VOLUME VOLUME VOLUME VOLUME VOLUME AND DELAY

in State Appellate Courts: Problems and Responses

VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES

by

Stephen L. Wasby
Thomas B. Marvell
Alexander B. Aikman

A Publication of

Appellate Justice Project
NATIONAL CENTER FOR STATE COURTS

Publication No. R0048 July 1979

ISBN 0-89656-040-6

This publication was supported by Grant No. 78-DF-AX-0021, awarded to the National Center for State Courts by the Law Enforcement Assistance Administration of the U. S. Department of Justice. Additional funding was supplied by the Charles E. Culpeper Foundation. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U. S. Department of Justice, the Charles E. Culpeper Foundation, the National Center for State Courts, or the project advisory board. The Law Enforcement Assistance Administration reserves the right to reproduce, publish, translate, or otherwise use, and to authorize others to publish and use, any or all parts of the copyrighted material contained in this publication.

THE NATIONAL CENTER FOR STATE COURTS

The National Center for State Courts is a nonprofit organization dedicated to the modernization of court operations and the improvement of justice at the state and local level throughout the country. It functions as an extension of the state court systems, working for them at their direction and providing for them an effective voice in matters of national importance.

In carrying out its purpose, the National Center acts as a focal point for state judicial reform, serves as a catalyst for setting and implementing standards of fair and expeditious judicial administration, and finds and disseminates answers to the problems of state judicial systems. In sum, the National Center provides the means for reinvesting in all states the profits gained from judicial advances in any state.

Board of Directors

Lawrence W. I'Anson, Chief Justice, Supreme Court of Virginia, President
William S. Richardson, Chief Justice, Supreme Court of Hawaii, Vice-President
Mercedes F. Deiz, Judge, Circuit Court of Oregon
Roland J. Faricy, Judge, Ramsey County Municipal Court, St. Paul, Minnesota
Robert H. Hall, Justice, Supreme Court of Georgia
E. Leo Milonas, Deputy Chief Administrative Judge, New York City Courts
Theodore R. Newman, Jr., Chief Judge, District of Columbia Court of Appeals
Wilfred W. Nuernberger, Judge, Separate Juvenile Court of Lancaster County, Nebraska
Kaliste J. Saloom, Jr., Judge, City Court of Lafayette, Louisiana
Joseph R. Weisberger, Associate Justice, Supreme Court of Rhode Island
Robert A. Wenke, Judge, Superior Court, Los Angeles, California

Council of State Court Representatives

Loren D. Hicks, State Court Administrator, Supreme Court of Oregon, Chairman
John P. Cotter, Chief Justice, Supreme Court of Connecticut, Vice-Chairman

Staff

Headquarters Office, Williamsburg, Virginia
Edward B. McConnell, Director
Geoffrey W. Peters, Deputy Director for Programs
Keith L. Bumsted, Associate Director for Administration
John M. Greacen, Associate Director for Programs
Lynn A. Jensen, Associate Director for Programs
Joel S. Zimmerman, Associate Director for Research and Development

Regional Offices
Francis L. Bremson, Director, North Central, St. Paul, Minnesota
Samuel D. Conti, Director, Northeastern, North Andover, Massachusetts
Douglas C. Dodge, Director, Mid-Atlantic, Williamsburg, Virginia
James R. James, Director, Southern, Atlanta, Georgia
Larry L. Sipes, Director, Western, San Francisco, California

TABLE OF CONTENTS

ACKNOWLEDGMENTS

The authors would like to thank a number of people who reviewed prior drafts of this monograph: the members of the advisory board of the National Center for State Courts' Appellate Justice Improvement Project, Mr. Ronald Dzierbicki, Clerk, Michigan Court of Appeals, Hon. Jerome Farris, Chief Judge, Division One, Washington Court of Appeals, Hon. Leonard Garth, Judge, U.S. Court of Appeals for the Third Circuit, Hon. Nathan S. Heffernan, Justice, Wisconsin Supreme Court, Mrs. Florence Peskoe, Deputy Director, Administrative Office of the Courts of New Jersey, Hon. Mary Schroeder, Judge, Arizona Court of Appeals, and Mr. Irwin Stolz, Swift, Currie, McGhee & Hiers, Atlanta, Georgia; Mr. Nicholas Demos, Program Monitor for the project for the Law Enforcement Assistance Administration; and Drs. Barry Mahoney and Steven Weller, the two project directors for the Appellate Justice Project.

A special thanks goes to Maxine Rhodes, who typed the entire manuscript several times with efficiency and good humor.

I. INTRODUCTION

This monograph provides a start toward answering three basic questions about volume and delay in America's state appellate courts:

1) What is the volume of appellate work in state courts today and how does this volume compare with previous eras?

2) What is known about delay in state appellate justice today and historically?

3) What procedures, techniques, or changes in the appellate process itself have been tried to deal with volume and delay problems and what is known about how they have worked?

For a number of years now, it has been common for persons interested in the operation of appellate courts to speak of a crisis of volume facing these courts. And, increasingly, there have been expressions of concern about excessive delays in the appellate process.[1] Much has been written about the causes of and possible remedies for problems of volume and delay in appellate courts, yet many questions remain about both the problems and the relative effectiveness of proposed remedies. This monograph reviews the present state of knowledge about several aspects of delay and backlog in state appellate courts that are available from written sources.

The body of literature on appellate justice has grown greatly in recent years. Much of it will be referred to here, but an obvious shortcoming of a literature review is that it is limited to published facts and ideas. Substantial practical knowledge about operations of appellate courts, little of which is available from the literature, is possessed by judges and court officials. Hence, although their knowledge may be limited to a single state, some readers will know much more about some topics than is contained in this report. They are invited to use this monograph to broaden and test their experience through exposure to the experience of others. All readers are invited to use this monograph as a reference and a stimulus for thinking about the matters discussed in it. This monograph is offered not as a substitute for the numerous and well-reasoned writings on appellate justice or to provide the research answers still largely lacking. Rather, it is offered as a guide to issues and the literature and as a stimulus to renewed attention to the problems of appellate volume and delay.

Delay serves as the integrating theme of this report. Because many elements of the appellate process bear on delay, choices have had to be made. Certain topics of great importance in the appellate area are not addressed, among which are the appointment and removal of judges, judges' disqualification and withdrawal from cases, the substantive standards used by reviewing courts, the outcome of decisions, and the quality of judging and opinions. One aspect of an element of the appellate process may be relevant to delay while another aspect of the same element is not. Courts' use of unpublished opinions provides an example. Whether a court follows its own rules in selecting opinions for publication or nonpublication is not necessarily relevant to delay; what would be relevant is whether the use of unpublished rather than published opinions aids the court in reducing opinion-writing time. The latter is discussed here because only the latter is relevant to the central theme.

Some other aspects of the process that affect or might affect a court's ability to dispose of its caseload expeditiously also have been omitted. One of the most important is the administrative duties often imposed on appellate courts, especially courts of last resort. These duties, which include serving as administrative and policy-making organ for the judicial branch, making rules for the trial and appellate process, and regulating the bar, can consume substantial time and energy. Although a significant portion of the daily operations in these areas can be delegated, the ultimate responsibility normally is the court's. As an increasing number of states move to state-financed and -administered judicial systems, this aspect of a court's responsibility may have growing impact on appellate delay across the country. Other areas not touched upon here that can affect delay include the length of a court's term, conference procedures and the scheduling of conferences, the clerk's office's procedures, data processing and word processing equipment, and the quality of appellate briefs and advocacy.

Another topic not covered in this monograph, but one which must be mentioned, is the linkage between trial and appellate courts with respect to delay. Some of the literature about trial court delay and its causes are instructive to one's thinking about appellate delay. Also, trial court delay can affect the appellate process in that lengthy trial court proceedings may make the parties less willing to appeal because of the additional time involved. Or, the losing party might be eager to appeal in order to postpone resolution of the matter even longer. For this reason, among others, a full measure of litigation delay

would include both trial court time and the time involved in appellate proceedings.

The responsibility of trial courts for elements of the appellate process, such as the preparation of trial transcripts (court reporters are usually responsible to the trial courts), further illustrates the linkage; what the trial court does can affect appellate delay. Appellate courts can affect trial court delay, too, beyond the impact substantive rulings requiring new trial court procedures might have. If an appellate court uses trial court judges to assist in reducing appellate court backlog, it may be more difficult for the trial courts to process their own caseloads. Another important relationship that must be noted is that if trial court caseload continues to increase, the work of the appellate courts will also increase even if there is no change in the rate at which trial court decisions are appealed; the addition of trial court judges, which may increase trial court output, may in due course also lead to increases in appellate court caseload.

