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THE VIRGINIA JUDICIAL COUNCIL'S INTERMEDIATE APPELLATE COURT PROPOSAL

The ever-expanding volume of appellate litigation in Virginia has engendered a crisis in appellate justice in this state which can be adequately addressed only by the creation of an intermediate appellate court.¹ Not only is Virginia the most populous state without such an intermediate court, its highest court also has the largest caseload of any single state appellate court.²

Legislation to create an intermediate appellate court in the Commonwealth was introduced at the 1982 session of the Virginia General Assembly,³ based on a proposal drafted by the Judicial Council of Virginia.⁴ The purpose of this comment is to discuss Virginia's need for an intermediate appellate court and to evaluate the Council's proposal in light of the experience of other states⁵ and with reference to current American Bar As-

1. Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?* 57 VA. L. REV. 3, 57-58 (1971). The number of petitions for appeal has increased 400% over the past 21 years. Virginia Court Organization Study, A Report of The National Center for State Courts 242 (1979) (unpublished report prepared for Virginia Judicial Council on file in office of Executive Secretary of Virginia Supreme Court) [hereinafter cited as Court Organization Study].

2. Court Organization Study, *supra* note 1, at 239.

3. Several months after this comment was written, two bills proposing the creation of an intermediate court, H.R. 454 and H.R. 455, were introduced before the House of Delegates' Committee on Courts of Justice. Action on these bills was unknown at the time of publication.

4. *Judicial Council of Virginia Adopts Proposal for Intermediate Appellate Court*, 29 VA. B. NEWS 11 (1981) [hereinafter cited as *Judicial Council Proposal*]. The Virginia Judicial Council consists of two attorneys qualified to practice in the Virginia Supreme Court, seven trial court judges, and the chairmen of the Virginia General Assembly House and Senate Committees for Courts of Justice. VA. CODE ANN. § 17-222 (Repl. Vol. 1975). The Council is responsible for the continuous study of Virginia's judicial system and is expressly authorized to consider the creation of an intermediate appellate court. VA. CODE ANN. § 17-225 (Repl. Vol. 1975).

Virginia's former constitution provided for a temporary lower appellate court to hear cases assigned to it by the supreme court. VA. CONST. of 1902, art. VI, § 89 (1971). This court was convened only four times, however, the last time being from 1927 to 1928, and no provision is made for this court under the revised constitution. Lilly & Scalia, *supra* note 1, at 47 n.113. See generally Note, *The Virginia Special Court of Appeals: Constitutional Relief for an Overburdened Court*, 8 WM. & MARY L. REV. 244 (1967).

5. At present, 32 states have intermediate appellate courts: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennes-

sociation Standards Relating to Appellate Courts.⁶

I. THE PRESENT CRISIS IN VIRGINIA

The discretionary nature of most appeals in Virginia⁷ has enabled the state's supreme court to process its huge caseload with remarkable efficiency. However, as the number of petitions for appeal has increased, there has been a corresponding decline in the ability of the supreme court to perform the two essential functions of appellate review. First, the supreme court is responsible for performing the corrective function of reviewing trial court decisions for error which results in injustice to the parties.⁸ Second, the court is responsible for performing the developmental function of writing opinions which will provide meaningful guidance to the state's legal community.⁹ In order to adequately carry out these responsibilities, the reviewing court must be able to maintain a balance in the time it devotes to each function. Where such balance is impossible, these functions become competing rather than complementary duties. The result is likely to be an endless cycle in which the incidence of error in the trial courts increases as the clarity and coherence of the precedent guiding them decreases.

Because of the ever-increasing number of petitions for appeal, the Virginia Supreme Court faces precisely this kind of situation.¹⁰ Clarity and

see, Texas, Washington and Wisconsin. M. OSTHUS, *STATE INTERMEDIATE APPELLATE COURTS* 20-23 (rev. ed. 1980). Over half of these courts were created after 1960, and seven of these have been established since 1976. See Blair & Flango, *Creating an Intermediate Appellate Court: Does It Reduce the Caseload of a State's Highest Court?* 64 *JUDICATURE* 74, 77 (1980).

6. ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *STANDARDS RELATING TO APPELLATE COURTS* (1977) [hereinafter cited as ABA STANDARDS].

7. Appeal is only by leave of the supreme court unless an appeal as of right is expressly provided by statute. See W. BRYSON, *NOTES ON VIRGINIA CIVIL PROCEDURE* 173 (1979). Compare, e.g., VA. CODE ANN. §§ 8.01-670 (Repl. Vol. 1977) (civil appeals) and 19.2-317 (Repl. Vol. 1975) (criminal appeals) with 12.1-39 (Repl. Vol. 1978) (appeals from State Corporation Commission) and 17-110.01 (Cum. Supp. 1981) (appeal of death sentence).

Petitions for appeal are decided upon by panels consisting of three or four justices. If leave to appeal is granted, the case is heard by the full court. The panels review petitions on their merits on the basis of a full record, briefs and oral argument by the petitioner if requested. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 132-33 (1976); Court Organization Study, *supra* note 1, at 256-57. See also ABA STANDARDS, *supra* note 6, at § 3.10, Commentary. The panels grant petitions whenever the trial court's decision presents "a substantial possibility of injustice." *Saunders v. Reynolds*, 214 Va. 697, 701, 204 S.E.2d 421, 424 (1974) (rejecting due process attack on discretionary appeal procedure).

8. ABA STANDARDS, *supra* note 6, at § 3.00, Commentary.

9. *Id.*

10. According to the National Center for State Courts, Virginia's "constantly rising appel-

coherence in rulings must be sacrificed if justice is to be done, as it must be, in cases of little interest to anyone other than the immediate parties.¹¹ The court simply cannot afford to prevent error by selecting and devoting time to cases which would give it an opportunity to clarify or revise existing law.¹² To do so would require sacrificing the rights of parties whose appeals would be rejected in order to keep the court's caseload within manageable bounds. This price would be too great.

A more serious concern is that the supreme court is becoming increasingly less accessible to litigants.¹³ Indeed, it is questionable whether the court currently gives petitions for appeal the careful judicial review required by ABA Standards.¹⁴ Thus an intermediate appellate court is des-

late caseload . . . has rendered this system unworkable, and an intermediate court is now required." Court Organization Study, *supra* note 1, at 253. The commentary to ABA STANDARDS, *supra* note 6, at § 3.01, points out that the discretionary appeal procedure, because it permits the court to deny review, often masks the symptoms of an appellate crisis: "[S]uch an arrangement may persist long after the point has been reached when an intermediate appellate court should have been established. Moreover, internal inconsistency in the court's decisions may be ignored or tolerated to an excessive degree in the hope of avoiding the cost of establishing an intermediate court."

11. [T]he quality of appellate justice is to a large degree determined by the attention given to the merits of cases that are of little interest to anyone but the immediate parties. All appellate courts should remain mindful that every case, whether it has general importance or not, is important to the immediate litigants.

ABA, STANDARDS, *supra* note 6, at 3 (Introduction).

12. Four justices have "expressed concern that they do not have enough time to research issues and prepare opinions adequately to perform the Court's law-making function." Court Organization Study, *supra* note 1 at 257.

13. While the number of petitions for appeal has increased 400%, the number of appeals granted has declined from about 40% in the late 1950's to about 13% in the late 1970's. *Id.*

14. *Id.* at 256. ABA STANDARDS, *supra* note 6, at § 3.10(a), requires that litigants generally be accorded an appeal of right from the trial level. The commentary to this section, however, indicates that discretionary review procedures are acceptable if the litigant has the rights to: (1) present the record of the proceedings below, (2) submit written argument in the form of briefs, (3) present oral argument except in cases where it has so little utility that it may justly be denied, and (4) thoughtful consideration of the merits of the case by at least three judges of the court. ABA STANDARDS, *supra* note 6, at § 3.10(a), Commentary.

