APPELLATE COURT RESPONSES TO CASELOAD GROWTH

Project Summary

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The litigation explosion of the past few decades struck hardest at the appellate level, where filings have been doubling roughly every ten years. The response, in most states, has been major changes in appellate court structure and procedure.

This research addresses three questions: 1) Have state appellate courts kept up with the enormous caseload pressures? 2) What changes have the courts made in response to the pressures? 3) Which changes have been most effective? The last question is especially important because the answers can help judges and state officials determine which changes their courts should adopt.

The research strategy was to gather information about appellate court caseloads and operations for as many states as possible for the years 1968 to 1984. Information was obtained for 45 states, primarily from court annual reports, unpublished statistics, court rules, case reporters, interviews with court staff, and the large body of law review and other literature on appellate court operations.

To answer the first question above, appellate courts have nearly kept up with the volume of appeals filed. For the 39 states with information about both appeals filed and appeals decided, the average 10 year growth for the two is similar: 123 percent for filings and 116 percent for decisions. The major question for the study, therefore, is how appellate courts have managed to keep abreast of caseload demands.

Before progressing to this topic it is necessary to describe briefly the state appellate structures. Most states have two appellate court layers. The intermediate court (typically called the "court of appeals") hears initial appeals from trial courts, and a litigant losing there can request review in the state supreme court (called the "court of appeals" in Maryland and New York). Supreme court caseloads in states without intermediate courts consist primarily of initial appeals from trial courts. In states with intermediate courts, supreme court caseloads contain both discretionary appeals from the intermediate courts and appeals filed directly from the trial courts.

The focus of the research is the whole appellate system of a state because the division of jurisdiction between supreme and intermediate courts differs greatly from state to state, and it changed drastically in many states over the period studied. Hence, rather than compare individual courts, the research looks at total state caseload, combining supreme court and intermediate court caseloads.

Responses to Caseload Growth.

The appellate courts made numerous structural and procedural changes in response to the rising caseloads. The following description, based on the 45 states studied, organizes the changes into seven categories.

1) Judges. The most obvious response to caseload growth is adding judges. The states, on the average, increased the number of appellate judges by 64 percent in the sixteen year period, 1968-84, and by 38 percent in the decade 1974-84. Virtually all the growth has been at the intermediate court level; supreme courts are seldom enlarged.

The number of judges has increased far less than caseloads, however. In 1974-84 judgeships grew less than a third as much as appeals filed. Hence, the average decisions per judges rose from 53 to 88, which is a 65 percent increase in productivity.

Appellate courts can also add judicial capacity by temporarily assigning retired judges or trial judges. Although most courts occasionally use temporary judges to substitute for regular judges who are ill or disqualified, only 15 courts studied use temporary judges to supplement regular judges and, thus, increase the number of sitting judges. Nation-wide, on the average, major use of temporary judges did not change appreciably during the course of the study; but individual courts quite often initiated or abandoned the practice.

2) Intermediate courts. An important adaptation to appellate caseload growth is to create intermediate courts or expand the jurisdiction of existing ones. These structural changes permit states to increase appellate judgeships without enlarging supreme courts. Thirty-six states now have intermediate courts, which receive varying shares of the appellate workload. During the period of this study, 15 of the 45 states studied created intermediate courts, and 11 states relieved supreme courts by transferring jurisdiction to existing intermediate courts. Virtually all the increase in appeals decided occurred in the intermediate courts.

3) Law clerks and staff attorneys. Appellate court attorney staff fall into two categories. Law clerks work directly for individual judges and generally "clerk" for a year or two after law school. Staff attorneys work for the whole court or division of the court, and they are frequently experienced lawyers. The number of law clerks and staff attorneys per judge doubled between 1968 and 1984, but the total number employed is still limited, two attorneys (law clerks plus staff attorneys) per judge on the average. Courts rarely employ more than three attorneys per judge.

4) Opinion practices. Judges spend a large portion of their time preparing opinions, which are written explanations of their decisions. Curtailing opinion writing has taken three forms. First, judges can refrain from publishing some of their opinions, preparing them instead for the parties only. Unpublished opinions, many claim, require less work because they need not be as polished and as thoroughly documented as published opinions. Less than 10 states studied restricted publication in 1968; by 1984 almost three-quarters did. The average percent of cases decided with unpublished opinions doubled, from 16 to 33 percent, during the 1974-84 decade.

Second, courts can curtail opinion writing by issuing memorandum and per curiam opinions (called "memo opinions" here), which are not signed by a judge and are generally much shorter than regular opinions. Almost half the states studied greatly increased the use of memo opinions.

The third, most drastic, curtailment is deciding cases without any opinion. Appellate courts in 22 of the states studied now decide some cases without opinion, a substantial increase from 4 states in 1968 and 13 in 1974. However, in only eight states are more than a fifth of the appeals are decided without opinion. The average percent of cases so decided rose from a negligible amount in 1968 to 7 percent in 1974 and 11 percent in 1984.

5) Panels. A common efficiency measure is to reduce the number of judges involved in decisions. Intermediate courts generally sit in three-judge panels. Most supreme courts sit en banc; that is, all judges on the court - generally five or seven - decide each case. However, twelve of the supreme courts studied use panels, and ten more did so at some time in the 1968-84 period. Overall, the state average for the number of judges participating in decisions declined from 4.6 in 1974 to 4.0 in 1984, largely because intermediate courts now decide a larger portion of the appeals.