Although the consequences of delay, as they cause discontent or provide tactical advantages, have led many to examine the issue of delay, no effort is made here to examine the impact of delay, in part because no serious study of the impact of delay has been made. This monograph begins, however, with a value judgment that problems of volume and delay are serious and threaten the effective functioning of the American legal system. The reputed benefits and detriments of delay have been argued by those writing about appellate delay and are cited in this monograph, but they are not explored in detail.

The problem of delay normally is linked to the volume of cases that the courts are expected to process. Indeed, caseload and delay are thought by many to be inseparable issues. For some, volume can be reduced or its rate of increase controlled; others, however, think this to be impossible. Carrington, Meador and Rosenberg, throwing up their collective hands over the problem of volume, have written:

> In the end, if appellate justice is to be provided, there is no alternative to the erection of a judicial system of a size sufficient to accommodate the needs of all citizens seeking just decisions.[2]

This conclusion, that the ills of appellate courts can be cured by a larger and more fully staffed judiciary, has been attacked by others as eventually self-defeating:

> Mere quantification of appellate resources--more courts and more judges--may handle more filings, but this approach ultimately defeats the important appellate function of providing clear rules of law to resolve unsettled or conflicting questions.[3]

While there is as yet no conclusive resolution of such conflicting views, one's individual answer is likely to be influenced largely by his view of the effect of rising volume on an appellate court's internal operations and on the quality of justice it dispenses.

The manner in which an appellate court deals with rising volume depends in part upon how it views its mission, its role in the justice system. If a court sees itself as an arbiter of justice, with a basic responsibility to see that all trial errors are corrected and every conflict fairly and justly resolved, any reform chosen must not exclude the bulk of appeals from reaching the court. Under this view, improvements should focus on more efficient management of available appellate resources and on the addition of judges to handle the volume that has been accepted as a consequence of the court's role. But if an appellate court's primary function is the formulation of policy and precedent to provide direction and assistance to trial courts, with only secondary concern "to do justice" in particular cases, it becomes less crucial to provide a right to appeal in every case; some form of truncated review then becomes more palatable as a solution to problems of appellate court volume. A single court may have to approach these two perspectives--error-correction and law-making--as if they usually were mutally exclusive. An appellate system that includes both an intermediate court and a court of last resort, however, may be able to perform both functions well through jurisdictional and procedural divisions of labor, with each court adopting distinct approaches in response to high volume or delay.

Three conclusions stand out in the material that follows. First, high volume and delay in the processing of appeals are not unique to the 1970s. The caseloads of a number of state supreme courts were quite high at the beginning of the 20th century. Today, their caseloads, compared with those of the earlier period, have declined. This decrease in caseloads in courts of last resort has been more than offset in most states, however, by the growing caseloads of the intermediate appellate courts. Because some of these states have made basic structural adjustments to volume and because the problems of volume and delay may have shifted largely to the intermediate appellate level, the

solutions to such problems might be quite different now from what they would have been in the early 1900s.

The second conclusion that is apparent from a review of the literature is that few proposals for dealing with caseload and delay are new or untried. Moreover, several important and comprehensive works in recent years have discussed these proposals in depth.[4] Yet a number of judges still seem to be unfamiliar with or tentative about some of these reforms, particularly those directed toward assisting appellate courts to make more effective use of available time. Perhaps this absence of a firm grasp of all the possibilities is related to the third observation to be gleaned from the literature: The potential for transfer to other courts of many, if not most, of the responses to problems of appellate volume and delay remains unknown and the impact of those reforms has not been fully tested.

The balance of this monograph is divided into five chapters. Chapter II examines present caseload volume and offers a historical perspective to help the reader put current data into context. Chapter III reviews several facets of delay; definition and measurement problems are examined first and current and historical data on the magnitude of the problem then are presented. The final two chapters examine various responses by appellate systems to the problems of volume and delay. Chapter IV discusses reforms designed to add or restructure appellate resources, such as the creation of new courts, the addition of judges, and changes in the jurisdiction of appellate courts. Chapter V looks at efforts--ranging from use of panels, to limiting oral argument, to settlement conferences--that serve to expand the time presently available for decision making by the judges. A brief epilogue is offered as Chapter VI.

Footnotes -- Introduction

1. E.g., Marlin O. Osthus and Robert A. Shapiro, Congestion and Delay in State Appellate Courts (Chicago, IL.: American Judicature Society, 1974).

2. Paul D. Carrington, Daniel J. Meador, and Maurice Rosenberg, Justice on Appeal (St. Paul, MN.: West Publishing Co., 1976), p. 137.

3. Albert Tate, Jr., "Containing the Law Explosion," Judicature, Vol. 56 (1973), p. 228.

4. Advisory Council for Appellate Justice, Appellate Justice: 1975 (Paul D. Carrington, et al., eds.) (San Diego, CA.: National Center for State Courts, 1975), Vols. I-V; American Bar Association Commission on Standards of Judicial Administration, Standards Relating to Appellate Justice (Chicago, IL.: American Bar Association, 1977); Carrington, Meador, and Rosenberg, supra note 2; Robert Leflar, Internal Operating Procedures of Appellate Courts (Chicago, IL.: American Bar Association, 1976); National Center for State Courts, The California Courts of Appeal (San Francisco, CA.: National Center for State Courts, 1974).

II. APPELLATE CASELOADS

The precise nature of the relationship between the size of a court's caseload and delay is not clear (see page 37, below), but many believe that the greater a court's caseload, the longer it will take to dispose of cases.[1] Consequently, before examining what is known today about the magnitude of appellate court delay and the responses to it, it might be useful to provide a common context for the discussion. This chapter, therefore, will provide a brief overview of present caseload data and some historical perspective.

Current caseload data are incomplete and pose problems of interpretation, but they still are better than any data previously available. The omissions and the interpretation problems require that the data be considered approximations, but the data nonetheless suggest some useful insights.

The jurisdiction of some courts of last resort is largely mandated; the jurisdiction of the balance of these courts is basically discretionary, with a generally small percentage of their caseloads subject to mandatory jurisdiction. Most of the states whose courts of last resort have discretionary jurisdiction also have intermediate courts of appeal. To reduce the problems of comparison, Tables 2.1, 2.2, and 2.3 present statistics for each category of court.[2] Figures for each column of the tables are not always available and even total filings are not known for a few courts. The number of filings per 100,000 population is based on the total cases filed and the 1975 estimated population of the state. Filings per judge are the total cases divided by the number of regular judges, excluding commissioners and judges assigned for short periods.

The variation among states is striking. Among courts of last resort with discretionary jurisdiction, the court with the largest number of total filings (California) has 10 times the number of cases as the court with the least filings (Alabama). For filings per 100,000 population, however, the ratio drops to five to one between the smallest and the largest courts. Among courts with mandatory jurisdiction, the differences between smallest and largest are greater: The largest court (Texas Court of Criminal Appeals) has 21 times as many filings and filings per judge as the smallest (Wyoming and North Dakota). On a population basis, however, the differences are somewhat smaller: The District of Columbia has almost 16 times the number of filings per 100,000 population as South Carolina. If the District of

Table 2.1

1975 Caseloads of Courts of Last Resort
With Discretionary Jurisdiction

	Cases filed				Filings per 100,000 population	Filings per judge
	Appeals	Original proceedings	Requests to appeal	Total cases		
Alabama	202		167	369	10	41
Arizona	174	715		889	40	178
California	18	1,084	2,566	3,668	17	524
Colorado	111	244	198	553	20	79
Florida	247	362	1,237	1,846	22	264
Georgia	889		424	1,313	27	188
Illinois	241	18	828	1,087	10	155
Indiana	NA	NA	NA	NA	NA	NA
Louisiana	358	1,248		1,606	42	229
Maryland	252	21	483	756	18	108
Massachusetts	591	153		744	13	106
Michigan	X		952	952	10	136
Missouri	119	320		439	9	63
New Jersey	221	73	754	1,048	14	150
New Mexico	235	137	128	500	44	100
New York	617		2,332	2,949	NA	NA
North Carolina	173		347	520	10	74
Ohio	293	18	1,012	1,323	12	189
Oklahoma (Supreme Court)	654	163	175	992	37	110
Oregon	472	X	301	773	34	110
Pennsylvania	828		868	1,696	14	242
Tennessee	326		627	953	23	191
Texas (Supreme Court)	104	201	668	973	8	108
Virginia	194		1,332	1,526	31	218
Washington	155	114	235	504	14	56
West Virginia		427	293	720	40	144