With regard to the fourth element, the ABA STANDARDS require that "[e]ach judge who is to participate in deciding an appeal should read the briefs and become familiar with the record, the parties' contentions, and the principal authorities relevant to the questions presented." ABA STANDARDS, *supra* note 6, at § 3.34. This requirement applies to deliberations on the question of whether to grant discretionary appeal. ABA STANDARDS, *supra* note 6, at § 3.34, Commentary. The National Center for State Courts has found indications that the fourth element is lacking. Court Organization Study, *supra* note 1, at 249. At present, "[t]he justices usually do not read the briefs or records, relying on the memoranda [prepared by a law clerk or staff attorney] and on oral argument [only the petitioner may argue orally] for information about the facts and the parties' contentions." *Id.*

perately needed, not only to allow more time for careful exposition of the law, but also to assure meaningful judicial review of the merits of each case that is appealed on the basis of error.

The addition of an intermediate appellate court would give Virginia's judicial system the capacity necessary to perform the two essential functions of appellate review. The primary role of the intermediate court would be to perform the corrective function of remedying trial court error.¹⁵ The Supreme Court of Virginia then would be able to concentrate primarily on the developmental function of establishing a uniform body of case law.¹⁶ It could be more selective in accepting appeals and could devote more time to those cases without jeopardizing the rights of other litigants.

II. OBJECTIONS TO AN INTERMEDIATE APPELLATE COURT

There are four principal objections to the creation of an intermediate court. It has been argued that the addition of a lower appellate court would: 1) encourage appeals;¹⁷ 2) increase the delay and expense involved in appeals;¹⁸ 3) undermine the certainty of precedent;¹⁹ and 4) cost more than internal reforms.²⁰

Although the addition of an intermediate court undoubtedly would encourage appeals from the trial level, one of the basic reasons for creating an intermediate appellate court is to increase access to the appellate process. The current lack of access to appellate review discourages some parties from seeking appeals in cases clearly meriting review.²¹ An intermediate court would give Virginia the appellate capacity necessary to afford deserving parties a greater opportunity to invoke the corrective function of appellate review. Not all cases, however, would warrant invoking the developmental function of supreme court review.

The objection that an intermediate court would increase the delay and

15. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975).

16. See Groot, *The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience*, 7 WAKE FOREST L. REV. 548, 557 (1971); Court Organization Study, *supra* note 1, at 270.

17. Blair & Flango, *supra* note 5, at 76.

18. Osthus, *supra* note 5, at 2-3.

19. *Id.*

20. See ABA STANDARDS, *supra* note 6, at § 3.01, Commentary; Lilly & Scalia, *supra* note 1, at 21, 28, 34-35; Court Organization Study, *supra* note 1, at 269.

21. "[M]any cases [are] not now appealed . . . because of the foreknowledge that the Supreme Court will not accept review . . ." Lilly & Scalia, *supra* note 1, at 58.

expense involved in taking an appeal rests on the assumption that two levels of appellate courts would result in two appeals in every case. Statistics from states having intermediate courts indicate that this assumption is not valid.²² Many litigants are apparently satisfied with one appeal. In addition, when relieved of their responsibility for performing the corrective function of appellate review, state supreme courts may be more selective in accepting cases for review. Finally, the appellate system can be structured to eliminate the need for double appeals by directing cases presenting issues of major public importance or involving novel legal questions to the supreme court for decision in the first instance.²³

Decisional conflict within an appellate system would, of course, undermine the certainty of precedent. However, two-level appellate systems can be structured to minimize the risk of such conflict by permitting the intermediate court to decide cases en banc and by providing for supreme court review where necessary to maintain decisional uniformity.²⁴ Moreover, any conflicts which did arise would serve as helpful indicators to the supreme court of areas of the law in need of clarification or revision.

Creating an intermediate appellate court would cost more than such internal reforms as increasing the size of the supreme court, using panels of justices to hear appeals, expanding the role of staff attorneys, or using commissioners to write opinions.²⁵ None of these measures, however, would improve the quality of justice and case law in Virginia or would comport with ABA Standards. The first two alternatives simply would not be adequate to cope with the present appellate caseload crisis²⁶ and would impair the supreme court's ability to perform its developmental function. Increasing the size of the court might impair the effectiveness of conference deliberations and increase the number of dissenting opinions.²⁷ Likewise, the use of three- or five-judge panels to decide appeals

22. Osrhus, *supra* note 5, at 3. Recent studies indicate that in states having two level appellate systems, supreme court review is sought in only about 40% of the cases decided by the intermediate court and is granted by the supreme court in only about 15% of these cases. Marvell, *The Problem of Double Appeals*, 1979 APPELLATE ADVOCACY REV. 23; Court Organization Study, *supra* note 1, at 264.

23. Although Blair & Flango, *supra* note 5, at 84, conclude that creating an intermediate court seems to increase the overall number of appeals from the trial level, they do concede that the addition of such a court can reduce the caseload of the supreme court if the intermediate court is given the appellate jurisdiction and membership necessary to accommodate the increase in initial appeals from the trial level.

24. Osrhus, *supra* note 5, at 10, 14.

25. Court Organization Study, *supra* note 1, at 262-63. For a detailed evaluation of each of these alternatives see Lilly & Scalia, *supra* note 1, at 21-42.

26. Court Organization Study, *supra* note 1, at 262.

27. The Virginia Supreme Court currently has seven members. The ABA has endorsed

could prevent the collective professional and intellectual resources of the entire court from being brought to bear upon the development of the law.²⁸ Perhaps the greatest risk in using panels is that such use could create internal conflict in the court's decisions. This would be intolerable at the supreme court level. Even if the court reheard en banc decisions which reflected a lack of uniformity between panels, the danger of internal inconsistency would continue to exist.

The two remaining alternatives would involve unacceptable delegation of the judicial function. Staff attorneys already play a major role in the petition for appeal process, in contravention of ABA Standards.²⁹ The use of commissioners to hear appeals and help write opinions would also violate these standards.³⁰

The costs involved in creating an intermediate court could be minimized by utilizing, to the extent possible, existing administrative facilities and personnel.³¹ Centralized administration of the intermediate court together with divisional sitting would maximize the efficient use of available judicial and administrative resources. Although some additional expenditures may be required, an even greater cost will be imposed on the Commonwealth in terms of the declining quality of appellate justice in Virginia if the two-tier appellate system is not adopted. In the words of several commentators, this is "a price . . . which most Americans and their lawyers would or should be unwilling to bear."³²

III. THE JUDICIAL COUNCIL'S INTERMEDIATE APPELLATE COURT PROPOSAL

The addition of an intermediate level of appeals in Virginia would require careful planning of the intermediate appellate court's organization, jurisdiction, and relationship to the state supreme court. The effectiveness of the intermediate court in reducing the delay and expense involved in the appellate process and in providing docket relief to the supreme court turns upon these three features. The thirty-two states with two-tiered appellate systems vary significantly in terms of these three central

five- to nine-member appellate courts. ABA STANDARDS, *supra* note 6, at § 3.01, Commentary.

28. The ABA STANDARDS recommend against divisional sitting of the supreme court. ABA STANDARDS, *supra* note 6, at § 3.01.

29. The court's reliance upon staff-prepared memoranda in deciding on whether to grant leave to appeal violates ABA STANDARDS §§ 3.10 and 3.34. *See* note 14 *supra*.

30. "The court should not . . . delegate its deliberative and decisional functions to officers such as commissioners." ABA STANDARDS, *supra* note 6, at § 3.01(2).

