

Could He Go Faster Than He Could? Ruminations on the Time Lapse from Oral Argument to Opinion Filing in The Court of Appeals of Maryland

William H. Adkins II

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Courts Commons](#)

Recommended Citation

William H. Adkins II, *Could He Go Faster Than He Could? Ruminations on the Time Lapse from Oral Argument to Opinion Filing in The Court of Appeals of Maryland*, 51 Md. L. Rev. 205 (1992)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol51/iss1/7>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**COULD HE GO FASTER THAN HE COULD?
RUMINATIONS ON THE TIME LAPSE FROM
ORAL ARGUMENT TO OPINION FILING IN THE
COURT OF APPEALS OF MARYLAND**

WILLIAM H. ADKINS, II*

INTRODUCTION

In Chapter V of *The Antiquary*,¹ Jonathan Oldbuck of Monkbarne, the antiquary of the title, dispatches Caxon, an ancient messenger, with an important missive directed to Monkbarne's neighbor, Sir Arthur Wardour of Knockwinnock. Monkbarne urges the aged Mercury to "'[g]o as fast as if the town-council were met and waiting for the provost, and the provost was waiting for his new-powdered wig.'"² But Caxon does not speed on his mission. We are told,

He hobbled—but his heart was good!
Could he go faster than he could?³

That is a good question. If "could" denotes physical ability, the answer must be in the negative. Obviously, no one can go faster than he or she is physically capable of going. Even so, in some cases physical ability can be improved by exercise, and speed enhanced by application of appropriate techniques. And if we assume that "could" contains within it some notion of psychological attitude—of will—the answer changes. Now the proper reply is that one may go as quickly as one wishes to go subject only to the limits of physical ability.

The thesis of this Essay is that the time lapse from oral argument to opinion filing in the Court of Appeals of Maryland is, as a general proposition, too long. I further submit that this unnecessary delay is not the result of "physical" inability to move more rapidly. The problem, instead, is one of "will." The court's record, therefore, is susceptible of improvement.

* A.B., Williams College, 1949; LL.B., Harvard University, 1952. The author served for nine years as Maryland State Court Administrator, four as an associate judge of the Court of Special Appeals of Maryland, and four as a judge of the Court of Appeals of Maryland. He retired from the court on August 31, 1990.

1. SIR WALTER SCOTT, *THE ANTIQUARY* (Boston, Ticknor & Fields 1857).

2. 1 *id.* at 71.

3. 1 *id.* at 72.

Let me make clear at the outset that I understand that an appellate court—especially the highest court of a state—cannot and should not turn out opinions the way an automobile factory turns out production-line vehicles. Cases are not fungible; each must be examined in the context of its own facts. The law must be meticulously researched, and there must be adequate time for reflection on the ramifications of a decision, one way or another. Further, the opinion itself requires careful drafting so that the pertinent facts, the procedural posture of the case, the decision, and the rationale are clearly expressed. And once the opinion writer has done all this, there still must be reasonable time within which the draft can be distributed to other members of the court, studied by them, and discussed around the collegial conference table. Revisions may be needed—perhaps even a dissent or concurrence will be forthcoming.

Beyond these concerns, I am also aware that once a case has been argued and the opinion assigned, all else does not come to a halt until the opinion has been approved. There are, for example, other briefs to read, arguments to hear, and opinions to write and to study. Additionally, certiorari petitions must be reviewed, rule proposals considered, and bar admission ceremonies performed.⁴

But having conceded all this, I continue to believe that the opinion-preparation pace of the Court of Appeals of Maryland is unduly deliberate. “Justice delayed is justice denied” is a cliché we are often fond of repeating. It is hard for a litigant who has waited a year or more for a judgment in the circuit court⁵ and some 250 days for a decision in the Court of Special Appeals⁶ to have to wait more than 315 additional days for the Court of Appeals’ decision.⁷ It is easy enough to give innumerable specific illustrations of the ways that undue delay harms individual litigants, public policy implementation, and the internal operating practices of the court itself. But for our purposes it suffices to note that

4. The tasks listed are illustrative only; the enumeration is far from an exhaustive one.

5. In fiscal year 1990 the average elapsed time from filing to disposition of a civil case in a circuit court was 364 days. 1989-1990 ANN. REP. MD. JUDICIARY 60. And while two-thirds of the cases were disposed of in less than 361 days, almost 15% of the cases remained undisposed of after 721 days and about 7% after 1081 days. *Id.*

6. The averages, in fiscal year 1990, were 104 days from disposition in a circuit court to docketing in the Court of Special Appeals, 138 days from docketing to argument, and 28 days from argument to decision by the Court of Special Appeals. *Id.* at 35.