Table 2.2

1975 Caseloads of Courts of Last Resort
With Little or No Discretionary Jurisdiction

	Cases filed				Filings per 100,000 population	Filings per judge
	Appeals	Original proceedings	Requests to appeal	Total cases		
Alaska	227	7	81	315	90	63
Arkansas	NA	NA		NA	NA	NA
Connecticut	NA		NA	NA	NA	NA
D.C.	1,221	44	X	1,265	177	141
Delaware	333			333	58	111
Hawaii	189	5		194	22	39
Idaho	307	31		338	41	68
Iowa	1,086			1,086	38	121
Kansas	345	23		368	16	53
Kentucky	1,051	122	26	1,199	35	171
Maine	268			268	25	15
Minnesota	NA	71	29	NA	NA	NA
Mississippi	613			613	26	68
Montana	186	113		299	40	60
Nebraska	X			571	37	82
Nevada	435	118		553	93	111
New Hampshire	238	50		288	35	58
North Dakota	108	21		129	20	26
Oklahoma (Ct. Crim. App)	518	296		814	30	271
Rhode Island	240	31	76	347	37	69
South Carolina	264	12		276	10	55
South Dakota	183	20	15	218	32	44
Texas (Ct. Crim. App)	1,903	839		2,742	22	548
Utah	462			462	38	92
Vermont	351	4		355	75	71
Wisconsin	718	122		840	18	120
Wyoming	121	8		129	35	26

Table 2.3

1975 Caseloads of Intermediate Appellate Courts

	Cases filed				Filings per 100,000 population	Filings per judge
	Appeals	Original proceedings	Requests to appeal	Total cases		
Alabama						
(Total)	1,011		X	1,011	28	126
(Ct. Civ. App)	(133)			(133)	(4)	(44)
(Ct. Crim. App)	(878)		X	(878)	(24)	(176)
Arizona	1,593	132		1,725	78	144
California	5,915	4,021		9,936	47	195
Colorado	858			858	34	86
Florida	6,960	528	361	7,849	94	392
Georgia	NA	NA	NA	NA	NA	NA
Illinois	4,135			4,135	37	122
Indiana	626			626	12	70
Louisiana	1,812	208		2,020	53	70
Maryland	1,154		132	1,286	31	107
Massachusetts	870			870	15	145
Michigan	3,090	185	1,160	4,435	48	246
Missouri	1,552	266		1,818	38	83
New Jersey	4,383			4,383	60	209
New Mexico	514			514	45	103
New York						
(Total)	9,606	87		9,693	54	294
(App. Div. Sup. Ct.)	(7,429)	(87)		(7,516)	(42)	(313)
(App. Term Sup. Ct.)	(2,177)			(2,177)	(12)	(242)
North Carolina	1,078			1,078	20	120
Ohio	6,869			6,869	64	181
Oklahoma	327			327	12	55
Oregon	1,539			1,539	67	257
Pennsylvania						
(Total)	5,023			5,023	42	359
(Superior Court)	2,996			2,996	25	428
(Commonwealth Court)	2,027			2,027	17	290
Tennessee						
(Total)	1,285			1,285	31	80
(Ct. of App.)	(655)			(655)	(16)	(73)
(Ct. of Crim. App.)	(630)			(630)	(15)	(90)
Texas	1,764			1,764	14	42
Washington	1,467	352		1,819	51	152

Columbia is excluded because of its possibly unique circumstances, the ratio between the smallest and largest is nine to one.[3] The intermediate appellate courts have the widest range of filings (75 to 1 ratio for the largest and smallest courts), but on a per-judge basis, the range is more like that for the courts of last resort (10 to 1 ratio).

The reasons for these differences are unknown, although some of the difference may be attributable to the characteristics of the populations in the different states[4] and, for courts of last resort in states that do not have intermediate courts, to differing jurisdictional divisions between trial and appellate courts for appeals from administrative agencies and courts of limited jurisdiction.

Equally striking is the variation in number of original proceedings and requests to appeal, although information here is unavailable for many states. Among courts for which complete data are available, the number of requests to appeal range from none to more than 2,500; as a percentage of total filings, requests to appeal represent only 26 percent of New Mexico's total cases, but in four states they represent 75 percent or more of the total filings. While some original proceedings may take as much time to decide as do regular appeals, requests to appeal typically require less judge time, even when some consideration of the merits is involved. Thus, the total number of filings in courts may not reflect true differences in workload. Available information does not permit a judgment whether the workload differences exceed, are the same as, or are less than the caseload differences. Yet differences in the filings per judge in the three types of courts--ranging from 26 to 524 (a 20 to 1 ratio)--suggest that some appellate judges have much greater workloads than others.

These caseload statistics, although only rough indicators of workload, show that the appellate courts across the nation presently face greatly differing circumstances. A similar situation has existed throughout this century, however. Before the numbers are examined, though, the problems in interpreting them should first be understood.

Many important problems lie behind the interpretation of appellate court caseload statistics and thus hinder the study of caseload trends. The major problem is that appellate court structure and jurisdiction have changed drastically in most states during the past hundred years. Thus, for example, statistics about a court's business when its jurisdiction is mandatory cannot be compared usefully with its statistics after it has been given discretionary

jurisdiction. Caseload statistics are uncertain indicators of workload; one can only guess that the difficulty of cases before one court approximates that of cases before another court, or before the same court at another time. Also, one typically has little assurance that those compiling the statistics have not made mistakes during the lengthy manual counting chores involved or in data entry into computers.

This discussion will use two common measures of caseload: the number of appeals filed and the number of opinions issued. The number of filings typically is much larger than the number of opinions, mainly because of settlements, abandonments, dismissals and other terminations of appeal that do not result in an opinion being filed. There are problems peculiar to each measure. If one is referring to opinions, for instance, some studies count unpublished opinions and some do not. Opinions also are an inexact measure of judicial workload because judges perform many duties, such as deciding petitions for review, without writing opinions. The major problem with statistics about appeals filed is that few appellate courts kept adequate records early in this century and several still do not do so. Also, because the number of cases terminated between filing and court action differs greatly from court to court--and probably from period to period in one court--the number of appeals filed may misrepresent workload.

There are several studies of caseloads in one or several courts over a long period of time.[5] There also have been efforts to gather nationwide statistics for one or several years.[6] In evaluating these data, two limitations must be understood. Characteristics peculiar to a court's milieu and its operations in a specific year often overshadow general national trends. Thus, extrapolations from one court's data to the nation should be at least tentative and at worst can be misleading. One year's statistics from a court also cannot be relied upon accurately to represent the caseload in that court for other years because some courts have experienced large short-term fluctuations.

These limitations permit only a hazy indication of nationwide trends, though some are apparent nonetheless. Considerable evidence indicates that caseloads climbed, or continued at a high level, throughout the first third of this century in most courts.[7] The major exception to this trend is that many states had a substantial drop in appeals during and right after World War I.[8] Starting in the early or mid-1930s, the number of appeals plummeted, continuing to fall through World War II. Appellate caseloads decreased by more than 50 percent in a decade. The levels then generally

remained low through the 1950s.[9]

Then came the enormous increase of the last two decades: In most courts without discretionary jurisdiction for which data are available (see Table 2.4) the number of appeals in 1975 doubled or nearly doubled from their low point in the 1950s.[10] In some states, particularly midwestern states, recent caseloads still are less than the highs of the first quarter of the century,[11] but nationwide, the number of appeals has at least doubled.[12]

Even more striking, especially in terms of absolute numbers, has been the rise of appeals in the intermediate courts. Statistics from three states are given in Table 2.5 as examples.[13] The business of these courts has at least tripled in 15 years. Similarly, the caseload in the Michigan Court of Appeals tripled between 1966 and 1976, and that of the Illinois Court of Appeals almost tripled.[14]

Many explanations are possible for the trends during the past hundred years, but most are rather speculative. The rise in the 19th century would seem to follow the expanding population, commerce, and industry of the nation. The same could be said for the generally high caseload in the first third of the 20th century. The most interesting question, however, is why the high caseloads did not continue. The downturns occurred during the two world wars and the depression. It has been suggested that during wars business troubles decline, many who might have been involved in litigation are away at war, and people are preoccupied with matters other than litigation.[15] The opposite of these conditions during the early depression years may be the reason for the high level of appeals at that time.[16] In both instances, however, one cannot be sure whether the relationship between these events and changes in caseloads is causative or coincidental.