31. *See* Court Organization Study, *supra* note 1, at 282-84.

32. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 7, at 133.

features. The intermediate courts in these states also have demonstrated differing levels of effectiveness in increasing access to the appellate process and in providing docket relief for the supreme court.³³ Thus, the merits of the Judicial Council's proposal for improving Virginia's appellate system may be evaluated against the backdrop of the experiences of other states and the standards which have been formulated by the American Bar Association in light of those experiences.

A. *Organization of the Proposed Intermediate Appellate Court*

The Council's proposed intermediate appellate court would consist of four divisions, with three judges assigned to each division.³⁴ One division would sit in Richmond, and the others would sit at locations designated by the supreme court to provide convenient geographical access to the appellate process.³⁵ The court would be centrally administered and would have a single clerk, whose office would be located in Richmond.³⁶

The membership of each division of the court would rotate on the basis of assignment by its chief judge,³⁷ and he would also assign cases among divisions.³⁸ Generally the divisions would function independently of each other, deciding both petitions for appeal and appeals granted.³⁹ However, upon motion the court would be required to rehear en banc the decision of any division in which there was a dissenting opinion. An en banc rehearing would also be held upon certification by any intermediate court judge that a division's ruling conflicted with a prior decision of a division, the intermediate court sitting en banc, or the supreme court.⁴⁰

33. See Blair & Flango, *supra* note 5.

34. *Judicial Council Proposal*, *supra* note 4, at 11-15 (reprinting Judicial Council of Virginia, A Bill to Amend Title 17 of the Code of Virginia by Adding thereto Chapter 3.1 Providing for a Court of Appeals, §§ 17-116.01 to -116.02 (1981) [hereinafter cited as *Judicial Council Bill*]).

35. Judicial Council Bill, *supra* note 34, at § 17-116.02(2).

36. *Id.* at § 17-116.013.

37. Section 17-116.02(b) of the Council's proposal authorizes the chief judge to assign members to divisions and imposes no local residency requirements for judges. Although this section does not expressly require rotating membership, such membership is recommended by § 3.01(b) of the ABA STANDARDS and by the National Center for State Courts. Court Organization Study, *supra* note 1, at 284. The majority of states with intermediate courts employ rotating membership at the intermediate level. OSTHUS, *supra* note 5, at 13.

38. Judicial Council Bill, *supra* note 34, at § 17-116.02(a).

39. *Id.* at § 17-116.02(c).

40. The Council's proposal provides that:

The Court of Appeals shall sit en banc at such place as the Chief Judge shall direct and the Court shall rehear the decision of any division upon the motion of a party or upon its own motion (1) when there is a dissent in the division to which the case was

On the whole, the Council's proposal follows the recommendations of the ABA and the organizational model used by a majority of the states which have intermediate courts. The actual number of judges at the intermediate level varies among states, depending upon the size of a state's population, geographical area, appellate caseload, and whether the intermediate court sits divisionally. However, states similar to Virginia in these respects typically have twelve judges at the intermediate level.⁴¹ In addition, to maximize appellate capacity, the majority of states authorize the intermediate court to sit in divisions of three to five judges each.⁴² The states vary significantly, however, with regard to the jurisdiction of such divisions and the permanency of their membership.

Divisional sitting creates the risk of decisional conflict among divisions. To minimize this risk, five states permanently divide the intermediate court into a civil and criminal division.⁴³ While this model eliminates the risk of express decisional conflict between divisions, the permanency of the divisions may result in the development of divergent judicial philosophies and procedural policies. Where permanent divisions are employed, the need for supreme court supervision to develop a uniform approach to all cases is increased.⁴⁴ Moreover, because appellate judges generally consider criminal cases "the dullest, least challenging and most repetitive component of their business,"⁴⁵ first-rate judges may not be attracted to the permanent criminal divisions created under this model.

Most states provide for the sitting of divisions at convenient geographical locations as a means of increasing the accessibility of the appellate process.⁴⁶ Among these states, two basic organizational models are used: 1) divisions with statewide jurisdiction and rotating membership;⁴⁷ and 2)

originally assigned, or (2) when any judge of any division shall certify that in his opinion any decision of such division of the court is in conflict with a prior decision of the court or of any division thereof or of the Supreme Court.

Id. at § 17-116.02(d). See VA. CONST. art VI, § 2; VA. SUP. CT. R. 5:3. The proposal does not clarify whether this requirement applies to a division's decision on petitions for appeal.

41. Court Organization Study, *supra* note 1, at 280-82. See, e.g., N.C. GEN. STAT. § 7A-16 (Repl. Vol. 1981).

42. OSTHUS, *supra* note 5, at 20-23. See, e.g., N.C. GEN. STAT. § 7A-16 (Repl. Vol. 1981). ABA STANDARDS, *supra* note 6, at § 3.01 requires at least three judges per division.

43. The states creating permanent civil and criminal divisions in their intermediate courts are Alabama, Oklahoma, Pennsylvania, Texas and Tennessee. In addition, Alaska's intermediate court has only criminal jurisdiction. OSTHUS, *supra* note 5, at 26, 40-44, 50.

44. *Id.* at 6.

45. Lilly & Scalia, *supra* note 1, at 38.

46. See OSTHUS, *supra* note 5, at 13. See generally U.S. DEPT. OF JUSTICE, NATIONAL SURVEY OF COURT ORGANIZATION (1973).

47. See, e.g., N.C. GEN. STAT. § 7A-16 (Repl. Vol. 1981).

divisions with geographically limited jurisdiction and permanent membership.⁴⁸

The Council's proposal adopts the first model, which is recommended by the American Bar Association.⁴⁹ Statewide jurisdiction gives the intermediate court the flexibility necessary to accommodate caseload variations and is conducive to centralized administration. The number of appeals arising within a particular region of a state may vary, both within the region and in relation to other regions.⁵⁰ With statewide jurisdiction, cases can be allocated among divisions to achieve relatively equal caseloads, and divisions can be assigned to the areas where they are needed most. Without this flexibility, the time required for disposition of cases could vary greatly among divisions, resulting in unequal treatment of litigants.⁵¹

Rotating membership reduces the risk of decisional conflict by preventing divisions from becoming separate courts with different judicial philosophies and procedural policies.⁵² The development of separate courts would undoubtedly make litigants feel that they were being treated unequally and increase the need for supreme court supervision.⁵³ While rotating membership would require some travel on the part of judges, oral argument and decisional conferences could be held by telephone where feasible.⁵⁴

The second model, which limits a division's jurisdiction to a statutorily defined geographic area and provides for permanent membership would allow each division to develop a local character and would require less travel by judges.⁵⁵ The permanency of divisions, however, could produce both administrative and decisional disunity. In addition, this model would probably require the creation of a separate clerk's office for each division.⁵⁶ While a single clerk is conceivable, such an arrangement would entail extensive mailing between the clerk's office and distant divisions. Another administrative problem would be a lack in the flexibility neces-

48. See, e.g., IND. CODE ANN. § 33-2.1-2-2 (Burns 1980).

49. ABA STANDARDS, *supra* note 6, at § 3.01(b).

50. Court Organization Study, *supra* note 1, at 278.

51. ABA STANDARDS, *supra* note 6, at § 3.01, Commentary.

52. *Id.*

53. *Id.* See OSTHUS, *supra* note 5, at 6.

54. ABA STANDARDS, *supra* note 6, at § 3.36, Commentary; ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS 99 (1977).

55. Letter from Tidewater Region of Circuit Court Judges' Study Commission to Judicial Council of Virginia 2-3 (July 13, 1981) (recommending second model).