7. *Id.* at 26. In fiscal year 1990, the time from argument to decision comprised 226 days of this 315 day average. *Id.*

[c]ourt delay is much more than a statistical curiosity, a popular topic of the media, or a seemingly mandatory agenda item at many professional conferences. Litigation may alter permanently the lives of the parties directly involved as well as those of other members of society. Appellate courts often determine irrevocably whether a person will be compensated for injury or loss, or released from confinement or continued in incarceration. These courts may help to determine the direction and scope of important public policy. When the resolution of appeals is delayed, lives may be disrupted while individuals and society, unable because of the delay to plan confidently for the future, await the final disposition of cases. . . . [I]t is generally agreed that court delay compromises the quality of justice. This conclusion is based, implicitly, on the premise that the speedy resolution of controversies is a fundamental societal goal which, with alarming frequency, is not being met by the courts.⁸

There is really no need to enlarge upon the unfortunate situations that delay may cause. They are many and readily perceptible. No one, I suspect, will argue that undue delay is desirable. The questions are whether the delay that exists is "undue," and if so, what can be done about it. In other words, could we go faster if we would, and how do we produce the will to do so? It is to these questions that I now turn, and I do so in the specific context of the time lapse from the oral argument of a case to the filing of the opinion in that case.⁹

8. JOHN A. MARTIN & ELIZABETH A. PRESCOTT, *APPELLATE COURT DELAY* 1 (1981); *see also, e.g.*, PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 137 (1976); ROBERT A. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* 9 (1976). Out of compassion for the reader, I omit citations to the numerous reports of committees and commissions in Maryland that contain similar views. *See generally* THOMAS B. MARVELL, *BIBLIOGRAPHY: STATE APPELLATE COURT WORKLOAD AND DELAY* (1979).

9. It is tempting to look at the problem in the context of the total time lapse from noting an appeal (filing of certiorari petition) to ultimate disposition of the case. This aggregate time period is, after all, the sum total of appellate "delay." Moreover, many states compile statistics on this time period, thus permitting extensive comparison with Maryland's experiences. By some standards, Maryland is quite slow if this time period is used. *Compare* 1989-1990 ANN. REP. MD. JUDICIARY 26 (315 days from granting of certiorari to decision) *with* AMERICAN BAR ASSOCIATION, *STANDARDS RELATING TO APPELLATE DELAY REDUCTION* § 3.52(b) (1988) (proposing 280 day limit from notice of appeal to issuance of opinion). But discussion of this more extensive time period would distract attention from the critical argument-to-opinion period over which judges have exclusive control. In the Court of Appeals of Maryland, this time period occupies the bulk of appellate processing time: 226 out of 315 days in fiscal year 1990. *See supra* note 7. Furthermore, it is the latter time period that is of great concern to the bar. Even as long ago as 1982, it was noted that "[w]ith respect to the Court of Appeals, the problem

I. HOW QUICKLY (OR SLOWLY) IS THE COURT GOING?

The Maryland Judiciary's Annual Reports for fiscal years 1987 through 1990, inclusive, reveal that the time lapse from oral argument or submission to decision averaged about seventy percent of the total time from grant of certiorari to filing of the opinion.¹⁰ In other words, almost three-quarters of the appellate processing time involved the preparation of the decision. Further details are displayed in Table 1.

TABLE 1¹¹

Fiscal Year	Days From Argument To Decision	Days From Grant of Certiorari To Decision	Time From Argument To Decision As Percent of Overall Time
1990	226	315	72% ¹²
1989	256	356	72% ¹³
1988	217	295	74% ¹⁴
1987	160	253	63% ¹⁵

How do these numbers compare with those in other states? It is difficult to tell without extensive further research because few states publish statistics comparable to those given above.¹⁶ Moreover, any comparison of time lapse figures without detailed analyses of procedural requirements, caseload, opinion load, and other factors, is likely to be somewhat flawed. Nevertheless, in the spring of 1990, in an effort to obtain some pertinent data, I wrote to the state

appears to be the elapsed time from argument to decision." MARYLAND STATE BAR ASSOCIATION, REPORT OF THE COMMISSION TO STUDY THE JUDICIAL BRANCH OF GOVERNMENT 15 (1982).

10. See 1989-1990 ANN. REP. MD. JUDICIARY 6; 1988-1989 ANN. REP. MD. JUDICIARY 19; 1987-1988 ANN. REP. MD. JUDICIARY 19.

11. Table 1 is based on all cases argued to or submitted to the court—including per curiam decisions and those dismissed by order on the day of argument or shortly thereafter.

12. 1989-1990 ANN. REP. MD. JUDICIARY 26.

13. 1988-1989 ANN. REP. MD. JUDICIARY 19.

14. 1987-1988 ANN. REP. MD. JUDICIARY 19.

15. 1986-1987 ANN. REP. MD. JUDICIARY 27.

16. In the spring of 1990, the Information Service of the National Center for State Courts advised that it had virtually no relevant comparable figures. See Letter from Kenneth G. Pankey, Jr., Staff Attorney, National Center for State Courts, to author (Apr. 9, 1990). Copies of all letters referenced in this article are on file with the *Maryland Law Review*.

court administrator in each state employing a two-tier appellate structure roughly similar to Maryland's.¹⁷ The information supplied in responses reflects an interesting disparity in time of delay between the various states and Maryland.

Although all of the time figures were better than those of Maryland, the states can be roughly divided into two categories: those with delays of more than approximately 150 days and those with less extensive delays. In considering the comparisons, it is important to note that, in fiscal year 1990, the Court of Appeals of Maryland filed 142 majority opinions.¹⁸

In fiscal year 1989, 166 or 167 civil cases were considered by the Supreme Court of Alaska, with an average time lapse of 185 days from argument or submission to "publication."¹⁹ During the first nine months of fiscal year 1990, 189 civil cases were considered with an average of a 207 day delay.²⁰ The Supreme Court of Michigan is even less expeditious. "[I]t normally takes an average of nine to twelve months after argument before an opinion of this court is released. That average has remained fairly constant over the last decade."²¹ New Jersey's Supreme Court, another court with extensive delay, filed 73 majority opinions in fiscal year 1989. The average time from argument to decision was 206 days.²² The Supreme Court of Washington in calendar year 1989 showed a median of 150 days from argument to filing of the opinion in civil matters (84 cases) and a median of 166 days in criminal matters (33 cases). The figures for 1988 were 142 days for 77 civil cases and 141 days for 35 criminal cases.²³

In contrast, many states have managed to file opinions in a timely fashion. Hawaii, which averages between 300 and 400 opin-

17. Thirty-six surveys were sent out, 34 were returned, and 11 contained useful information for purposes of comparison to the information available in Maryland. The 36 states that received surveys are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

18. 1989-1990 ANN. REP. MD. JUDICIARY 23.

