. That experiment, commenced in February 1981, provides the most substantial body of data yet collected on the practicability and desirability of such a process in an American court.[40]

The experiment was limited to civil appeals. The appeals subjected to this experimental expedited process were selected through a screening procedure operated by a staff attorney. Briefing in the selected cases was not eliminated but was substantially restricted; a brief could not exceed ten double-spaced typed pages. The courts scheduled oral arguments within approximately thirty days after the filing of the appellee's brief. No time limit was set on the argument of counsel. The court delivered its decision within ten days after oral argument.

During the first twelve months of the experiment more than 100 appeals were heard and decided under the expedited procedure. In these cases the overall elapsed time from the filing of notice of appeal to the court's decision averaged just over eight months. The overall elapsed time in appeals following the traditional process had been 14 months. This expedited process, emphasizing oral argument and deemphasizing briefs, cut overall dispositional time by approximately 40 percent.

Structured interviews with 165 of the 212 attorneys involved in these appeals revealed that they thought the process was no less fair than the traditional appellate process. The attorneys thought that the ten-page limitation on briefs did not prevent adequate presentation of the cases. They believed that the shortened briefs gave the opponents and the court adequate notice of the parties' positions on the issues raised and that they provided a framework for the oral argument. A

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40. Joy Chapper and Roger Hanson have drafted a comprehensive report on the results of this experiment. *See* Chapper & Hanson, *Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal*, 42 MD. L. REV. 696 (1983). *See also* Chapper, *supra* note 10, at 50.

majority of the attorneys reported that they spent less time in brief preparation than they did under the traditional briefing procedure. The judges sitting on these appeals and the staff lawyers observing the oral arguments noted a higher level of exchange between the court and the attorneys, with more questioning and probing than usual by the judges. The judges believed that this procedure promoted greater clarity in the presentation of issues.

IV. A MODEL FOR FURTHER EXPERIMENTATION

The various ideas, tests, and simulations looking toward an enhanced role for oral argument in the American appellate process, with a corresponding diminution in the role of briefs, have set the stage for more wide-spread and intensive experimentation now. In addition to what is described above, since the early 1970's there have been numerous discussions at bar meetings and conferences on this subject. Whenever the idea of reversing the trend toward exclusive reliance on briefs has been broached, especially when put in terms of an almost exclusive reliance on oral argument, the response typically has been that American judges cannot handle cases without elaborate briefing, that American lawyers are so inept that appellate argument cannot be presented effectively in oral fashion, and—the real clincher—that no American court has ever adopted the idea, thus proving, apparently, that it has no merit in the American context, even though it works effectively in England.

The experiences of the last decade have now gone far toward rebutting these arguments, but they are still little known to the great mass of American judges and lawyers. The program now going on in the California Court of Appeal in Sacramento is being publicized by its promoter, the American Bar Association Action Commission to Reduce Court Costs and Delay. That publicity should do much to help dispel doubts.

From that project and the others described above, lessons have been learned and ideas have been refined. The profession is now in a better position than it was a decade ago to design an effective procedure for presentation of an appeal through oral hearing with little briefing. Certain conditions and circumstances affect the workability of the proposed process; it is likely that the process will not work effectively in all types of cases or in all courts.

Observation and experience suggest that a successful move toward orality is most likely when the following circumstances obtain:

1) Where the case is not complex and the issues presented on appeal are relatively few and readily understandable;

2) Where there are no substantial problems of delay in getting necessary trial transcripts prepared (a jurisdiction with computer-aided transcription would be an optimum forum);

3) Where the docket of the court is such that cases can be scheduled for oral argument within a few weeks of filing in the appellate court;

4) Where the lawyers handling most of the practice in the appellate court are located in proximity to the court and thus are not required to incur substantial time and expense in travel;

5) Where the judges of the appellate court are receptive to trying procedures to improve the administration of justice, even if such procedures are novel and untested.

The presence of all of these circumstances in a particular appellate court makes it an ideal forum for an effective focus on oral presentation. The absence of one or more of these circumstances makes the undertaking more difficult.

Given a reasonably promising appellate forum for the installation of this process, the judges and the bar should cooperate in designing a procedure adapted to local conditions. The objective should be to design a process that permits counsel for the litigants substantially to dispense with writing briefs and to present the case orally to the judges within a relatively short time after conclusion of the trial court proceedings. To that end, drawing upon the experiences of the last decade, the following procedures are suggested as a model, or at least as a starting point from which each court can design its procedures.

The appeal would be initiated, as under present practice, by the filing of a notice of appeal. Within ten days of that filing the appellant would be required to file a "statement of points," limited to five double-spaced typed pages. This statement would briefly identify the precise issues the appellant wishes to tender on appeal and contain a highly succinct summary of the argument or theory on which the appellant relies. Citations of pertinent statutes and cases should be included.

Within ten days after service of appellant's statement of points the appellee would be required to file a statement in response, likewise limited to five double-spaced typed pages. In this response the appellee would state his position on each of the appellant's points and would include a succinct summary of the theory being relied upon by the appellee, along with citations of pertinent statutes and cases.