56. Court Organization Study, *supra* note 1, at 278.

sary to accommodate variations in caseload. Most serious is the risk that a particular division would consistently disagree with other divisions, a result which would produce utter chaos in Virginia if the rehearing en banc requirement is retained.

One of the most unique and potentially problematic features of the Council's proposal is the requirement of rehearing en banc. Only a few states provide for such rehearing,⁵⁷ and the American Bar Association recommends against its frequent use.⁵⁸ In the states where it may be used, the rehearing en banc is not required. Rather, it is an extraordinary proceeding to be authorized only where a majority of the intermediate court agrees that it is necessary to maintain decisional uniformity.⁵⁹ Parties may request a rehearing en banc,⁶⁰ but neither a single party nor a judge can require the intermediate court to disrupt its proceedings to hold the rehearing. Under the Council's proposal, a single judge would have this power, either by dissent or by certification of decisional conflict. A party could obtain the rehearing merely upon a proper motion.

The justification for rehearing en banc is that it would give intermediate court decisions the uniformity and precedential value necessary for these decisions to be final.⁶¹ A decision by the majority of the intermediate court would have more weight than the split decision of a single division. In cases where the supreme court agreed with the majority, a double appeal would not be necessary. Even if it did not agree, the supreme court would have the benefit of the views expressed by the intermediate court judges. Finally, in cases where the supreme court's discretion to review intermediate court decisions is limited or nonexistent, an en banc rehearing would be essential to securing a uniform body of case law.

The most significant drawbacks of rehearing en banc are its disruptive and delaying consequences. An en banc rehearing would require the filing of additional briefs and copies of the trial record to accommodate the larger number of judges. It would also disrupt routine divisional proceed-

57. See, e.g., FLA. R. APP. P. 9.331(c); MD. CTS. & JUD. PROC. CODE ANN. § 1-403 (Repl. Vol. 1980). A few states permit rehearsings en banc where it appears a division's decision may conflict with precedent. See, e.g., KY. CIV. R. 1.030(7)(d). The Commentary to ABA STANDARDS, *supra* note 6, at § 3.01, states that "[t]he *en banc* hearing mechanism is . . . unnecessary and inappropriate in most state appellate court systems."

58. "[E]n banc hearings should be kept to a minimum because they impose a heavy burden on the court's time and, if held after a panel's decision, impose an additional burden on litigants." ABA STANDARDS, *supra* note 6, at § 3.01, Commentary.

59. See, e.g., FLA. R. APP. P. 9.331(c).

60. *Id.*

61. See ABA STANDARDS, *supra* note 6, at § 3.01, Commentary.

ings when the judges convened en banc at a central location.⁶² In addition, rehearing en banc is likely to be more cumbersome and less effective than appeal to the supreme court. If conflicting interpretations of law arose among the divisions, only the state supreme court could definitively resolve the matter.

Even if the mechanism secures the finality of intermediate court decisions and eliminates double appeals, requiring rehearing en banc at the motion of a party or on the basis of the action of a single judge is not a sound way to secure its benefits. The requirement provides a built-in dilatory tactic, especially for defendants who hope to pressure their opponents into settlement as an alternative to prolonged litigation. If provision for rehearing en banc is retained, the decision to hold such a rehearing should be made by a majority of the intermediate court and should be authorized only where necessary to secure decisional uniformity. Further restricting the procedure to cases in which no appeal from the decision of the intermediate court is allowed would optimize its use.

B. *The Nature of Appeal to the Intermediate Appellate Court*

Under the Judicial Council's proposal, appeal to the intermediate court would be discretionary, as are most appeals to the Virginia Supreme Court under the present system.⁶³ Petitions would be heard by a division of the court and would be granted if one judge found that full scale review was warranted. The decision to reject a petition would have to be unanimous.⁶⁴

Unlike the Council's proposal, all states with intermediate courts accord civil and criminal litigants at least one appeal from the final judgment of a trial court of record as a matter of right.⁶⁵ The primary justification for the discretionary appeals process in Virginia has been the necessity of enabling the supreme court to manage its huge caseload.⁶⁶ The addition of an intermediate court, however, would eliminate this rationale. It would also allow Virginia to conform to current, national standards of fairness, under which "it is almost axiomatic that every losing

62. See FLA. R. APP. P. 9.331(c); Judicial Council Bill, *supra* note 34, at § 17-116.02(d).

63. Judicial Council Bill, *supra* note 34, at § 17-116.05(a)-(b). See also authorities cited in note 7 *supra*.

64. Judicial Council Bill, *supra* note 34, at § 17-116.07(a).

65. Virginia and West Virginia, neither of which have intermediate courts, are the only two states which do not provide at least one appeal as a matter of right. Court Organization Study, *supra* note 1, at 239.

66. See Lilly & Scalia, *supra* note 1, at 57-58; Court Organization Study, *supra* note 1, at 253.

litigant in a one-judge court ought to have a right of appeal to a multi-judge court . . . [as] a protection against error, prejudice, and human failings in general."⁶⁷

The major objections to an appeal of right are that it will lead to frivolous appeals and cause needless delay and expense.⁶⁸ The first objection is easily countered in view of the authority of virtually all appellate courts to impose sanctions for frivolous appeals.⁶⁹ The second objection correctly identifies the primary value of the discretionary appeal process from the judicial perspective—its efficiency. Without question, the court's summary procedures for reviewing petitions save time. The real issue, however, is whether these procedures are worth the cost they impose upon litigants.

From the litigant's perspective, the discretionary appeal process is both unfair and costly. For the litigant whose appeal is denied, there is an implication that his case is not worthy of the same careful judicial consideration given to appeals which are granted.⁷⁰ Although the process costs him as much as an appeal of right, he obtains much less in terms of judicial review. He must finance his attorney's presentation of a full record, a

67. B. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* 4 (1976). *But see* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (states not constitutionally required to provide for appeals).

The Virginia Trial Lawyer's Association Committee on Federal and State Courts currently seeks to form an ad hoc committee composed of members from each of Virginia's four bar groups—the Virginia Trial Lawyer's Association, the Virginia Bar Association, the Virginia State Bar Committee and the Virginia Association of Defense Attorneys—to try and develop an intermediate court proposal which would satisfy the members of all four groups. One of this committee's central concerns will be to secure appeal as a matter of right to the intermediate court. Telephone conversation with F. Rodney Fitzpatrick, Chairman of the Virginia Trial Lawyer's Association Committee on Federal and State Courts (Sept. 22, 1981). The National Center for State Courts has also recommended an appeal as of right to the intermediate court. Court Organization Study, *supra* note 1, at 271.

A possible compromise between appeal as of right and appeal by leave of court is found in those states which make interlocutory appeals discretionary and permit appeal as of right only from final judgments. *See, e.g.*, FLA. R. APP. P. 9.130(b); ILL. SUP. CT. R. 307. ABA STANDARDS, *supra* note 6, at § 3.12(b), recommends that interlocutory appeals be discretionary to insure that litigation is not unnecessarily protracted. VA. CODE ANN. § 8.01-670(B) (Repl. Vol. 1977) currently provides for discretionary review of specified equitable interlocutory decrees.

68. Telephone conversation with F. Rodney Fitzpatrick, Chairman of the Virginia Trial Lawyer's Association Committee on Federal and State Courts (Sept. 22, 1981).

69. *See, e.g.*, FED. R. APP. P. 38; ALA. R. APP. P. 38; OHIO R. APP. P. 23; PENN. R. APP. P. 2761.

70. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 7, at 133; Court Organization Study, *supra* note 1, at 272.

written brief, and oral argument.⁷¹ However, it is likely that only his oral argument will reach the justices.⁷² The litigant whose appeal is granted is also hurt by the process. He must finance the presentation of not only a full record, but also two formal briefs, an appendix, and two oral arguments.⁷³ For him, the current process is as expensive as a double appeal. Discretionary appeal to the intermediate court could require a party to finance four stages of briefing and argument.