19. 1989 ALASKA ANN. REP. 231-32.

20. Letter from David A. Lampen, Sr., Clerk, Supreme Court of Alaska, to author (May 21, 1990).

21. Letter from Corbin R. Davis, Clerk, Michigan Supreme Court, to author (May 10, 1990).

22. Letter from Robert D. Lipscher, Administrative Director, Administrative Office of the Courts, State of New Jersey, to author (May 30, 1990).

23. Letter from Brett Maurer, Research Specialist, Office of the Administrator for the Courts, State of Washington, to author (May 24, 1990).

ions per year in the Supreme Court, including unpublished memorandum opinions, shows reasonable diligence in issuing opinions. Both the intermediate court of appeals and the Supreme Court "normally issue [opinions] within 3 months after oral argument."²⁴ The Supreme Judicial Court of Massachusetts has also exhibited relative speed. In fiscal year 1989, on average, 90 percent of its 222 full opinions were filed within 101 days of argument if there was no dissent or concurrence, and 90 percent within 145 days if there was a dissent or concurrence. Figures for earlier fiscal years back through fiscal year 1987 (247 full opinions) are comparable.²⁵

During fiscal year 1989, the Supreme Court of Missouri disposed of 136 cases by opinion or order. With respect to appeals other than writs—including 15 death penalty cases—the average time from submission to opinion was 107 days in criminal cases and 70 days in civil cases, for an overall average of 75 days.²⁶ The Supreme Court of New Mexico reported an average time of 81.80 days from submission to decision in fiscal year 1989, with 171 opinions considered.²⁷ This is a marked improvement over time statistics for the two previous fiscal years, which were 113.95 days and 202.50 days, respectively.²⁸

The Supreme Court of North Carolina considered 141 cases in fiscal year 1989. The average opinion processing time from argument to the filing of the opinion was 99.40 days.²⁹ The Supreme Court of the Commonwealth of Virginia considered 215 cases in 1989, yet turned in the best performance recorded. "The time lapse between argument and the handing down of decisions . . . [was] approximately six weeks."³⁰ Although the pertinent figures in the Idaho Supreme Court are confidential, in 1989, with 148 opinions considered, the time lapse from argument to filing was substantially

24. Letter from Matthew Goodbody, Staff Attorney, Supreme Court of Hawaii, to author (May 3, 1990). This figure is especially impressive considering that only about half of the cases are granted any oral argument. *Id.*

25. Letter from Hon. Arthur M. Mason, Chief Administrative Justice of the Trial Courts, Commonwealth of Massachusetts, to author (May 29, 1990).

26. Letter from Jane Hess, Administrator, Office of State Court Administrator, State of Missouri, to author (June 26, 1990).

27. 1989 NEW MEXICO CTS. ANN. REP. 12, 15.

28. *Id.*

29. Letter from Franklin Freeman, Jr., Director, Administrative Office of the Courts of North Carolina, to author (May 22, 1990).

30. Letter from Robert M. Baldwin, Executive Secretary, Supreme Court of Virginia, to author (Apr. 27, 1990).

less than in Maryland. The same is true for 1988, 1987, and 1986.³¹

These data may be read to indicate that with the possible exception of Michigan and New Jersey (the latter state being only minimally more expeditious than Maryland), the Court of Appeals of Maryland takes longer from argument to opinion filing than does any state's highest court for which I was able to obtain roughly comparable data. Of course, the data come from only eleven of the thirty-four states that responded to my inquiry. Because of the modest amount of pertinent data collected, and because of the difficulties of comparison previously mentioned, it cannot be said that these data prove anything conclusively. Still, they do at least hint that the Court of Appeals of Maryland may be somewhat laggard in filing opinions. Other signs point to the same conclusion.

For example, the Supreme Court of the United States generally decides all cases argued during a term by the time it rises at the end of that term. Practically speaking, the term is a period extending from the first Monday in October in one year to late June in the next—a period of about nine months, or 270 days. Obviously, all the cases in a term are not argued in October, nor are all decisions held until the end of June. As a consequence, the average time lapse from argument to filing is bound to be well under 270 days. The Supreme Court filed 142 opinions during the 1987 Term,³² 143 opinions in the 1988 Term,³³ and 139 opinions in the 1989 Term.³⁴ Thus, the Supreme Court, with its remarkable workload, seems to dispose of its cases more rapidly than does the Court of Appeals of Maryland.

In addition, the American Bar Association (ABA) has promulgated standards that suggest the Maryland pace is unduly deliberate. The ABA recommends a period of 120 to 150 days from argument to filing of the decision.³⁵ This standard is far more generous than the 90 days proposed by the Maryland Constitution,³⁶ yet the Court of Appeals does not even come close to meeting it.³⁷

The evidence of laggardliness contained in Table 1, however, is

31. Letter from John R. Peay, Assistant Director, Administrative Office of the Courts, State of Idaho, to author (Apr. 26, 1990).