The reason for the recent increase is in part simply the return to earlier levels after the hiatus caused by the depression and World War II. Another obvious reason is the influx of criminal cases. Rising crime rates, expanded constitutional rights, more available postconviction remedies, and free counsel on appeal for indigents probably have drastically increased criminal appeals in the past one or two decades. During this century, criminal appeals have increased from roughly 10 percent to roughly 50 percent of the appellate caseload, although there are large differences among states.[17]

The evidence that the recent rapid increase in appeals is attributable to criminal cases is not uniform, however. For example, the number of criminal cases pending before the Michigan intermediate court increased by more than 600

Table 2.4

Caseload Rise in State Supreme Courts
Without Discretionary Jurisdiction
(number of majority opinions issued)

	1954	1961	1967	1975
Alaska	--	32	63	NA
Arkansas	280	300	358	534
Connecticut	108	132	141	NA
Delaware	33	44	83	NA
Hawaii	--	32	59	97
Idaho	94	87	96	176
Iowa	168	198	244	378
Kansas	NA	234	278	290
Kentucky	648	NA	639	857
Maine	78	58	73	140
Minnesota	205	179	280	406
Mississippi	NA	NA	367	480
Montana	97	111	118	NA
Nebraska	156	155	257	368
Nevada	47	75	105	263
New Hampshire	102	90	95	205
North Dakota	NA	NA	98	109
Rhode Island	NA	159	209	172
South Carolina	NA	129	143	225
South Dakota	61	59	45	122
Utah	128	143	172	230
Vermont	NA	43	82	157
Wisconsin	NA	235	354	503
Wyoming	22	64	79	NA

Table 2.5

Caseloads of Intermediate Courts in California, New Jersey, and New York

	1960	1965	1970	1975
California				
Filings	2709	4352	7721	9936
Opinions	1440	1835	3442	5574
New Jersey				
Filings	998	1186	2449	4383
Opinions	569	523	1167	2644
New York				
Filings	2254	3967	5015	7429
Opinions	2023	3022	3730	4031

percent from 1966 to 1976, while civil appeals grew by a little more than 100 percent.[18] In California, on the other hand, criminal case filings only doubled, and grew at a slower pace than civil appeals.[19] In addition, some states previously have experienced high rates of criminal appeals.[20] It may be, therefore, that the present criminal appeal increase is not a phenomenon unique to the past two decades.

The types of civil appeals also have changed during the past hundred years. The proportion of business and property cases has decreased; tort and public law cases now are a much greater part of the caseload. The Kagan study of opinions in 16 supreme courts found that debt collection cases decreased from about a quarter to about 8 percent of appeals between the 1870-1900 period and the 1940-1970 period. The percentage of real property cases decreased by almost half, to 11 percent, between these two periods. On the other hand, tort cases increased from 10 to 22 percent. Appeals involving the regulation of business and land use increased five-fold, to about 7 percent. And divorce and child-custody cases increased four-fold to more than 5 percent.[21]

As this discussion suggests, the history of appellate caseloads is marked by extreme variations, both in the numbers of appeals and in the types of issues presented. It also is clear that the recent increase is not unique. Caseloads grew almost as quickly in the latter part of the 19th-century and may well have grown even faster in earlier eras of the republic. Even the rise in criminal cases may be only an amplified echo of an earlier trend. Nevertheless, it can be inferred from the historical trends noted here that the present high caseloads probably will remain for some time, since high or rising caseloads were the norm after the 19th-century growth. Yet at the same time we should remember that major events seem to affect caseloads drastically. Another war, another depression, or some other turn in history may deplete the business of appellate courts. Because one cannot forecast these events, it is best to assume that the caseloads will remain high or increase for the indefinite future. This may create unique, continuing pressures on appellate courts, as caseloads in many states now are higher than they were at the end of the last boom. The option of creating intermediate courts has been exercised in a majority of states; policy and practical considerations may operate to limit the number of judges who can serve on a court. The assumption of continuing high caseloads, therefore, has major implications for the types of reforms best suited to meet the present congestion in appellate courts. This assumption will not be restated in the balance of this monograph. Henceforth the discussion will focus on what delay is and how various courts have responded to it. The historical lessons about caseloads should be borne in mind, however.

Footnotes -- Chapter II

1. It often is assumed that higher caseloads produce delay in a court. The assumption was tested at the trial level in a recent study: Thomas Church, Jr., et al., Justice Delayed: The Pace of Litigation in Urban Trial Courts (Williamsburg, VA: National Center for State Courts, 1978). The often-stated relationship between the pace of trial litigation and the size of a court's caseload was not supported by the data produced in that study. Ibid., pp. 23-31. There are clear differences between appellate courts and trial courts that may result in a quite different relationship at the appellate level, but the absence of a positive relationship between caseload and delay at the trial level should suggest caution in assuming a relationship at the appellate level. Data from 11 appellate courts will be analyzed in 1979 by the Appellate Justice Project. That analysis should provide further insight into this question.

2. These tables are derived from statistics in Tables 5, 6, 8, 10, 12, 14, 16 and 18 of the National Court Statistics Project, State Court Caseload Statistics: Annual Report, 1975 (Williamsburg, VA.: National Center for State Courts, 1979). All but two of the courts on Table 2.1 are in states with intermediate courts; the two are the Virginia and West Virginia Supreme Courts. Many courts in Table 2.1 have mandatory jurisdiction over several categories of appeals, occasionally a substantial part of their caseload. A few courts in Tables 2.2 and 2.3 have discretionary jurisdiction over a minority of their appeals. Blank cells in the tables indicate that not enough information is known about the data; the case category may or may not be handled by the courts. "NA" means that the information is unavailable or that computation of the number is inappropriate because of incomplete or incomparable data. "X" indicates that information for this category is unavailable, but is known to be included in the total. In addition, the Annual Report contains comments about many of the specific figures given here. Cases included as "appeals" in these three tables are those to be decided on the merits. For courts with discretionary jurisdiction, the "appeals" category is not uniform. It sometimes refers to cases falling under the court's mandatory jurisdiction, and at other times to these cases plus cases accepted for a decision on the merits by granting petitions for review. Original proceedings do not involve direct review of a final decision in the lower

tribunal. Requests to appeal are petitions for the exercise of discretionary jurisdiction.

3. The great variation among states in number of appeals per 100,000 population has existed throughout the century. Studies of caseloads in 1912 and 1930 found roughly a ten-fold variation. See Grant Foreman, "The Law's Delays," Michigan Law Review, Vol. 13 (1914), p. 100, at pp. 108-109, and Edward O. Curran and Edson R. Sunderland, "The Organization and Operation of Courts of Review," Third Report of the Judicial Council of Michigan (1933), p. 51, at p. 199. The caseload measures used in these two studies and in the 1975 Annual Report, supra note 1, differ so much that one cannot determine with much accuracy whether the number of appeals per population has increased or decreased. The 1912 study found an average of 34.1 appeals taken per 100,000 population, while the Annual Report estimated 55.6. But the considerations discussed in note 12, below, suggest that the appeal rates are really much closer, or even the same.

4. There does not appear to be any relationship in Tables 2.1 to 2.3 between caseload per population and whether the state is an industrial state.

5. Curran and Sunderland, supra note 3; Robert A. Kagan, Bliss Cartwright, Lawrence Friedman, and Stanton Wheeler, "The Business of State Supreme Courts, 1870-1970," Stanford Law Review, Vol. 30 (1977), p. 121. Other publications resulting from the Kagan et al. study are expected in the near future. See also, David S. Clark, "American Supreme Court Caseloads: A Preliminary Inquiry." The American Journal of Comparative Law, Vol. 30 (Supplement) (1978), p. 217.

6. In Grant Foreman, supra note 3, p. 109, the author obtained from court systems statistics "for the number of cases taken up . . . by appeal or writ of error," in 1912. In "Methods of Work in the Appellate Courts of the United States," Journal of the American Judicature Society, Vol. 9 (1925), p. 20, at pp. 22-23 and Vol. 10 (1926), p. 57, at p. 59, data were sought about the number of dispositions in state supreme courts. Ten states supplied the information. In Laurance M. Hyde, Methods of Reaching and Preparing Appellate Court Decisions (Chicago, IL.: Section of Judicial Administration, American Bar Association, 1942), pp. 44-46, appellate courts around the country were asked for statistics about opinion output, but the data presented

are very incomplete. Statistics for majority opinions and other decisions on the merits in 37 supreme courts during 1946 or 1947 are presented in "Judicial Statistics of State Courts of Last Resort," Journal of the American Judicature Society, Vol. 31 (1947), p. 116. The number of cases disposed of in most state courts in 1956 or 1957 was compiled in Institute of Judicial Administration, Appellate Courts. Internal Operating Procedures. Preliminary Report. (New York, N.Y.: Institute of Judicial Administration, 1957), Appendix, p. 1, at pp. 22-27. The Institute of Judicial Administration also in this same period issued a study of caseloads in the 13 intermediate courts then in existence, although data for three are missing or very incomplete. Institute of Judicial Administration, State Intermediate Appellate Courts, Their Jurisdiction, Caseload and Expenditures (New York, N.Y.: Institute of Judicial Administration, 1956) p. 10. The Council of State Governments has issued three studies of caseloads in the great majority of courts of last resort. The first two studies, dated August, 1955, and July, 1962, covered the latest year for which the courts had available statistics. The third study contains statistics for 1965, 1966, and 1967. See Council of State Governments, Workload of State Courts of Last Resort and Trends in Numbers of Appeals (Chicago, IL.: Council of State Governments, 1955); Council of State Governments, Workload of State Courts of Last Resort (Chicago, IL.: Council of State Governments, 1962); Council of State Governments, Workload of State Courts of Last Resort 1965-1967 (Chicago, IL.: Council of State Governments, 1968). The two latest studies are: Wilfried J. Kramer, Outline of Basic Appellate Court Structure in the United States (St. Paul, MN.: West Publishing Co., 1976), and National Court Statistics Project, supra note 2. Updated versions of both will be published in the near future.