An appeal of right would enhance the litigant's perception of the appellate process as responsive to his needs and would reduce the drain on his financial resources. Of greater significance, an appeal of right would allow the litigant to determine whether the trial court's decision would receive full scale judicial review, subject to the power of the court to impose sanctions where this right was clearly abused. Finally, the efficient use of judicial resources is possible under an appeal of right process. Such efficiency could be maximized by permitting the intermediate court to sit in divisions, to dispense with oral argument in cases where it clearly would not be helpful, and to state the grounds for its decisions in short, informal opinions which would not be published.⁷⁴ Other time-saving measures are also available, such as pre-disposition conferences to limit the issues on appeal.⁷⁵

C. *Jurisdiction of the Intermediate Appellate Court*

1. Original Jurisdiction

The Judicial Council's proposed intermediate court would have jurisdiction to issue writs of mandamus and prohibition against circuit

71. See VA. SUP. CT. R. 5:8, 5:21, 5:28.

72. It has been noted that "[t]he justices usually do not read the briefs or records." Court Organization Study, *supra* note 1, at 249.

73. Parties may not adopt the briefs used at the petition stage for use in the full appeal stage. See VA. SUP. CT. R. 5:42. Nor can the record be used. The appellant must prepare a formal appendix containing relevant parts of the record which is presumed complete. VA. SUP. CT. R. 5:35, 5:37. Although oral argument may be waived, most attorneys naturally do not do so for fear of prejudicing their client's case.

74. LILLY, GRAHAM C., *THE APPELLATE PROCESS AND STAFF RESEARCH ATTORNEYS IN THE SUPREME COURT OF VIRGINIA: A REPORT OF THE APPELLATE JUSTICE PROJECT OF THE NATIONAL CENTER FOR STATE COURTS, 1972-73* (1974); OKSMAN, G. TIMOTHY, *THE APPELLATE PROCESS AND STAFF RESEARCH ATTORNEYS IN THE SUPREME COURT OF VIRGINIA: A REPORT OF THE APPELLATE JUSTICE PROJECT OF THE NATIONAL CENTER FOR STATE COURTS, 1973-74* (1975).

75. Many states permit conferences with an intermediate court judge to simplify the issues and procedure on appeal. See, e.g., KY. CIV. R. 76.14. ABA STANDARDS, *supra* note 6, at § 3.53, recommends the use of such conferences.

judges⁷⁶ and to issue writs of habeas corpus against any governmental official.⁷⁷ Each judge would also have the authority to summarily review a circuit court's action respecting an injunction.⁷⁸

In providing the intermediate court with co-extensive original and appellate jurisdiction, the Council's proposal conforms both to the practice of the majority of states with intermediate courts⁷⁹ and to ABA Standards.⁸⁰ However, the proposal does not adequately explain the relationship between the original jurisdiction of the intermediate court and that of the supreme court. This relationship should be clarified so that initial appeals may be filed in the proper court. The need for such clarification might arise, for example, where an intermediate court refused to issue a writ, or if a judge of that court refused to review a circuit court's action on an injunction.⁸¹

Most states require that a litigant initially seek a writ from the court which would have initial appellate jurisdiction over a final judgment in his case⁸² and specify that appeal to the supreme court is the appropriate remedy where the intermediate court refuses to issue the desired writ.⁸³ Absent such clarification, petitions and briefs could be filed simultaneously or successively in the intermediate court and the supreme court,

76. Judicial Council Bill, *supra* note 34, at § 17-116.04.

77. *Id.*

78. *Id.* VA. CODE ANN. § 8.01-626 (Repl. Vol. 1977) authorizes a single supreme court justice to summarily review a circuit court's orders with regard to an injunction. Also, VA. CODE ANN. § 8.01-670 (Repl. Vol. 1977) provides for an ordinary discretionary appeal from such orders. The authority conferred by § 8.01-626 is classified under the Council's proposal as part of the original jurisdiction of the intermediate court. To date, the relationship between §§ 8.01-626 and 8.01-670 has not been clarified. See Hartnett, *Extraordinary Writs and Unusual Appeals - State and Federal Courts*, in APPELLATE PRACTICE SEMINAR - VIRGINIA AND FEDERAL, II-9 to II-11 (1981).

79. OSTHUS, *supra* note 5, at 4. Most states, however, do not limit the intermediate court's jurisdiction to issuing writs in aid of its appellate jurisdiction. Such a limitation is desirable to avoid congestion in the intermediate court. Hufstedler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 598 (1969).

80. ABA STANDARDS, *supra* note 6, at § 3.00(a)(2).

81. Section 17-116.07 of the Council's proposal provides that the intermediate court's decision is to be final in certain types of cases. It is not clear whether appeal to the supreme court will be available from the intermediate court's action respecting extraordinary writs sought in such cases. Section 17-116.07 provides for finality only where the intermediate court "has rejected a petition for appeal or has granted and decided an appeal." Judicial Council Bill, *supra* note 34, at § 17-116.07. Thus, it would seem that the finality created by the provision could easily be circumvented by seeking appeal from the intermediate court's action pursuant to its original jurisdiction. See text accompanying notes 110-22 *infra*.

82. See, e.g., N.C. R. APP. P. 22(a).

83. See, e.g., KY. R. CIV. P. 76.36(6).

creating unnecessary expense and duplication of effort.⁸⁴

2. Appellate Jurisdiction

Under the Council's proposal, the intermediate court's appellate jurisdiction would encompass all cases in which appeal to the supreme court is currently discretionary.⁸⁵ Thus, all appeals from the circuit courts and the Virginia Industrial Commission⁸⁶ would lie in the intermediate court. The direct appellate jurisdiction of the supreme court would be confined to the narrow class of cases in which appeal is currently of right.⁸⁷ This category includes appeals from the State Corporation Commission, appeals from the circuit courts in capital cases, and appeals from the special three-judge tribunal in disbarment proceedings.⁸⁸

If the proposal is adopted, most appeals would be taken initially to the intermediate court. The intermediate level of appeal could be bypassed, however, through an order of "certification" issued by the supreme court. A party wishing to bypass the intermediate court could file a motion for certification in the supreme court. The proposal would also allow the intermediate court itself to request certification of an appeal. A request for certification by a party or the intermediate court could be granted if the case involved either a "substantial question of constitutional law," a circuit court's decision that a statute is unconstitutional, or a legal principle "of major significance to the jurisprudence of the Commonwealth that [has] not been previously decided by the Supreme Court." However, the supreme court, upon its own motion, would be authorized to certify any case.⁸⁹

Thus, the Council's proposal would give the intermediate court broad appellate jurisdiction, subject to the authority of the supreme court to certify cases for direct review. In this respect, the proposal conforms to the jurisdictional model which has proven most effective in states with intermediate courts⁹⁰ and has been recommended by the American Bar

84. See FLA. R. APP. P. 9.100(e) Committee Notes.

85. Judicial Council Bill, *supra* note 34, at § 17-116.05(a)-(b). See authorities cited in note 7 *supra*.

86. See VA. CODE ANN. § 65.1-98 (Repl. Vol. 1980); Judicial Council Bill, *supra* note 34, at § 17-116.05(c).

87. See authorities cited in note 7 *supra*. See also VA. CODE ANN. § 54-74(5) (Repl. Vol. 1978 & Cum. Supp. 1981) (appeals in disbarment proceedings).

88. Judicial Council Bill, *supra* note 34, at § 17-116.05(b).

89. *Id.* at § 17-116.06.