32. *The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 350 (1988).

33. *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 394 (1989).

34. *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 359 (1991).

35. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO APPELLATE DELAY REDUCTION § 3.55(a)(3) (1988); see *infra* note 77.

36. MD. CONST. art. IV, § 15.

37. The Maryland constitutional provision is directory, not mandatory. See *McCall's Ferry Power Co. v. Price*, 108 Md. 96, 113, 69 A. 832, 838 (1908).

only part of the story. It is based on statistics published by the Maryland Administrative Office of the Courts (AOC), but these totals include figures of all cases that are argued or submitted. For example, if a case is dismissed on the day of argument because certiorari was improvidently granted, the AOC data reflects that quick action. It also reflects other instances in which disposition of a case occurs quite rapidly. When one examines only cases disposed of by signed opinions, however, a much more dismal picture appears. It is a picture that portrays a substantial difference among the performances of individual judges, a fact masked by the AOC statistics. Table 2 gives data on individual judges, compiled for fiscal years 1987, 1988, 1989, and 1990.³⁸

This table makes apparent the great disparity in time taken by individual judges to prepare opinions. A look at the data for Judges *A*, *B*, *C*, *E*, *G*, and *I*—each of whom were on the court for all four fiscal years studied—shows that Judges *C*, *E*, and *I* were consistently quicker in filing opinions than Judges *A*, *B*, and *G*. The rate does not correlate positively with the number of opinions written. Judge *A*, one of the slower writers, produced fewer signed opinions over the four-year period than did any other of the six judges who served for all four years. Judge *C*, one of the more rapid, filed more signed opinions than any of the six judges.

As the individual figures also demonstrate, the whole court's average elapsed-time figures somewhat mask the delay that may occur in specific cases. On occasion, two years or more may pass between argument and filing. According to data compiled by the Clerk's Office, there were seventy-nine unfiled opinions as of October 1, 1987. Almost sixty-two percent of these had been argued six months or more before that date.³⁹ The cumulative backlog that

38. The figures in Table 2 were compiled under the author's supervision during his tenure on the bench. They include only signed opinions. For purposes of Table 2, a judge is treated as on the court for the entire fiscal year if he was a member of the court at the end of the fiscal year and had served continuously since prior to the beginning of the Term of Court that commenced during that fiscal year. Table 2 does not include individual data for specially assigned judges. The signed opinions written by those judges, however, are included in the total number of signed opinions for each fiscal year. The total average elapsed time for the whole court also incorporates the opinions written by those judges. This last inclusion probably substantially decreases the court's overall elapsed time average. For example, in fiscal year 1990, retired Judge Charles E. Orth, Jr. was specially assigned to the Court of Appeals for substantial periods of time from November 1989 through March 1990. According to figures I compiled while on the Court of Appeals, he filed 16 signed opinions. His average elapsed time from argument to filing was 52 days.

39. Figures were calculated by using data compiled by the Clerk's Office and obtained in telephone interviews.

TABLE 2

	FISCAL YEAR 1987	FISCAL YEAR 1988	FISCAL YEAR 1989	FISCAL YEAR 1990
Entire Court	Average Elapsed Time—Arg. To Filing in Days 166	Average Elapsed Time—Arg. To Filing in Days 226	Average Elapsed Time—Arg. To Filing in Days 269	Average Elapsed Time—Arg. To Filing in Days 237
	Number of Signed Majority Opinions 144	Number of Signed Majority Opinions 127	Number of Signed Majority Opinions 149	Number of Signed Majority Opinions 157
Judge A	307	448	525	488
Judge B	328	418	500	326
Judge C	62	119	97	112
Judge D	†	158*	319	286*
Judge E	120	115	147	133
Judge F	†	†	†	96*
Judge G	436	406	421	490
Judge H	112*	†	†	†
Judge I	106	118	241	122
	23	21	13	23

* Judge was not on the court for the entire fiscal year.

† Judge was not on the court for any part of the fiscal year.

this situation produces is discouraging.⁴⁰ For a court that on average files between 127 and 157 signed opinions in a 12-month period, a backlog of 90 unfiled opinions is far from insubstantial.

Enough has been said to show that the Court of Appeals has a problem with respect to the rate at which opinions are filed. It has also been shown that the problem is not inherent in the structure of the court, the size of its workload, or the number of law clerks and other assistance given the judges. Rather, the problem appears to lie with the differences in the speed of opinion writing by individual judges. These differences are too great to be satisfactorily explained by inherent differences in working speeds, variations in the difficulty of cases assigned, or similar factors. I concede that different judges work at different paces (and within reason, should be allowed to do so), that all cases are not equally difficult, that reasonable time for research and reflection is required, and that collegial focus on each opinion is important. Something is wrong, however, if during fiscal year 1990, Judge *E* filed 20 signed opinions averaging 133 days from argument, but Judge *G*, with an equal number of signed opinions, took on average 490 days to file them—almost four times as long.