6) Oral arguments. Under traditional appellate procedures, judges heard 30 to 60 minute arguments from each attorney. The the courts have curtailed arguments in two ways. First, rule changes in nearly half the states studied reduced time limits. Second, most courts have greatly increased the number of cases decided "on the briefs" - that is, without oral arguments. In 1984 about half the appeals were decided without argument in the average state.

7) Summary judgment procedures. Several courts abbreviate the appellate process even further in appeals that the judges believe to be without merit. These summary judgment procedures curtail the written briefs and other material ordinarily submitted to the court. Such drastic measures were almost unheard of

a decade ago, and they have gained only limited acceptance today: courts in only five states use them in more than a tenth of the appeals decided.

Impact of Changes: Method of Analysis.

What changes actually help the courts increase decision output? How much do they help? These questions involve causation in human affairs, which has long been a troublesome research topic for social scientists. This study, therefore, paid close heed to the traditional social science standards for research on causation.

The study uses the time series-cross section design, one of the few considered adequate for causal analysis. This design pools data for several years from the different states, and it determines the relationship between changes in one year and decision output in that and later years. The statistical techniques used are the standard econometric techniques for this type of data: the Cobb-Douglas production function using a fixed effects regression. In all, this methodology permits results that are unusually detailed and free from causal uncertainty.

The study evaluates the efficiency measures discussed above. These include all the major structural and procedural changes, but they do not include changes in judges' work habits, such as working longer hours or limiting the time spent reading briefs and checking opinions. Also, the analysis does not address the impact of changes on the quality of appellate justice.

The analysis includes only states with filings, as well as decision output and changes made, and missing data for filings restricted the analysis to 605 state-year observations. Statistics memo opinions, oral argument, and summary judgment procedures are not available for several states; they are represented in the main analysis by dichotomous variables that simply indicate whether the efficiency measure is used, and more precise findings are made by using continuous variables in the states with available statistics.

The main purpose of the research is to determine the impact of changes on decision output, which is defined as the number of cases "decided on the merits" -- that is, decisions that actually decide appeals. The term excludes other, much less time-consuming decisions: denying writs, ruling on motions and petitions for rehearing, and dismissing cases when the attorneys fail to file briefs. As discussed above, the unit of analysis is the appellate system of a state, combining the supreme and intermediate courts.

Impact of Changes: The Findings

The clearest finding is that filings have an extremely strong impact on decision output. If filings increase 10 percent, for example, the number of cases decided the next year will increase 5 to 6 percent even if no judges are added and none of the efficiency measures discussed here are initiated or expanded. The implication is that appellate judges adapt their work habits to the demands made on them, but not enough to meet the demand fully.

A major finding is that there are nearly "constant returns to scale": adding judges by a certain percent increases output by roughly the same percent, assuming a corresponding increase in filings.

Temporary judges contributed to decision output nearly as much as regular judges. Adding law clerks, on the other hand, has only a moderate impact: each additional clerk per judges raises output by 4 or 5 cases a year. Increasing central attorney staff has no effect on output. More staff, however, may increase the quality of appellate decisions, a topic not covered here.

Deciding cases without opinions greatly enhances judicial productivity. If a court that now decides all appeals with opinions, for example, adopts a policy of writing opinions in only half the cases, the annual decision output should increase by about 15 appeals per judge. This efficiency measure, however, is often criticized in the legal literature as damaging the quality of appellate justice.

Curtailing opinion publication and issuing memo opinions have smaller impacts: increasing their use by fifty percentage points would increase the decision output per judge by roughly 10 and 7 appeals, respectively.

Creating or expanding intermediate courts help increase output in the sense that more judges are added, but the output per judge becomes only slightly greater. The same is true when courts reduce the number of judges participating in decisions, either by adopting a panel system or by reducing panel size.

The analysis found that limiting oral arguments has a moderate impact. For example, if appellate courts in a state eliminate arguments in half the appeals, the decision output per judge should rise by some 5 to 10 cases a year. Reducing the maximum time for argument allowed under the rules has little impact.

The final efficiency measure is the summary judgement procedure, which limits the materials submitted to the judges.

The research found that this procedure, in itself, has no discernible impact. The procedure, however, is usually accompanied by other efficiency measures, such as limiting oral arguments and opinion writing, that do have substantial impacts.

Summary

Even though caseloads are growing much faster then judgeships, appellate courts are not falling behind. The number of appeals decided per judge is increasing dramatically. About half of the increase is due simply to the pressures of more cases, rather than to procedural changes made to enhance efficiency; apparently judges adjust their work habits to meet the demand.

Appellate courts have adapted to caseload growth through a wide variety of concrete changes. The study concluded that several definitely increase decision output. Adding judges generally leads to a proportionate increase in decisions. Creating or expanding intermediate courts increase output to the extent accompanied by new judgeships.

Among the procedural changes, deciding appeals without opinion has the greatest impact, followed by limiting opinion publication. Using memo opinions, limiting oral arguments, and adding law clerks have moderate impacts. Changes found to have little or no effect on decision output include reducing panel size, using summary judgment procedures, and adding staff attorneys.