7. See especially the statistics for Colorado, Indiana, Iowa, Michigan, Minnesota, Montana, New York, and Oregon in Curran and Sunderland, supra note 3, pp. 140, 142, 145, 195, 219, 226, 227, 230. None of the 23 states in this 1933 study, except possibly Illinois, shows a substantial decline in appeals. Rhode Island, though, which was not studied 1933, experienced a steady decline in the first third of this century. See Kagan et al., supra note 5, p. 129.

8. This drop is evidenced in all but a few states studied by Curran and Sunderland.

9. See Kagan et al., supra note 5, p. 129. The average number of opinions for the 16 courts fell from about 240 in 1930-1935 to about 150 in 1940-1945 and increased very slightly in 1950-1955. A questionnaire survey of appellate judges in 1941 found that, "most courts say that the volume of appellate work has been reduced in the past decade, and particularly in the last five years." Hyde, supra note 6, p. 46. Also supporting this trend are statistics for selected years in state supreme courts without discretionary jurisdiction. See Council of State Governments, Workload of State Courts of Last Resort and Trends in Numbers of Appeals (Chicago, IL.: Council of State Governments, 1955); "Judicial Statistics of State Courts of Last Resort," Journal of the American Judicature Society, Vol. 31, (1947), p. 116. These two studies cover the years 1920, 1930, 1946, and 1954. They do not include all states and the data are not completely comparable, but they support general conclusions about trends. At 11 of the 16 courts for which data were collected, caseloads decreased to less than 50 percent of the 1930 level, and at two more the decrease was almost 50 percent. Appeals in Maryland and New Hampshire seemed to remain at their prior levels, however. On the other hand, the number of appeals in Rhode Island seems to have increased steadily from the early 1930's on. Kagan et al., supra note 5, p. 129. It should be noted that the apparent rise between 1920 and 1930 in Rhode Island is probably due largely to the smaller number of appeals during and immediately after World War I.

10. Courts with discretionary jurisdiction are excluded because for the most part they have been able to control their workload irrespective of overall trends in the number of appeals. These statistics are obtained from the three Council of State Government studies, supra note 6, and the National Court Statistics Project study, supra note 2. Many of the statistics in all the studies refer to fiscal years rather than calendar years.

11. Early statistics are given for seven of the states in Robert A. Kagan, Bliss Cartwright, Laurence Friedman, and Stanton Wheeler, "The Evolution of State Supreme Courts," (1978) (Unpublished Manuscript), Table 3. They are presented below, along with the 1975 statistics.

	Average for 1900, 1905, 1910	Average for 1915, 1920, 1925	1975
Idaho	101	131	176
Kansas	277	457	290
Maine	105	119	140
Minnesota	375	423	406
Nevada	23	43	263
Rhode Island	106	76	172
South Dakota	196	153	122

The figures in the Kagan study exclude unpublished opinions and opinions of less than a page. In addition to these seven states, the number of opinions in Iowa averaged 500-600 a year in the first third of the century, Curran and Sunderland, supra note 3, p. 142, substantially more than the 378 opinions in 1975.

12. The total number of appeals in 44 states in 1912 was about 26,000. See Foreman, supra note 3, p. 108. In 1975 the total number for 46 states was about 112,000. This suggests a four-fold increase. If one includes only the 39 states with data in each study, however, the 1929 figure is 30 percent of the 1975 figure. Thirty percent also is too low. The 1975 statistics count petitions for review as appeals, so many cases are double counted--that is, counted both at the supreme court and at the intermediate court level. The earlier statistics probably tend to be based on filings at a later stage, e.g., receipt of record as opposed to notice of appeal, than do the 1975 statistics. It also is unknown whether original proceedings were included in the earlier figures.

13. The 1975 statistics are from the National Court Statistics Project, supra note 2. The remaining statistics are from the courts' annual reports: Judicial Council of California, "California Judicial Statistics for the Fiscal Year 1969-70,"

Annual Report of the Administrative Office of the Courts, Jan. 4, 1971; State of New Jersey, Report of the Administrative Director of the Courts, State of New Jersey for 1959-1960, 1964-1965, and 1969-1970; State of New York, The Judicial Conference, Sixth Report (1961), Eleventh Report (1966), and Sixteenth Report (1977). The statistics are for the fiscal years ending in the years indicated on the table. Filings include appeals and original jurisdiction cases. Opinions include unpublished and memorandum opinions. The trend in New Jersey is somewhat overstated because the Supreme Court during the early part of the period in question removed and decided some of the intermediate court's appeals.

14. See State Court Administrator, Michigan 1974-1975 Report, p. 7 and 1976-1977 Report, p. 10. Administrative Office of the Illinois Courts, 1976 Annual Report to the Supreme Court of Illinois, p. 31.

15. Edward L. Kimball, "Criminal Cases in a State Appellate Court: Wisconsin 1839-1959," American Journal of Legal History, Vol. 9 (1965), p. 96, at p. 99.

16. Ibid., pp. 98-99. Kimball believes that there was an upturn in Wisconsin appeals following the various business panics and depressions since 1850.

17. In 16 state supreme courts, 10.7 percent of the opinions longer than a page were in criminal appeals during 1870-1900, and 11.6 percent in 1905-1935 Kagan et al., supra note 5, p. 135. In addition, 10 percent is about the median portion of criminal appeals filed in 44 states in 1912. Foreman, supra note 3, pp. 109, 110. The recent proportion of criminal appeals is rather uncertain because many courts do not publish such statistics. The 50 percent figure is a rough estimate gleaned from National Court Statistics Project, supra note 2, Tables 19 and 20. The United States Supreme Court's opinion in Anders v. California, 386 U.S. 738 (1967), requiring that assigned counsel file briefs in initial criminal appeals even if they believe the appeal lacks merit may well have affected this trend.

18. State Court Administrator, Michigan, 1976-1977 Report, p. 12.

19. Judicial Council of California, 1978 Judicial Council Report to the Governor and Legislature, January 1, 1978, p. 65. The California figures are for the fiscal years beginning in 1966 and 1976.

20. Massachusetts, Oklahoma, and Wisconsin, for example.

21. Kagan et al., supra note 5, pp. 133-135.

III. DELAY

A court's specific responses to delay may be affected by the extent and type of delay it is experiencing. In evaluating the available alternatives, it may want to know not only what has been tried by other courts but also the severity of other courts' delay as compared with its own situation and how much improvement has occurred in the other courts. Part of each of these questions includes the need to define delay, to measure it, and to compare delay in two or more courts. Therefore, before we examine the range of delay-reduction techniques, it might help to review some of the ways to measure delay, the pitfalls associated with measurement, and the presently available national data on delay in appellate courts.

Defining and Measuring Delay

The term "delay" often is used loosely. In general, people seem to mean that the courts are taking "a long time" to dispose of cases. But the standard underlying the judgment--that is, what "a long time" is--normally is left undefined. It also can vary from place to place or person to person. Some time is necessary for the disposition of any case; the question becomes how much of that time is inappropriate and hence constitutes "delay."

In this monograph "delay" is used as a shorthand reference to "case-processing time." Elapsed processing time--the amount of time between the filing of an appeal and its final disposition--can be independent of what should happen, and carries no expectation about what ought to occur in court. Indeed, as Church remarks, "there is general agreement that actual case processing time is the most meaningful indicator of delay for both individual cases and court systems."[1] Case-processing time may or may not be "too long" in a particular case, so the term "delay" need not have a pejorative meaning each time. It is used here for ease of reference to cover both acceptable and unacceptable processing time; the context should indicate in which sense it is intended.

While specific standards might be established for the "appropriate" time for a case (see pages 30-31, below), at bottom delay is a perceptual matter. A year to complete an appeal may be quite proper for one observer yet unacceptably long for another. After studying delay during the pretrial stages of litigation, Church et al. discovered that attitudes toward and perceptions of what constitutes delay vary markedly across the country.[2] There is no reason to expect a different situation regarding the time consumed on appeal. And

geographic differences are only part of the perception problem. For instance, litigants, attorneys and the court may measure the length of litigation from different points. Litigants may start measuring from the initiating incident (accident, breach of contract, or arrest), from filing of the complaint, or from the time the notice of appeal was filed. The attorney may distinguish trial court and appellate court time, but measure the latter from filing of the notice of appeal or from the filing of his or her brief in the appellate court. The appellate court may not start counting until all briefing is completed. What the court sees as a year may appear to be 15 to 18 months for the attorney and three years for the litigant. Each, then, would have a different view of how long the case was pending. And even if each agreed on the time the case consumed, each may have different perceptions about whether that time constitutes "delay."