II. WHAT IS THE PROBLEM?

One may imagine numerous possible reasons for the excessive elapsed time between argument and opinion filing in the Court of Appeals. Some of these are too few law clerks, too little effective automation, too much time spent on rule-making or other administrative and policy matters, too many days devoted to arguments, too many court conferences, and too heavy a workload in general. But as I have already suggested, any of these reasons, if applicable at all, would apply equally to all judges. Additionally, assignment of difficult cases should even out over a period of time. I find it hard to believe, for example, that for four years Judge *C* was assigned only opinions in simple cases, while Judge *A* was assigned mostly very tough ones. None of these “reasons” can adequately explain the disparity in filing times. Rather, that disparity, I submit, arises from what I shall call “local judicial culture.”

40. On September 16, 1986—near the beginning of the 1986 Term—53 opinions were pending; there were 79 on October 1, 1987; 87 on September 1, 1988; and 90 on September 15, 1989. Data compiled by author. Until the 1963 Term, the Court of Appeals disposed of all of its argued cases during the term in which they were argued. MARYLAND STATE BAR ASSOCIATION, REPORT OF THE COMMITTEE ON JUDICIAL ADMINISTRATION 1 (June 24, 1965).

I derive that term from one frequently cited by scholars at the National Center for State Courts in their studies of delay at the trial court level. After looking at many factors that might produce trial court delay, scholars concluded that one of the most important—and most pervasive—was the “local legal culture.”⁴¹ In a nutshell, “local legal culture” involves the notion that local judges and local lawyers tend to preserve the status quo to which they have become accustomed. If, for example, lawyers tend to agree to continuances as a courtesy to one another, judges are likely to go along, despite court rules or policies designed to discourage continuances. The bench and bar reach a frequently tacit understanding on what pace of litigation is agreeable to them, and it is at this pace that litigation moves. Not often considered is the interest of litigants, or the general public, in having matters move at a particular pace.

I believe that there is a “local judicial culture” that operates within the Court of Appeals which produces the remarkable variations in filing patterns that I have discussed. This “culture” may in part be produced by a misplaced view of judicial independence. The function of judicial independence is to safeguard each judge’s right to express his or her views on the law without fear of reprimand, other than in the course of lawful appellate review, and without danger of personal retaliation or punishment. Thus, it is appropriate, and indeed essential, that each judge be free to expound the law as he or she conscientiously understands it. Judicial independence, however, does not encompass the right of a judge to be free from all administrative regulations or reasonable time constraints on opinion preparation.

But the “culture” of the Court of Appeals seems to embody the idea that each judge should be allowed to move at his or her own pace. Despite various efforts made by the Chief Judge,⁴² peer pressure does not seem to motivate the judges. Those who choose to write slowly simply will do so. Indeed, peer pressure may scarcely exist. The court as an institution seems to be comfortable with the concept that the rate of opinion preparation is a matter to be left to each individual judge, and is not one with which the collegial court should be concerned. In short, the court seems to have accepted

41. *See, e.g.*, THOMAS CHURCH ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 54 (1978).

42. For example, it has been my experience that the Chief Judge frequently circulates lists of pending opinions by judges, as well as lists of pending opinions about which inquiry has been made to the Chief Judge or to the Clerk’s Office. The name of the inquirer is never given.

this hands-off approach to the pace of litigation as an almost inevitable aspect of the way an appellate court operates.

My thesis is not only that dilatory opinion filing is undesirable, but also that there is nothing in the nature of an appellate court or proper appellate practice that makes it inevitable. Some of the information garnered from other states, and summarized in Part I, supports this latter conclusion. So does the experience of the Court of Special Appeals.

I understand that comparisons between the Court of Appeals and the Court of Special Appeals are not always appropriate. There are real differences in the missions of each court, as well as real differences in caseload, case mix, general workload, support staff, and other matters. Therefore, I do not even begin to suggest that because the intermediate court disposed of 1355 cases in fiscal year 1990, with an average elapsed time of 28 days from argument to decision,⁴³ the Court of Appeals should attempt to do likewise. What I do suggest is that the "judicial culture" of the Court of Special Appeals is something that, with considerable benefit, could be transferred to the Court of Appeals.

During the four years I sat on the Court of Special Appeals, almost every member of that court was concerned with the pace of litigation. The court functions with a strong collegial sense of the importance of moving the caseload—the sort of team spirit that, to me, is noticeably absent from the Court of Appeals. This commitment to filing opinions in a reasonable time while maintaining the highest appellate standards feasible is fundamental to the operations of the Court of Special Appeals. Without it, that court simply would disappear under an avalanche of unfiled opinions. A similar approach may not be essential to the Court of Appeals, but, nevertheless, it should be transported there. That, I believe, is the best solution to the slow opinion-filing problem—a change in the way the court views this aspect of its work, a change in its "judicial culture." Even if the court's "judicial culture" changes, however, it is desirable to reinforce or institutionalize the new attitude in some way.

III. POSSIBLE REINFORCEMENTS

It is possible, of course, to take various measures in an effort to expedite opinion filing. For example, Florida court rules require a decision within 180 days of oral argument or submission.⁴⁴ The

43. See 1989-1990 ANN. REP. MD. JUDICIARY 35.

44. See FLA. R. JUD. ADMIN. 2.085(d)(2) (1991).

Georgia Constitution directs the appellate courts of that state to “dispose of every case at the term for which it is entered on the court’s docket for hearing or at the next term.”⁴⁵

The Florida provision is not thought of as mandatory, and there is no penalty for failure to meet the time limit.⁴⁶ I do not have data to show how expeditiously the Supreme Court of Florida moves with respect to the time from submission or argument to opinion filing. The Georgia time limit does appear to be regarded as mandatory, even jurisdictional; it is enforced by dismissal of the appeal.⁴⁷ While this limitation is said to cause “much distress” to Georgia judges, its rather liberal time requirements, I am told, have seldom been violated, at least in recent times.⁴⁸