90. See OSTHUS, *supra* note 5, at 7. Studies have shown that a broad jurisdictional grant is most effective in reducing supreme court congestion. *Id.*; Blair & Flango, *supra* note 5, at 84.

Association.⁹¹

As previously noted, double appeals may occur in a two-level appellate system where the jurisdictional boundaries of the courts overlap. To avoid this problem, a preliminary sorting process should be established to direct cases of great legal or public significance to the supreme court. The process should be relatively simple and clear-cut in order to avoid jurisdictional conflicts.

Subject matter and amount classifications (e.g. the involvement of a constitutional issue or specific amount of money) should not be used to define the intermediate court's initial appellate jurisdiction: "Subject matter and monetary divisions, which generally represent an *attempt* at winnowing out the cases of importance, are simply not effective in doing so."⁹² Moreover, imprecise classifications may lead to jurisdictional disputes and confusion. Recognizing the inaccuracy and imprecision of such classifications, many states have given their intermediate courts the broad appellate jurisdiction recommended by the American Bar Association.⁹³ With a few specific and narrowly drawn exceptions, all appeals in these states must be taken initially to the intermediate court.⁹⁴ As indicated above, the Council's proposal for an intermediate court in Virginia adopts this model. The exceptions suggested by the proposal for direct supreme court jurisdiction in capital cases, disbarment proceedings, and appeals from the State Corporation Commission are sufficiently precise to prevent dispute.⁹⁵

The majority of states with intermediate courts also have adopted some form of the certification process described above, which allows bypassing of the intermediate court in certain cases so that the state supreme court may have direct appellate review in these matters.⁹⁶ The bypass mechanism can facilitate the prompt consideration of cases whose legal signifi-

91. ABA STANDARDS, *supra* note 6, at § 3.00(a)(2).

92. Lilly & Scalia, *supra* note 1, at 49 (emphasis in original).

93. The states which follow the ABA recommendation include Arizona, California, Florida, Illinois, Kentucky, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Ohio, Oregon, and Wisconsin. See OSTHUS, *supra* note 5, at 27-29, 31, 33-37, 39, 40-41, 45. ABA STANDARDS, *supra* note 6, at § 3.00(a)(2), recommends that there be no exceptions to the intermediate court's initial appellate jurisdiction.

94. See, e.g., N.C. GEN. STAT. § 7A-27(a) (Repl. Vol. 1981) (excepting only appeals from sentence of death or life imprisonment from intermediate court's jurisdiction).

95. See Judicial Council Bill, *supra* note 34, at § 17-116.05(c). These cases constitute only a small portion of the supreme court's current caseload. Court Organization Study, *supra* note 1, at 274.

96. OSTHUS, *supra* note 5, at 11. ABA STANDARDS, *supra* note 6, at § 3.10(d), recommends the use of a bypass mechanism for cases of "great and immediate public importance."

cance mandates authoritative resolution by the supreme court. The definition of "legal significance" varies among states, but the criteria for certification set out in the Council's proposal do not differ materially from the criteria employed by other jurisdictions.⁹⁷

Following the model of most states which utilize a bypass mechanism, the Council's proposal would give parties to an action the right to request certification of their appeal to obtain a direct hearing by the state supreme court.⁹⁸ An alternative approach would be to adopt the unique procedure used by the State of Florida, which gives the intermediate court shared responsibility for securing the transfer of legally significant cases to the supreme court for prompt resolution. Under the Florida system, a party desiring to bypass the intermediate court must first petition that court.⁹⁹ If the intermediate court determines that prompt supreme court review is warranted, it invokes the supreme court's discretion to accept the case.¹⁰⁰

Florida's procedure is less disruptive to proceedings in both appellate courts and is less burdensome to the parties.¹⁰¹ The intermediate court, while familiarizing itself with the case, can conveniently consider the merits of a party's petition for bypass without disrupting its normal appellate processes. The parties, in the midst of perfecting an appeal in the intermediate court, are not required to file the lengthy petitions necessary to adequately familiarize the supreme court with the case. In addition, the supreme court does not have to rule upon all petitions for bypass since it is aided by the prior determination of the intermediate court.

Florida's procedure does involve the risk that the intermediate court may fail to request the transfer of some legally significant cases. This risk

97. See, e.g., FLA. R. APP. P. 9.125(a) ("great public importance" and "great effect on the administration of justice"); N.C. GEN. STAT. § 7A-31(b) (Repl. Vol. 1981) ("significant public interest;" "legal principles of major significance;" delay likely to cause "substantial harm;" and "expeditious administration of justice").

98. Most states limit the supreme court's discretion to authorize the bypassing of the intermediate court. OSTHUS, *supra* note 5, at 11. Under the Council's proposal, however, the Virginia Supreme Court may act upon its own motion to certify any case in which the intermediate court has granted leave to appeal. Judicial Council Bill, *supra* note 34, at § 17-116.06. This provision would allow the supreme court to accept cases where its own caseload permitted, thereby relieving any backlog which developed at the intermediate level. As in the Council's proposal, several states also authorize the intermediate court to request certification on its own motion. See, e.g., Ky. Crv. R. 76.18(5).

99. FLA. R. APP. P. 9.125.

100. *Id.*

101. Letter from Tidewater Region of Circuit Court Judges' Study Commission to Judicial Council of Virginia 7-9 (July 13, 1981) (recommending this procedure).

would be especially serious in Virginia if the Judicial Council's provision for the finality of intermediate court decisions in certain types of cases is retained. For cases falling within those categories, the bypass mechanism would be the supreme court's only opportunity to review legally significant issues.¹⁰²

In a few of the less populous states, all appeals are taken initially to the state supreme court which then assigns cases either to itself or to the intermediate court based on the legal significance of the issues involved.¹⁰³ While this model is probably the most effective way to assure that the supreme court hears all, and only, legally significant cases,¹⁰⁴ it leaves that court with the administrative task of sorting through appeals. In Virginia, this model would do little to alleviate the present appellate caseload crisis which has been caused by the enormous task of sorting through petitions for appeal from the trial level. In addition, only routine cases would be assigned to the intermediate court. Its stature would be diminished as a result, and judgeships on the court would be less attractive.¹⁰⁵

D. *Finality of the Decisions of the Intermediate Appellate Court*

Under the Council's proposal, the intermediate court's decision to deny an appeal, as well as its disposition of cases heard on appeal, would be final and without recourse to supreme court review, in domestic relations cases, misdemeanor cases involving a monetary sentence, cases originating before administrative agencies, and civil cases involving less than \$10,000, exclusive of interest and costs.¹⁰⁶ However, if a case falling within one of

102. See text accompanying notes 106-20 *infra*. The supreme court's power to act upon its own motion to certify any case would seem to alleviate this risk by permitting the court to take jurisdiction of any legally significant case in which the intermediate court failed to request certification. Whether the supreme court has ultimate authority on jurisdictional questions should be clarified. See OSTHUS, *supra* note 5, at 7.

103. In Hawaii, Idaho, Iowa and Oklahoma all appeals are taken initially to the state supreme court for assignment. OSTHUS, *supra* note 5, at 30, 31, 33, 40. Lilly & Scalia, *supra* note 1, at 49, recommended this model for Virginia.