What constitutes delay is situational as well as perceptual. For example, if the issue is the time taken by a court to review the action of a film censor, several days may constitute delay because the thrust of the First Amendment against prior restraint counsels prompt release of material.[3] In other situations--for instance, tort cases in which the injured party now is well and insurance has covered out-of-pocket expenses--a much longer time before disposition may not be delay, particularly if settlement occurs as a result and the settlement is not forced by excessive time.

Part of the setting in which delay must be evaluated is established by statutes. Just as there are "speedy trial" provisions for the trial of criminal cases, so also there are statutory priorities for cases on appeal. Such priorities may push aside "nonpriority" cases otherwise ready to be heard and decided. Election and some injunction cases receive priority. Sui generis cases of special public importance and note may be accorded de facto priority. With particular reference to criminal cases, a few states have "speedy appeal" provisions in their constitutions or statutes; even if there is no such provision in a state, the general pressure often exerted at the trial level for rapid disposition extends to the appellate courts, thereby creating priority over general civil cases.

The existence of these situational factors suggests that one may need to develop and apply more than one measure of delay to an appellate court's caseload. Criminal and civil appeals might be distinguished, and further differentiation of types of civil cases also may be necessary.

One must decide what is to be measured: the disposition time of cases that involve resolution on the merits, the time

for cases receiving judicial attention, or the time for all matters filed, regardless of the method of disposition. One important question is whether to use one measure that includes both those cases that proceed to court disposition and those that are filed but withdrawn. Perhaps at the appellate level one ought to concentrate only on the former, but that might lead to ignoring many cases that are settled after filing, with or without court intervention. Notice of appeal is filed in some cases because it must be done within a certain period or the option is lost. Settlement might be near at the time of filing and occur shortly after filing, but the appeal is filed "just in case." Excluding this case from the measure of a court's delay might not cause problems, but in appellate courts that actively seek settlement of cases, measurement may be distorted if attention is focused only on adjudicated dispositions.

When comparing one court with another, or even one court with itself in some prior period, one should be certain that the "starting point" for measurement is the same.[4] Care should be exercised, too, in choosing the statistic to be used in presenting information. Many courts use the "average" figure, but this can be distorted by a few very long or very short cases. The average typically is 10 or 20 percent above the median. The median time--50 percent of the cases require more and 50 percent require less time than the median--may give a more accurate picture of the time required or consumed by the "standard" case. Yet if a large number of cases are disposed of very quickly and another large group require substantial time, this figure, too, can be misleading. Therefore, if the median is used, it might help to show the fastest 25 percent, the slowest 25 percent, or the slowest 10 percent, as well.[5]

It is important to keep in mind that almost any measure can be distorted. If a court makes a particular effort to dispose of cases that have been on the docket for a particularly long time, time-lapse statistics for a given period may show an unusual number of such long-delayed cases; the statistical effect of this effort to "clear the decks" of old cases may be that the court looks worse in the short run. The bias in the data should be identified and understood.

A number of different time periods are used to measure appellate delay. Delay can be discussed as the time consumed in any one of the steps in the appellate process or between any two. Problems in measuring the time intervals should be recognized, however. For instance, if the starting point for measurement is the trial court "decision," that may be the announcement of the decision or the entry of judgment. The latter usually is more clearly and consistently recorded, and

thus probably is preferable for measurement purposes. The period from receipt of the record to completion of briefing indicates, in a rough fashion, the time counsel require to prepare briefs, although they may begin such preparation before receiving the transcript, especially if they were trial counsel. If one court wishes to compare its time in this period with that of another court, it should know whether the other court regularly allows a reply brief from appellants. If it does, and the first court does not, the "end point" for purposes of comparison will be different.

Essentially, completion of briefing is the point at which issues are joined and the court can take some action. Historically, it is also the point at which courts have assumed control of a case and many courts start measuring their time to disposition. But the significance of the time consumed between completion of briefing to submission or oral argument varies from court to court. If the court screens its cases, the court staff or screening judge may wait until both the record and the briefs are filed. If the court uses a docketing statement, however, screening may occur on the basis of the docketing statement before briefs are received. Some courts screen on appellant's brief alone. Thus, the court may or may not have started its work on the case before this period starts.

In some courts, judges do little with a case until oral argument, perhaps not even reading the briefs until after argument. This is referred to as "cold" argument and the time between briefing and argument is "dead" time. In other courts, the judges read the briefs and perhaps examine at least a portion of the record and transcript before argument ("hot" argument), making use of at least some of the time after completion of the briefing. Some judges also meet prior to argument to discuss the cases. But judges are not the only ones who can use this time effectively; even in "hot" courts, many judges do not examine the briefs until immediately before an oral argument calendar. Their law clerks, however, may use this time to examine the briefs, record, and transcript and to prepare a bench memorandum for the judges. In those courts using staff attorneys, these attorneys may use this period for their research and for writing memoranda that sometimes serve as draft opinions for the court, particularly in less complex cases.

One must remember, too, that the inability of a court to decide cases promptly can appear as delay in any step of the appellate process. If a court cannot or does not decide promptly all cases argued or submitted, the result may be growth in the number of undecided cases and a corresponding

delay in the period between argument or submission and decision. If the court schedules only as many cases for argument as it can decide promptly, the delay is shifted partially or fully to the period before argument or submission. Once delay builds in the period following filing of the briefs, the court is less likely to insist that the briefs and records be filed promptly. It may hesitate to order the court reporter and attorneys to hurry if the case would sit many months without action by the court following completion of the transcript and briefing. This can produce lengthy periods for record and brief preparation and freely granted extensions of time to reporters and counsel.

In short, decisions of courts about what time periods to measure and which starting and ending points to use for measurement can significantly affect data on delay. For comparison of several courts, the entire time involved in an appeal--from trial court judgment or order to final disposition of the case (issuing of the mandate)--may be both the least ambiguous and best measure. The principal risk in using this single overall figure is that one may be unable to distinguish "delay attributable to the court"--court-system delay in Rosenberg's terms--and "delay caused by the parties."[6]

Standards of Delay

It is difficult to talk about delay without reference to a standard of how long an appeal should take: What is an appropriate time? Each state's court rules provide one standard. For instance, in Florida civil appeals should be ready for action by the appellate court within 140 days from the filing of judgment in the trial.[7] California allows two more months than does Florida.[8] California's constitution also requires an opinion in 90 days from argument or submission or the judge responsible for the opinion is not to be paid.[9] The American Bar Association's Standards Relating to Appellate Courts propose a standard for the total time through completion of briefing, including completion of the record, of 100 days for civil cases and 80 for criminal cases.[10] The National Advisory Commission on Criminal Justice Standards and Goals calls for criminal cases to be ready for initial action by the court within 30 days, with final disposition within 60 days for simpler cases and 90 days for more substantial cases, assuming the court uses the flexible procedures and professional staff also recommended by the Commission.[11]

A court need not rely on these nationally developed standards, of course. It could develop standards of its own, either alone or in consultation with the bar. The standards could cover each step in the appellate process and thus parallel

the court rules except that they would extend through release of an opinion, or they could prescribe one figure for the total elapsed time from filing of the notice of appeal through disposition. The standard could be that all cases should be disposed of in X days, or that Y percent of the cases should be disposed of in X days. In setting standards such as these, one must keep in mind that time standards should bear some reasonable relationship to the time it actually takes to process a case; otherwise, the standards will be ignored and thus will be ineffective.[12] On the other hand, if a standard is developed for each of the stages in the appellate process, and they are longer than necessary for most cases, unnecessary delay may occur in cases that could proceed through the stages more rapidly. If the standards make the process more rapid than at present, some method for allowing exceptions must be developed.[13]

Current Data on Delay

The numerous conceptual and definitional problems associated with measuring delay should not forestall the effort to measure it. The problems need to be recognized when data are collected--and, more critically, when compared--but that recognition merely cautions against claims that are too rash. If the limitations are acknowledged, tentative statements are possible regarding the dimensions of appellate delay.

In recent years much more information has been gathered about delay on appeal than was available previously. Many problems with the statistics remain, but on the whole the quality of information is far better than previously available. Table 3.1 presents current statistics on the time from the beginning of an appeal to decision for those cases that complete the full appellate process.[14] Statistics are given for 24 courts of last resort and 13 intermediate courts in 29 states, including the District of Columbia.[15] Average (mean) figures are given whenever possible because they are the most common statistics; otherwise, the median is used.