As I have already observed, the Maryland Constitution sends a similar message: “[i]n every case an opinion, in writing, shall be filed within three months after the argument, or submission of the cause”⁴⁹ This provision of the Maryland Constitution, however, has been construed as merely directory, not mandatory.⁵⁰ Given the dilemma involved in the enforcement of a provision of this sort, it is hard to fault this interpretation for its practical effect. As we have seen, Georgia appears to dismiss an appeal if the time limit is exceeded, thereby letting the lower court’s decision stand. This seems a harsh penalty for an appellant, who has no way of controlling the speed at which the appellate court moves, yet nevertheless suffers for the court’s slowness. The alternative, to reverse the judgment below, is even worse. A blameless appellee is punished

45. GA. CONST. art. VI, § 9, ¶ 2. There are three appellate terms in Georgia, beginning in January, April, and September of each year. GA. CODE ANN. § 15-2-4(b)(c) (Michie 1990); *see also* GA. SUP. CT. R. 6.

46. Telephone Interview with Maribeth Hudson, Court Services Manager, Florida State Courts Administrator’s Office (Oct. 17, 1991).

47. *See* Dixie Realty Finance Co. v. Morgan, 155 S.E. 468, 468 (Ga. 1936) (transmittal of case delayed by clerk of lower court; case dismissed by supreme court for lack of jurisdiction because it could not be decided within the requisite period); *see also* Brown v. State, 223 S.E.2d 642, 642 (Ga. 1976) (if case not decided within statutory period, lower court’s opinion is affirmed); Davis v. Davis, 151 S.E.2d 123, 125 (Ga. 1966) (court will not consider state appeal caused by appellant’s delay).

48. Letter from Robert L. Doss, Jr., Director, Judicial Council of Georgia, Administrative Office of the Courts, to author (May 11, 1990). Mr. Doss advised in a subsequent letter in April 1991 that he has “always considered it a stroke of luck that [Georgia has] had the two-term rule.” Letter from Robert L. Doss, Jr., Director, Judicial Council of Georgia, Administrative Office of the Courts, to author (Apr. 4, 1991). I believe this indicates that the provision imposes some time limits (albeit rather broad ones) as to when an opinion must be filed.

49. MD. CONST. art. IV, § 15.

50. *See* McCall’s Ferry Power Co. v. Price, 108 Md. 96, 113, 69 A. 832, 838 (1908).

for the court's delay when a lower court's decision is stricken, not because of judicial error in that court, but because the appellate court is dilatory.

Perhaps to avoid the unfairness apparent in either of these results, some states have attempted to focus on laggard appellate judges. Alaska law, for instance, warns that

[a] salary warrant may not be issued to a justice of the supreme court until the justice has filed with the state officer designated to issue salary warrants an affidavit that no matter referred to the justice for opinion or decision has been uncompleted or undecided by the justice for a period of more than six months.⁵¹

This is interpreted to require each justice to whom an opinion has been assigned to circulate a draft of that opinion within the statutory time period.⁵²

By the same token, the California Constitution provided, until 1966, that:

No justice of the Supreme Court nor of a District Court of Appeals, nor any judge of a superior court nor of a municipal court shall draw or receive any monthly salary unless he shall make and subscribe an affidavit . . . that no cause in his court remains pending and undetermined that has been submitted for decision for a period of 90 days.⁵³

Section 19, replacing section 24 in California's amended constitution, now reads:

A judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision.⁵⁴

Alaska, as we have seen,⁵⁵ is a rather expeditious court within our frame of reference. I do not know whether California is equally expeditious. In any event, in a society that gives at least lip service to the effectiveness of market forces, there is something to be said for the notion of a fiscal incentive for judicial celerity. I do not believe, however, that the salary sanction is the best way to address the problem of judicial delay. Aside from the fact that in Maryland it

51. ALASKA STAT. § 22.05.140(b) (1990).

52. ALASKA SUPREME COURT ATTORNEY'S HANDBOOK 30 (1988).

53. CAL. CONST. art. VI, § 24 (repealed 1966).

54. *Id.* § 19.

55. See *supra* notes 19-20 and accompanying text.

probably would have to be authorized by constitutional amendment,⁵⁶ such a drastic measure may well have an adverse effect on due deliberation. Furthermore, such a provision is certain to produce debate about its precise meaning and thrust, and, perhaps, cumbersome procedures for its administration. There are those cases which, for good reasons, may not be properly determinable within a period fixed by law. Exceptions to the rule are inevitable and the exceptions are soon likely to swallow the rule.

Moreover, the most effective way of encouraging reasonable expedition in the filing of appellate opinions is to adopt a procedure that the judges themselves endorse, as opposed to one that is forced upon them from the outside. The adoption by the courts of rules or guidelines looking to speed up opinion filing is in fact widespread.