104. Lilly & Scalia, *supra* note 1, at 49.

105. Court Organization Study, *supra* note 1, at 275.

106. The Council's proposal provides in part:

When the Court of Appeals has rejected a petition for appeal or has granted and decided an appeal, its decision shall be final without appeal to the Supreme Court in:

- (1) cases of divorce, affirmation and annulment of marriage, custody, visitation and support of minors and spousal support,
- (2) misdemeanor cases where the sentence imposed consists only of a fine and costs or costs alone,
- (3) cases originating before any administrative agency, including the Industrial Com-

these four categories involved "a substantial constitutional question as a determinative issue,"¹⁰⁷ including cases where a circuit court declared a statute or ordinance unconstitutional,¹⁰⁸ discretionary review by the supreme court would be available. In any case not falling within one of the four categories noted above, discretionary review by the supreme court could be sought.¹⁰⁹

The use of subject matter and amount classifications to create four categories of cases in which the supreme court cannot review the intermediate court's decisions is perhaps the most problematic feature of Council's proposal. None of the states with intermediate courts employ such classifications on the broad basis contemplated by the Council's proposal.¹¹⁰ While finality of intermediate court decisions is essential to achieve docket relief for the supreme court and to avoid the delay and expense of double appeals, eliminating the supreme court's discretion to grant review simply because the case involves only small claims or minor penal infractions is neither a necessary nor a sound way to achieve these aims.

To carry out its responsibilities, the supreme court should have . . . authority to review and determine cases involving minor penal infractions or small claims, for they may present questions that should be resolved as a matter of public interest or because of their importance in the administration of justice. Such questions can be important even though they arise in cases that are otherwise of minor consequence because the law governing such cases often affects the interests of hundreds or thousands of citizens Attempts to foreclose such review categorically, by making the intermediate court's decisions unreviewable in specified circumstances, tend to result in forced or hypertechnical reasoning in the application of the criteria which determine whether further review may be had.¹¹¹

mission, and

(4) civil cases where the amount involved . . . does not exceed \$10,000. Where there is a judgment in the circuit court of any amount other than costs, the amount of such judgment shall be deemed to be the amount involved

Judicial Council Bill, *supra* note 34, at § 17-116.07(a).

107. *Id.* at § 17-116.07(b).

108. *Id.* at § 17-116.06.

109. *Id.* at § 17-116.08.

110. OSTHUS, *supra* note 5, at 9. A few of the states employing permanent civil and criminal divisions do make the decisions of the criminal division final. *See* note 117 *infra*.

111. ABA STANDARDS, *supra* note 6, at § 3.00, Commentary. This section further recommends that "[t]he supreme court should have authority to review all justiciable controversies and proceedings, regardless of the subject matter or amount involved." *Id.*

Lilly & Scalia, *supra* note 1, at 49, have also pointed out the difficulties involved in using subject matter and amount classifications:

All tort cases are *not* of negligible social importance, nor are all cases raising constitutional issues of general public concern—if for no other reason than that the issue is

As noted previously, subject matter and amount classifications are not always accurate indicators of the legal significance of a case. Because of the arbitrary nature of these classifications, a confusing body of case law regarding their meaning is likely to result.¹¹² The Council's proposal illustrates this problem. Under the provisions of the proposal, the amount of a judgment obtained in the trial court will be deemed the amount involved for purposes of obtaining appellate review. Thus, where the judgment obtained in a civil case is less than \$10,000, the decision may be appealed to the intermediate court, but it will not qualify for subsequent review by the supreme court because it is not within the proper jurisdictional amount.

However, consider a situation in which two plaintiffs each seek \$500,000 in damages, but only one of them prevails against the defendant, obtaining a judgment for \$1,000. The plaintiff who lost in the trial court will be able to seek supreme court review following an adverse decision by the intermediate court. The partially successful plaintiff will not. Nevertheless, the losing plaintiff's case may turn upon a legally insignificant evidentiary matter, while the partially successful plaintiff's case may turn upon the legally significant issue of whether an outmoded rule barring the substantial recovery sought should be rejected. Similar problems would undoubtedly arise within the other three categories of finality. Furthermore, because the categories of finality cut across substantive areas of the law, a uniform body of case law within any of these areas would be difficult to achieve.¹¹³

frivolous. Likewise, one cannot categorically state that all cases involving real estate are of grave private concern, while all adoption cases, which have no monetary value, are necessarily of minimal public consequence. Subject-matter and monetary divisions, which generally represent an *attempt* at winnowing out the cases of importance, are simply not effective in doing so. There is, in fact, no manner of doing so except on a case-by-case basis.

112. Florida's experience is illustrative of the difficulties involved in trying to preclude supreme court review of intermediate court decisions. See Note, *The Erosion of Final Jurisdiction in Florida's District Courts of Appeal*, 21 U. FLA. L. REV. 375 (1969). Constitutional amendment was necessary to eliminate the confusing body of case law which had evolved regarding the final jurisdiction of its intermediate courts. FLA. CONST. art 5, § 3 (1968, amended 1980). See England, Hunter & Williams, *Analysis of the 1980 Jurisdictional Amendment to Const. Art 5 § 3*, 54 FLA. B. J. 406 (1980).

113. In Texas, which permanently divides the intermediate court into a civil and a criminal division, the decisions of the criminal division are final in appeals under habeas corpus. TEX. CRIM. PRO. CODE ANN. art. 44.38 (Vernon 1979). Giving the criminal division's decisions complete finality is problematic since this finality creates two courts of last resort which may develop divergent approaches to civil and criminal cases in general. The finality of the criminal division's decisions at least encompasses a relatively well defined substantive area of the law. Under the Council's proposal, however, final authority would be split within

The sole exception to the categories of finality under the Council's proposal would be for cases involving a "substantial" constitutional issue, including a circuit court's decision that a statute or ordinance is unconstitutional. Although this exception is capable of strained interpretation, it will not be adequate to protect the supreme court's ability to supervise the development of state law. For example, a case involving heavy fines for business-related misdemeanor offenses could be legally significant without involving a constitutional issue. On the other hand, a felony case turning upon such factual issues as whether probable cause for arrest existed may well lack the legal significance necessary to justify supreme court review. Under the Council's proposal, a business might be forced to close because of the intermediate court's interpretation of a statute imposing fines for certain activities, and yet the company could not seek supreme court review. In contrast, the felon's largely factual issue could serve as a basis for seeking such review.

Nor will the certification or bypass mechanism be adequate to protect the supreme court's ability to perform its developmental function.¹¹⁴ The legal significance of a case may not become apparent until the intermediate court has decided the issues involved. Indeed, that court's decision may be the source of the case's significance.¹¹⁵ For example, the intermediate court could reach a result contrary to the supreme court's interpretation of its prior decisions. A significant issue would then exist, even though the supreme court, considering the matter at issue to be settled law, would not otherwise have certified the case for direct review. If the case fell within one of the categories of finality and lacked a constitu-

substantive areas of the law. For example, the supreme court would define the law for civil cases involving over \$10,000, and the intermediate court would define it for those involving less than \$10,000. Conflict in the law governing all civil cases would be inevitable. *See* OSTHUS, *supra* note 5, at 6.

114. It is not even clear that bypass should be permitted in these cases. Unless the case involved a substantial constitutional issue or the circuit court's having declared a statute or ordinance unconstitutional, permitting the intermediate court to be bypassed would seem inconsistent with the grant of final jurisdiction under § 17-116.07(a) of the Council's proposal. *See* OSTHUS, *supra* note 5, at 12. North Carolina, for example, prohibits bypass in post-conviction proceedings. N.C. GEN. STAT. § 7A-31(a) (1969) (amended 1977). The intermediate court's decisions had been final in these cases. *Id.* § 7A-28 (1969) (repealed 1978). Section 17-116.06 of the Council's proposal, in contrast, does not prohibit bypass in the cases in which the intermediate court's decision is to be final.