After pertinent parts of the trial record were filed, the case would be referred to the central staff attorneys in the appellate court. A staff attorney would then prepare a memorandum on the case, in the style

now familiar to many American appellate courts. The memorandum would summarize the key facts and the arguments of the lawyers. It would conclude with the staff attorney's evaluation of the arguments, the conclusions reached by the staff attorney based on his study of the case, and, if the court so desired, a recommended disposition.

An important part of the staff memorandum would be a listing of points to be explored on the oral argument. The memorandum could state precise questions to be asked of counsel by the judges, or it might more generally suggest lines of inquiry to be pursued.

A few days before the scheduled oral hearing each judge would receive the papers described above. A judge's preparation for oral argument would consist of his reading the statements of the opposing counsel and the staff attorney's memorandum. The judge could, of course, refer to pertinent parts of the transcript if he found doing so necessary.

The case would then come on for oral argument with no time limits fixed for counsel. It is crucial to the success of this procedure that the judges and lawyers not view it in the same way in which they now view and have long viewed the oral argument of an appeal in an American appellate court. Rather, the proceeding here should be viewed in the way an oral hearing is viewed in the English Court of Appeal. The occasion is an amalgam of counsel's presentation of argument and authority, the judges' probing of counsel, and the judges' conferring among themselves as they proceed. In short, it is a combination of the typical American oral argument and the court's closed conference. The two are blended in the open courtroom. The proceeding should last as long as the judges consider it helpful. The judges should be free to question counsel back and forth and not be bound by a pre-determined sequence.

The manner in which the judges deliver their decision is not linked to this oral proceeding. If the judges prefer, they can continue to decide cases presented in this manner through the traditional style of written opinion typically rendered several weeks after the oral argument. On the other hand, they can build into this procedure the practice of retiring from the bench and returning after a brief interval to announce their decision and reasons without any written statement. Such oral statements would be transcribed and become part of the record of the case, available to the parties. Such statements could even be published if they were deemed worthy of that treatment. As a third option, the judges could retire and decide the case and issue a shorter-than-usual opinion within a day or two. Maximum expedition and

economy of judicial effort in resolving the appeal would be achieved by either the second or third process.

As indicated earlier, not every type of case is equally suited to this treatment. Cases that are more complicated than average or that contain a large number of difficult issues may require briefs to assure adequate judicial consideration. Thus, a court adopting this procedure would need to devise some system for identifying the cases in which it would be most appropriate. There are two basic approaches to such a sorting process. One is to identify by court rule the categories of cases to which the oral procedure would apply. For example, the procedure could be applied to all criminal appeals but not civil appeals; it could be applied to all motor vehicle tort cases; it could be applied to all cases in which the opposing parties mutually agree to the procedure, and so on. The other approach is to install a screening process that would identify cases as appropriate or inappropriate for this process; that would be a routing system on a case-by-case basis. Such a screening decision could be made on the basis of the statements of points, described above, to be filed by each party. This system has the advantage of identifying perhaps more appropriately the cases that best fit the process; its disadvantage is that it takes the time of either a staff attorney or a judge and requires a decision in each case at the threshold. Whatever the method for putting a case onto this oral track, without briefs, it remains within the power of the court to call for briefs in any case at a later point if briefs seem desirable. Briefs could be requested of the parties either before or after oral argument. Thus it is always open to the court to supplement the oral presentation by requesting submissions in writing.

The two arguments most often made against the adoption of a process along these lines are that the judges cannot function soundly without briefs and that the lawyers cannot communicate orally with sufficient clarity and completeness. There are at least two answers to these arguments. One is that a procedure of this sort has worked for centuries in England. Allowing for the several differences that exist between England and America in their courts, bars, and legal systems, their common legal tradition remains; the demonstrated ability of English lawyers and judges to manage such a process is powerful evidence that their American counterparts can do the same, at least under certain conditions. The second answer is that the experiences of the last ten years, described above, show that American lawyers and judges in fact can function effectively and soundly under this style of oral proceeding. The conditions and circumstances set out above would have a lot to do with how well the procedure works; if the procedure is at-

tempted in a court where none of the listed circumstances is present, then poor results can be expected. On the other hand, the procedure probably will work if a majority of the conditions described above are present in the forum and the judges and lawyers are motivated to make it work.

Judges can do much to assure an adequate level of lawyer performance; lawyers will usually do what the courts expect of them. If the judges make it clear that lawyers presenting appeals orally must be well prepared and must provide help to the judges during the oral hearing, that is what the judges likely will get. If the judges do not insist on a helpful presentation and competent performance, they likely will not receive the kind of help from counsel essential to this process.

The potential gains that can be expected from this process—expedited resolution of appeals, reduced costs to litigants, and increased visibility—make the process one with which American appellate courts should at least experiment further. Although enough has been done to indicate that the process is workable, no American appellate court has yet gone the full distance toward the English style practice; that is, no American court has dispensed entirely with written briefs and placed reliance solely on counsel's oral presentations as the means of communicating the facts, argument, and law to the judges. Further testing is needed. There is little doubt remaining, however, that a procedure greatly shrinking the role of briefs and magnifying the role of oral argument can work in a sizeable number of American appeals.