In Alaska, for example, which has a statutory time limit,⁵⁷ the justices of the supreme court have adopted an internal operating procedure that cuts the statutory time limits in half.⁵⁸ The spirit that fostered the adoption of this policy is more likely the cause of Alaska's relatively speedy filing than is the salary sanction statute. California, in similar fashion, has ended controversy surrounding its constitutional salary sanction by adopting a policy of filing opinions within ninety days of oral argument.⁵⁹ The Chief Justice of California recently announced that the policy "has been successful, and we have met our goal in all cases thus far."⁶⁰

Comparable provisions, adopted by rule or otherwise, exist or are being adopted in a number of jurisdictions. The Supreme Court of Alabama has adopted the American Bar Association time standards for handling appeals.⁶¹ Hawaii's Supreme Court Rule 9 calls for an opinion within twelve months after oral argument, although in fact opinions usually are filed much more quickly.⁶² Idaho has

56. See MD. CONST. art. IV, § 14. The salary of a judge of the Court of Appeals "shall not be diminished during his continuance in office." *Id.*

57. See ALASKA STAT. § 22.05.140(b) (1990).

58. The justice to whom an opinion is assigned must circulate a draft opinion within 90 days of oral argument or submission. ALASKA SUPREME COURT ATTORNEY'S HANDBOOK 30 (1988).

59. See Philip Carrizosa, *State High Court Agrees to Decide Cases in 90 Days*, L.A. DAILY J., Sept. 18, 1988, at 1.

60. Malcom M. Lewis, *State Judiciary News: California*, STATE CT. J., Winter 1991, at 39.

61. See Sonny Hornsby, *State Judiciary News: Alabama*, STATE CT. J., Summer 1990, at 46; see *supra* note 35 and accompanying text.

62. See *supra* text accompanying note 24.

adopted a ninety-day guideline.⁶³ Louisiana has developed guidelines that apparently produce an opinion within about six weeks of argument.⁶⁴ Massachusetts has a standard of 130 days.⁶⁵

The New Mexico Rules of Appellate Procedure are particularly instructive:

A. The timely disposition of appeals is an essential requirement of justice. In any appeal or other case pending before the supreme court or court of appeals, the appellate court . . . should render a decision or otherwise dispose of the case within ten . . . months of the date of the filing of the notice of appeal. In any event, a decision shall be rendered within three . . . months of the date of submission to a panel or the full court.

[B. If that is not done, a statement of reasons for the noncompliance must be filed within a month of the due date, and monthly thereafter.]

C. If any appeal is pending before the supreme court or the court of appeals for more than two . . . months beyond the applicable deadline, the case shall be given priority by the court.⁶⁶

It is noteworthy that New Mexico appears to be one of the more rapid courts in opinion filing.⁶⁷

North Carolina lacks any constitutional provision, statute, or court rule controlling the time within which opinions must be filed. But the justices have adopted an unpublished policy under which they ordinarily circulate drafts of written opinions within 60 days after argument.⁶⁸ The supreme court of that state also files opinions with considerable speed.⁶⁹ Tennessee also is without a formal limiting provision. I am informed, however, that if a justice is too slow in opinion writing, the chief justice will call him or her, take the record back, and have the case reargued. This is said to cause considerable embarrassment, but we have no data to show what effect in

63. Letter from Carl F. Bianchi, Administrative Director of the Courts, State of Idaho, to author (Apr. 24, 1990).

64. Letter from Timothy F. Averill, Deputy Judicial Administrator, Louisiana Supreme Court, to author (June 11, 1990).

65. Letter from Hon. Arthur M. Mason, Chief Administrative Justice, Commonwealth of Massachusetts Trial Courts, to author (May 29, 1990).

66. N.M. STAT. ANN. § 12-406 (Michie Supp. 1991).

67. See *supra* note 27 and accompanying text.

68. Letter from Franklin Freeman, Jr., Director, Administrative Office of the Courts of North Carolina, to author (May 22, 1990).

69. *Id.*

promoting promptness the procedure may have.⁷⁰

In recent years Virginia has adopted stringent measures to reduce appellate backlog, among them the acceptance by each supreme court justice of a twenty percent increase in opinion-writing assignments. This effort has been quite successful.⁷¹ With respect to our particular concerns, the court has itself adopted the goal of disposing of all matters within twelve months of the filing of the petition for appeal. As earlier noted, the Virginia court files opinions within approximately six weeks (forty-five days) after argument.⁷²

This perhaps cursory survey shows three general approaches to reducing time lapse from argument or submission to opinion filing: a constitutional, statutory, or rule provision that is sometimes read as mandatory; a salary sanction; and a rule, guideline, or policy position adopted by the court itself.⁷³ For reasons I have already given, the first two "remedies" seem to have drawbacks that exceed their possible benefits. The third, however, has the advantage of always being the voluntary product of the court that adopts it. It therefore represents a statement of what the "local judicial culture" will tolerate as far as delay is concerned. Such a statement, made public by the judges themselves, should weigh heavily with the judges and produce the kind of peer pressure needed to make it effective, thus helping a chief judge in his efforts to move along dilatory colleagues. Equally as important, rules like those of Hawaii and New Mexico, and policies or guidelines like those adopted in Alaska and other states, leave sufficient flexibility to allow for the occasional case in which substantial delay may be appropriate, and they do so without adding the burden of major administrative complexity.⁷⁴

70. Telephone Interview with Cletus McWilliams, Tennessee Supreme Court Executive Secretary (May 29, 1990).

71. Letter from Robert M. Baldwin, Executive Secretary, Supreme Court of Virginia, to author (Apr. 27, 1990).

72. See *supra* text accompanying note 30.

73. Another possible approach would be to refer a persistently dilatory judge to the appropriate judicial disciplinary agency. In Maryland, the Commission on Judicial Disabilities may recommend and the Court of Appeals may take disciplinary action upon "a finding of . . . failure to perform the duties of [a judge's] office or of conduct prejudicial to the proper administration of justice" MD. CONST. art. IV, § 4B(b). Arguably, these provisions might apply to a particularly persistent and egregious failure to prepare opinions in a timely fashion. But the disciplinary mechanism, for a variety of obvious reasons, is a last-resort measure and is available only in an extreme case. It is not a useful means of establishing or enforcing day-to-day opinion-filing standards.