115. Several states authorize discretionary review where the intermediate court certifies the importance of its decision or where its decision is in conflict with a prior decision of the supreme court or of the intermediate court. *See, e.g.,* ALA. R. APP. P. 39(c)(4); ILL. SUP. CT. R. 316; FLA. APP. R. 9.030(a)(2)(iii); N.C. GEN. STAT. § 7A-31(c)(3) (Repl. Vol. 1981). This would be an effective alternative to the Council's rehearing en banc requirement. *See* Judicial Council Bill, *supra* note 34, at § 17-116.02(d).

tional ground for review, the supreme court would be powerless to remedy the resulting inconsistency between its prior holdings and the decision of the intermediate court. Certification would not be available, even where the intermediate court rejected a petition for appeal.¹¹⁶

The availability of rehearing by the intermediate court sitting en banc would not, of course, help the supreme court exert its influence over the development of state law.¹¹⁷ Where the intermediate court sitting en banc agreed with a division's erroneous interpretation of the supreme court's prior decisions, the supreme court would be equally powerless to remedy the error. Therefore, an exception permitting discretionary review by the supreme court in cases of major legal significance clearly is necessary to protect the supreme court's ability to supervise the development of state law.

In virtually all states, the availability of supreme court review of intermediate court decisions rests primarily in the discretion of the supreme court.¹¹⁸ Often, the grounds for bypassing the intermediate court are also grounds for supreme court review of the intermediate court's decisions.¹¹⁹

116. The Judicial Council's proposal permits certification only after the intermediate court has granted leave to appeal. Judicial Council Bill, *supra* note 34, at § 17-116.06(a).

117. No state relies solely upon the bypass mechanism to safeguard the supreme court's ability to supervise the development of state law. The mechanism's utility would be much greater if it could be employed to transfer cases to the supreme court prior to decision by the court of appeals sitting en banc, as required by the Council's proposal. *Id.* at § 17-116.02(d). Certification is permitted after "an appeal has been awarded by the Court of Appeals . . . [but] before it has been determined by the Court of Appeals." *Id.* at § 17-116.06(a). However, because the intermediate court "shall" sit in divisions which are to determine cases independently of each other, it seems unlikely that the Council intended certification to be available during the period after decision by a division, but before rehearing by the court en banc. *Id.* at § 17-116.02(b)-(c). Even if bypass were available during this period, it would not permit the supreme court to review the decision of the intermediate court sitting en banc if the case was classified within a category of finality and did not involve the constitutional ground for supreme court review. *See id.* at § 17-116.07.

118. Most states do not limit the supreme court's discretion to review the intermediate court's decisions. OSTHUS, *supra* note 5, at 10. In those that do, the grounds for discretionary review are calculated to protect the supreme court's supervisory authority. The presence of decisional conflict or a significant novel issue are the most common grounds for supreme court review of the intermediate court's decisions. *See, e.g.,* ALA. R. APP. P. 39; FLA. R. APP. P. 9.030(a)(2); N.C. GEN. STAT. § 7A-31(c)(3) (1969). Permitting supreme court review on these grounds would provide an effective alternative to the rehearing en banc required by the Council's proposal. Judicial Council Bill, *supra* note 34, at § 17-116.02(d).

A few states provide for appeal as of right from the intermediate court in certain types of cases. *See, e.g.,* N.C. GEN. STAT. § 7A-30 (1969) (appeal of right where dissent present). However, requiring supreme court review in other cases, such as those involving legally insignificant issues is undesirable. OSTHUS, *supra* note 5, at 9.

119. *Compare, e.g.,* N.C. GEN. STAT. § 7A-31(b)(1)-(2) (Repl. Vol. 1981) with § 7A-

Knowing it has the discretion to grant review, the supreme court is not compelled, in ruling upon the bypass motion, to take every case of potential legal significance away from the intermediate court. Rather, the supreme court can give the intermediate court an opportunity to decide the case correctly. Where the intermediate court decides correctly, further review is unnecessary. Where it does not, the supreme court can remedy the error and preserve the uniformity of its case law.

Under the Council's proposal, discretionary review by the supreme court may be sought in any case other than one in which the intermediate court's decision is to be final. However, the purpose of such review is not set out. As the foregoing example of the two plaintiffs illustrates, not all cases in which supreme court review is available involve issues of major importance to the public or to the administration of justice. In these legally insignificant cases there is no justification for review beyond the intermediate appellate level.

A party who has obtained appellate review before an intermediate court should be permitted to obtain further review in a higher appellate court only if that court in its discretion determines that the matter involves a question that is novel or difficult, is the subject of conflicting authorities applicable within the jurisdiction, or is of importance in the general public interest or in the administration of justice.¹²⁰

The supreme court, at the second level of review, should assume that the intermediate court has adequately performed the corrective function of carefully reviewing cases for prejudicial errors. Instead of repeating that function, the supreme court should make legal or public significance the focus of its review of petitions for appeal from the intermediate court. This approach would be fostered if some of the indicia of legal or public significance were specified by statute or court rules. Such specification would aid parties in recognizing whether their cases warranted supreme court review and in petitioning for such review where they believed one or more of the indicia of legal or public significance was present.

The grounds for certification or bypass set out in the Council's proposal could serve as reliable indicia that supreme court review of the intermediate court's decision is warranted. In fact, the constitutional issue ground for bypass or certification is already a ground for seeking discretionary review in cases where the decision of the intermediate court is to be final. Permitting discretionary review in cases involving "legal principles of major significance to the jurisprudence of the Commonwealth" would make

31(c)(1)-(2) (Repl. Vol. 1981).

120. ABA STANDARDS, *supra* note 6, at § 3.10(c).

it clear that legal or public significance would be the focus of the supreme court's review of petitions for appeal from the intermediate court. In the post-decision stage, there should be no requirement that the legal principles involved "have not been previously decided by the Supreme Court."¹²¹ Eliminating this restriction would permit review of decisions involving legally significant, but not necessarily novel issues. Such a situation might arise where a litigant urged rejection of an established rule, or where the intermediate court's decision conflicted with a prior supreme court decision. Permitting the intermediate court to certify the importance of its decision would also serve as a helpful ground for invoking the supreme court's discretion to grant review.

IV. CONCLUSION

The Judicial Council's proposal represents a major step toward improving the quality of appellate justice in Virginia. The proposal focuses primarily on the intermediate court as a source of docket relief for the supreme court. However, improving the rights of litigants on appeal and enhancing the quality of case law available to guide the legal community are equally important goals of an intermediate court. To achieve these goals, there should be an appeal of right to the intermediate court. In addition, the supreme court should have the discretion to grant review of intermediate court decisions in any case presenting issues of major legal significance. Clarifying the purpose of supreme court review will help insure that only cases of major legal or public significance reach the high court.

Avoiding needless delay and expense are also important considerations involved in planning for an intermediate court. To achieve these aims, two changes should be made. First, any provision for rehearing by the intermediate court sitting en banc should be founded upon necessity and left to the discretion of a majority of the members of that court. Second, the intermediate court should be given shared responsibility for transferring cases of major legal significance to the supreme court for direct review.

Creating an intermediate appellate court will involve complex policy decisions. The changes generated by the proposed system, if adopted, will provide greater protection for the rights of litigants on appeal and will enhance the quality of the case law guiding the legal community. Without the addition of an intermediate court, the Virginia Supreme Court's docket crisis is not likely to improve. As observed over a decade ago:

121. See Judicial Council Bill, *supra* note 34, at § 17-116.06(b)(3).

The issue is not, really, whether Virginia's appellate system should be changed. It is changing each year whether we like it or not, and whether we notice it or not, simply because the Court has the power—and probably the duty—to adjust its functions so that they remain within the bounds of the feasible.¹²²

With the court's caseload extending far beyond the bounds of the feasible, the creation of an intermediate court should not be further delayed.

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122. Lilly & Scalia, *supra* note 1, at 58.

Virginia's Proposed Court Structure