Table 3.1 shows much variation among the courts. In 14 states more than a year is consumed in disposing of the average case. Only four courts meet the American Bar Association's Standards' goal that decisions occur five or six months from the notice of appeal.[16] The vast majority take at least half again as long; nine courts average 18 months or more for civil appeals, criminal appeals, or both. These data have not been compared with standards that might exist in each state, but if the benchmarks of the American Bar Association or the National Advisory Commission on Criminal Justice Standards and Goals are accepted, delay on appeal seems to be a problem in this country.

Table 3.1

Case-Processing Times in Appellate Courts

State and Court	Period	Beginning Event	Type of Case	Time (months)	Statistic
Alabama					
Supreme Court	cases	decision	all direct	12	median
Ct. Crim. App.	docketed	below	appeals	11	
Ct. Civil App.	10/1/70 to 9/30/72			10	
Alaska					
Supreme Court	1977	notice of appeal	civil	16	mean
			criminal	19	
Arkansas					
Supreme Court	1977	decision below	all	10	mean
			civil	10	
			criminal	10	
California					
Ct. of Appeal	quarter ending 6/30/77	notice of appeal	civil	14	median
			criminal	11	
Colorado					
Supreme Court	1973	filing	criminal	15	mean
Connecticut					
Supreme Court	year ending 6/30/77	filing	all appeals	23	mean
			civil non-jury	20	
			civil jury	18	
			criminal	31	
District of Col.					
Court of App.	1977	docketing	all	15	mean

Table 3.1 cont'd

State and Court	Period	Beginning Event	Type of Case	Time (months)	Statistic
Florida					
Fourth Dist. Ct. of Appeals	Year ending 11/30/72	notice of appeal	all	11	median
			civil	10	
			criminal	12	
Hawaii					
Supreme Court	Year ending 6/30/76	filing	civil (regular opinion)	22	mean
			civil (memorandum opinion	18	
Idaho					
Supreme Court	1/1/77 to 8/31/77	notice of appeal	civil	20	mean
			criminal	16	
Illinois					
Appellate Ct.	1976	filing	civil	11	median
			criminal	14	
Iowa					
Supreme Court	1977	notice of appeal	all	21	mean
			civil	26	
			priority civil	11	
			criminal	14	
Kansas					
Supreme Court	Year ending 6/30/77	notice of appeal	civil	18	mean
			criminal	18	
Maryland					
Ct. of Appeals	year ending 6/30/77	decision below	all	11	mean
Ct. Sp. App.				8	

Table 3.1 cont'd

State and Court	Period	Beginning Event	Type of Case	Time (months)	Statistic
Massachusetts					
Sup. Jud. Ct.	1976	entry	all	8	mean
Appeals Court				12	
Michigan					
Ct. of Appeals	1975	notice of appeal	all	10	mean
Minnesota					
Supreme Court	1976	notice of appeal	all	15	mean
Mississippi					
Supreme Court	1977	decision below	all	16	mean
Missouri					
Ct. of Appeals, Eastern District	8/1/76 to 6/1/78	notice of appeal	all cases	15	mean
			accelerated docket	13	
			regular docket	18	
Nebraska					
Supreme Court	1973-74	notice of appeal	all	9	mean
			civil	9	
			criminal	10	
Nevada					
Supreme Court	12/75 and 3/76	first docket entry	all	5	mean
			civil	9	
			criminal	4	
New Hampshire					
Supreme Court	1975	filing	all	10	mean

Table 3.1 cont'd

State and Court	Period	Beginning Event	Type of Case	Time (months)	Statistic
New Jersey					
Supreme Court	year ending 8/31/77	notice of appeal (or granting leave)	all	15	mean
App. Div.				12	
New Mexico					
Supreme Court	1977	notice of appeal	all	8	mean
Ct. of Appeals				5	
Oregon					
Supreme Court	1977	notice of appeal	all	11	mean
Ct. of Appeals				6	
Texas					
Ct. Civil App.	1977	filing	all	6	mean
Washington					
Supreme Court	1977	notice of appeal	cases filed directly	18	median
			cases transferred	23	
Ct. of Appeals			all	16	
Wisconsin					
Supreme Court	year ending 6/30/77	docketing	all	19	median
			civil	22	
			criminal	13	
Wyoming					
Supreme Court	1976	notice of appeal	all	10	mean

An interesting question is whether, and if so to what extent, the recent caseload rise discussed in the previous chapter has increased delay. The scant information about earlier periods suggests that decreasing caseloads may not have resulted in less appeal processing time. When caseloads increase, judges may work harder, more judges may join the court on a permanent or temporary basis, judges may study each case less thoroughly, and a host of other adaptations may allow a court to keep current.[17] In fact, the relationship between caseload and delay is ambiguous at best. Table 3.2 presents delay statistics for 12 courts from 1970-1977.[18] All these courts faced increasing workloads during this period, but only in Iowa and the District of Columbia has there been a clear trend toward increased delay. The Massachusetts intermediate court might also be included, but it existed during only four years of the period under study. The California and Oregon courts, on the other hand, have noticeably reduced their decision time. Delay in the remaining courts, except the Maryland Court of Appeals, has been reasonably constant, although occasionally simply continuing at a high level.

These statistics, however, do not cover the period when caseloads began their rapid increase. Perhaps the initial rise produced delay and by the 1970s the courts were able to adjust and meet further increases. Not enough information is available to substantiate or refute that possibility, although this pattern is suggested somewhat by what happened in New Jersey.[19] The New Jersey intermediate court became badly congested in the early 1960s during the initial caseload rise, even though that rise was moderate in relation to the rise in later years. Except for temporary progress in 1967-1969, the court has remained congested. It has been able to absorb the greatly increased caseload since 1970, however, with a rather modest increase in delay.[20] Whether this one example is typical cannot be determined because other courts have not maintained adequate statistics on delay for long-enough periods.

A Historical Perspective

Whatever problems of delay exist today, modern appellate courts have adapted to the rising caseloads without the occasional extreme delay that appeared in several courts in the 1800s and early 1900s. Because of problems of interpreting delay statistics, however, only a very broad outline of the history of appellate delay is possible. In general, it seems that at any one time most courts were reasonably current, but a few had substantial delay problems. The number of courts with problems probably did not change greatly until recent times, but the extreme delays found in a few courts have long since disappeared.

Table 3.2

Delay Trends in Twelve Courts, 1970-1977

Court	Event	Beginning year or fiscal year ending in 1970	1971	1972	1973	1974	1975	1976	1977
California Courts of Appeal (civil cases)	notice of appeal	22	17	17	17	19	17	14	14
District of Col. Court of Appeal	notice of appeal	--	8	9	9	10	12	14	15
Iowa Supreme Court	notice of appeal	20	14	--	--	15	--	18	21
Kansas Supreme Court (civil cases)	notice of appeal	--	--	21	18	16	15	17	18
Maryland Court of Appeals	decision below	--	--	--	9	9	14	10	11
Court of Special Appeals		--	--	--	--	9	9	8	8
Massachusetts Supreme Judicial Court	entry	--	--	7	8	6	8	8	--
Appeals Court		--	--	--	7	10	8	12	--
New Jersey Appellate Division	notice of appeal	10	12	12	11	12	13	13	12
New Hampshire Supreme Court	filing	9	8	11	11	9	10	--	--
Oregon Supreme Court	notice of appeal	15	13	11	11	10	10	9	11
Court of Appeals		12	9	7	6	6	5	6	6

Appellate delay in the 19th century probably was more common than it is today because caseloads rose quickly and appellate judges often spent much of their time sitting as trial judges. For example, "the Virginia Supreme Court of Appeals accumulated a backlog of cases to such an extent that in 1848, it would take approximately eight or nine years to dispose of cases presently on the docket."[21] Although a separate court of appeals was periodically established to relieve the Supreme Court, the backlog remained high and in 1874 decisions still took two-and-a-half years.[22] Similarly, in Maryland, "a severe backlog of cases existed on the docket of the Court of Appeals from before the Revolution until the 1870s." Thereafter, the court was enlarged and was able to remain current until the 1950s.[23]

A more complete picture of delay emerges after the turn of the century because more data are available. As indicated in the previous chapter, caseloads were fairly high through the 1920s except for a drop in filings in most courts during World War I. The studies of delay from this period[24] suggest that most courts were able to decide appeals expeditiously. At any one time, however, a minority of courts were badly congested, and any one court was likely to have had problems with delay at some point during the period.[25]

The national profile of delay does not appear to have changed much during the slack period that followed the 1920s, but the evidence is hard to interpret. Three nationwide studies were conducted, in 1947, 1957, and 1961.[26] Each presented statistics for only part of the appellate process, so only a very incomplete picture of overall delay is possible. Although the three studies received responses from only a portion of the courts surveyed and they used ambiguous time periods, they suggest strongly that even after caseloads lessened, delay continued to be a problem in a small minority of appellate courts. The extreme delays of several years encountered by a few courts early in the century seem to have disappeared, but the decrease in caseload after the mid-1930s did not erase the delay problem.[27] Unfortunately, more detailed or certain statements are not possible.