74. There are, as virtually all standards and policies recognize, cases of seriousness and complexity that require extraordinary time for proper disposition. On other occasions, prudent delay may be required pending a relevant United States Supreme Court

IV. AN OPINION-FILING POLICY FOR MARYLAND

If judicially adopted time limits for opinion filing can work, as they seem to, in a number of our sister states, they can also work in Maryland. It is, as I remarked at the outset, a question of will. The judges of the Court of Appeals of Maryland should solve the existing delay problem by adopting and abiding by a reasonable time-limit policy. The policy should have a degree of flexibility, but it should be clearly understood that its time limits represent the norm and that deviations will be tolerated only in the rare and truly exceptional cases. Moreover, the policy, like that of New Mexico and several other states, should be adopted by rule. It would thus be a statement by the court of its own position, yet a public one, promulgated with the effect of law in the course of the court's rule-making power.⁷⁵

The Standing Committee on Rules of Practice and Procedure contains drafters much more competent than I, so I shall not venture to propose the text of a time-limit rule.⁷⁶ I shall suggest, however, what sort of time limits should be imposed.

To avoid undue shock at the outset, I propose that each judge to whom an opinion is assigned ordinarily be required to circulate a draft within sixty days of argument or submission; that a dissent ordinarily be circulated within thirty days of the conference at which the draft opinion is first considered; and that the opinion ordinarily be filed within 120 days of argument in most cases and within 180 days in the more difficult ones. Although the 180 day "outside" time limit somewhat exceeds the ABA's maximum, this proposal is generally consistent with the ABA standards.⁷⁷

decision or potential legislative action. But the fact that exceptions to expeditious filing policy do and should exist does not lessen the need for, or desirability of, such a policy.

75. See MD. CONST. art. IV, § 18(a). In addition, if the court adopted an appropriate timely-filing rule, it would help to delineate one of the duties of a Court of Appeals judge's office for judicial disciplinary purposes. See *supra* note 73.

76. The New Mexico rule might afford a promising beginning. See *supra* text accompanying note 27. In addition to the ABA time standards, see *supra* note 35; *infra* note 77 and accompanying text, attention might well be directed to forthcoming formulations of appellate court standards. For example, the Conference of Chief Justices and the Conference of State Court Administrators recently urged the National Center for State Courts to undertake such a project. See *State Court Leaders Hold Annual Meetings*, NAT'L CENTER FOR ST. CTS. REP. (Nat'l Center for St. Cts., Williamsburg, Va.), Sept. 1991, at 1, 3.

77. See *supra* note 35 and accompanying text. ABA standards in general call for preparation of opinions within 60 days from argument or submission (90 days in death penalty cases and cases of extraordinary complexity); circulation of dissents within 30 days of circulation of the opinion; and additional processing time of 30 days. See AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO APPELLATE DELAY REDUCTION § 3.55(b)(3)-

Moreover, I would have the Court of Appeals adopt procedures to enhance public accountability for its performance pursuant to these standards. The AOC statistics are helpful, but I would also cause to be printed in the Maryland Reports and the Atlantic Reporter the date of argument or submission of each case, in addition to the presently published date of filing. Perhaps the court itself, if it adopted standards like those I suggest, would also adopt even more effective ways of publicizing its compliance with them.

The adoption of and conscientious adherence to these standards would not necessarily place the Court of Appeals among the most rapid of state appellate courts. It would, however, materially diminish the time from argument or submission to opinion filing.⁷⁸ Since the time frames I propose are not averages, but maximums, the court's average filing time should be considerably better than the 160 days recorded for fiscal year 1987.⁷⁹

Even if the Court of Appeals operated so that its average elapsed times were consistent with the proposed standards, there would be a remarkable improvement. And once that level of performance had been achieved, it would be time to consider whether to go to the ABA's 120 to 150 day maximum, or perhaps even further.

It clearly is feasible to achieve a rate of productivity that would result in average elapsed time consistent with the proposed standards. As Table 2 demonstrates, three (Judges *C*, *E*, and *I*) of the six judges who were on the court for the four fiscal years under study, for the most part, did exactly that.⁸⁰ If they could accomplish this, why not all the members of the court? The answer, I submit, is that the court could if it would.

Perhaps some reflection on the adverse effects of undue delay in opinion filing and on the way in which other courts have coped with this problem will induce the Court of Appeals of Maryland to make the necessary effort to remedy the situation. It is a problem that can best, perhaps only, be solved by an exercise of the court's collegial will. If the court would, it could solve its opinion-filing delay problem.

(5) (1988). Thus, the ABA maximum is 150 days. I would allow a little more flexibility for dissents and extend the maximum to 180 days (perhaps over-generously) to give breathing room for especially difficult cases.

78. See *supra* Tables 1 and 2.

79. See *supra* Table 1. Fiscal year 1987 had the shortest average time reported for the four fiscal years studied here.

80. The only exception is Judge *I* in fiscal year 1989.