Footnotes -- Chapter III

1. Thomas W. Church, Jr., et al., Pretrial Delay: A Review and Bibliography (Williamsburg, VA.: National Center for State Courts, 1978), p. 3.

2. Thomas W. Church, Jr., et al., Justice Delayed: The Pace of Litigation in Urban Trial Courts (Williamsburg, VA.: National Center for State Courts, 1978), pp. 53-62.

3. See Freedman v. Maryland, 380 U.S. 51 (1965), which requires prompt processing by trial courts of actions brought by censors; the case can also be read to require prompt appellate review of trial court actions in such matters.

4. Church et al., supra note 1, pp. 3-4: ". . . there is considerable dispute among commentators . . . as to the appropriate starting and ending points to be used in calculating processing time."

5. The average can be seriously affected by the presence of only a few "extreme" cases, the time to dispose of which is noticeably longer than the time consumed by most cases in the court's output. The median, or "middle" case, determined by arranging the cases in sequence from shortest to longest time, provides a measure not affected by such extreme, outlying cases. As Church et al. point out, "because the distribution of case processing times typically include a great number of cases with relatively short times and a few with very long disposition times, most studies utilize the median because it is not sensitive to those few very long times as is the mean." Ibid., p. 3, n.10.

6. Maurice Rosenberg, "Court Congestion, Causes and Proposed Remedies," The Courts, the Public and the Law Explosion, (Harry W. Jones, ed.) (Englewood Cliffs, N.J.: Prentice Hall, 1965), p. 55.

7. Florida Appellate Rules, Rules 3.2, 3.5, 3.6, 3.7.

8. California Rules of Court, Rules 2, 4, 16.

9. California Constitution, Art. 6, sec. 19.

10. American Bar Association Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts, (Chicago, IL.: American Bar Association, 1977), Standard 3.52.

11. National Advisory Commission on Criminal Justice Standards and Goals, Courts (Washington, D.C.: 1973), Standard 6.4.

12. Maureen Solomon, Caseflow Management in the Trial Court (Chicago, IL.: American Bar Association, 1973), p. 38.

13. It should be clear as well that if the standards do any more than memoralize the present pace of appeals and are to serve as guides to conduct, the court will have to address and possibly tighten its policy on extensions.

14. Most of these statistics were taken from court annual reports. The other sources are: National Center for State Courts, Report on the Appellate Process in Alabama, (Denver, CO.: National Center for State Courts, 1973), p. 48; State of Connecticut Judicial Department, Case Management of the Dockets of the Supreme Court and Appellate Session of Superior Court Project, Summary of Project Operations, May, 1977 - June, 1978 (State of Connecticut Judicial Department, 1978), p. 70; National Center for State Courts, Caseload, Backlog and Delay in the Fourth District Court of Appeals of Florida (Denver, CO.: National Center for State Courts, 1973), p. 21; Supreme Court Appellate Court Committee, An Investigation Into the Problems Created by the Growing Appellate Caseload in Idaho (1977), p. 10; the Michigan figures are from National Court Statistics Project, State Court Caseload Statistics: Annual Report, 1975 (Williamsburg, VA.: National Center for State Courts, 1979); James A. Lake, The Appellate Process and Staff Research Attorneys in the Supreme Court of Nebraska (Denver, CO.: National Center for State Courts, 1975), pp. 47-48; George S. Pappagianis, "A Primer on Practice and Procedure in the Supreme Court of New Hampshire," New Hampshire Bar Journal, Vol. 17 (1976), p. 172, at pp. 182-183. Statistics for Iowa, Missouri, and Wyoming were obtained from unpublished tables obtained from the courts. Statistics for the New Mexico courts are somewhat uncertain; it appears that the Court of Appeals' statistics, using 23 categories of cases, do not include 20 "atypical cases" (or six percent of all appeals decided), which are generally the cases with the longest delays. They are unlikely to add more than a month to the average time for decisions, however. The figures for Alaska and Arkansas are for a sample of cases decided during the year rather than for all cases. Some manipulation of statistics was necessary in several states. In California and Washington the intermediate court figures are the medians of the median figures for the various divisions of the courts. In Illinois and Florida the medians are estimated

from time ranges given. When statistics were given in terms of days in the original sources, they have been translated into months for this table on the basis of 30.42 days per month.

15. An attempt was made to use the notice of appeal as the beginning event, but this was not available for several courts. The decision below typically occurs a month before the notice of appeal (e.g., Alabama, Maryland, and Mississippi). The filing or first docket entry is assumed to be the notice of appeal, but for some states this assumption may be erroneous. Except in Alabama, the period is the year the cases were decided.

16. See A.B.A. Standards Relating to Appellate Courts, supra note 10, p. 86.

17. It also should be noted that it is not feasible to relate delay to the number of cases decided or filed per judge. The use of panels and temporary judges and the temporary absence of regular judges, among other factors, make caseload per judge figures suitable for only very rough comparisons.

18. The courts in this table are those for which delay statistics for several years are presented in the annual reports, except that the New Hampshire figures are from Pappagianis, supra note 14, pp. 182-183, and the California and New Jersey statistics are taken from annual reports for successive years. Iowa is included even though the time period measured is very unclear. The figures in Table 3.2 accurately reflect the delay in the Iowa Supreme Court, however. See Mark McCormick, "Appellate Congestion in Iowa: Dimensions and Remedies," Drake Law Review, Vol. 25 (1975), p. 133, at p. 146. The data for 1976 and 1977 are from unpublished data supplied by the Court. Table 3.1 indicates that the average time from notice of appeal to decision in 1977 was 21 months and in 1976 was 18 months. A study of the court found that the 1969-1970 time was 15 months. Institute of Judicial Administration, The Supreme Court of Iowa, A Study of its Procedures and Administration (New York, N.Y.: Institute of Judicial Administration, 1971), p. 23-a.

19. The data are taken from Annual Report of the Administrative Director of the Courts, State of New Jersey, 1969-1970, pp. 19, 21.

20. The time from notice of appeal to decision in the New Jersey Appellate Division decreased slightly from 12.9 in

1975-1976 to 12.5 in 1976-1977. See Annual Report of the Administrative Director of the Courts, State of New Jersey, 1976-1977, p. B-12.

21. David K. Sutelan and Wayne R. Spencer, "The Virginia Special Court of Appeals: Constitutional Relief for an Overburdened Court," William and Mary Law Review, Vol. 8 (1967), p. 244, at p. 254.

22. Ibid., p. 266.

23. John T. Joseph and Henry R. Lord, "A Discussion of the Proposed Intermediate Appellate Court for Maryland," Maryland Law Review, Vol. 25 (1965), p. 300, at p. 303.

24. Robert W. Stayton and M.P. Kennedy, "A Study of Pendency in Texas Civil Litigation," Texas Law Review, Vol. 21 (1943), p. 382; Edward O. Curran and Edson R. Sunderland, "The Organization and Operation of Courts of Review," Third Report of the Judicial Council of Michigan (1933), p. 145; "Methods of Work in the Appellate Courts of the United States," Journal of the American Judicature Society, Vol. 9 (1925), p. 20, at pp. 20-21 and, Vol. 10 (1926), p. 57, at p. 59; Walter F. Dodd, "The Work of the Supreme Court of Illinois," Illinois Law Review, Vol. 21 (1926), p. 207, at p. 219.

25. For instance, the Oregon Supreme Court's delay increased from seven months in the late 1910s to more than two years from briefing to argument ten years later and then down to two months two years after that. See Curran and Sunderland, supra note 24, p. 145. The Texas Supreme Court and the New York Court of Appeals both were said to be current in the early 1930s but the delay in Texas was more than four years for the average case in 1913-1916 and in New York it was two years or longer between 1896 and 1921. Ibid., pp. 191-192.

26. "Judicial Statistics of State Courts of Last Resort," Journal of the American Judicature Society, Vol. 31 (1947), p. 117; Institute of Judicial Administration, Appellate Courts. Internal Operation Procedures. Preliminary Report (New York, N.Y.: Institute of Judicial Administration, 1957), pp. 22-27; Council of State Governments, Appellate Practices and Rules of Procedure, (Chicago, IL.: Council of State Governments, 1961), Table 6.

27. The 1947 study found that for civil cases decided in the last quarter of 1946 or early 1947 for 44 of the 48 states, seven months or less elapsed between filing of the record

and decision in most state supreme courts, but seven courts reported time of more than 10 months. Journal of the American Judicature Society, supra note 26, p. 117. Fewer than half of the appellate courts responded to the 1957 survey about the time from judgment below to oral argument. For those responding, a rough median time was eight months for supreme courts and six months for intermediate courts. Two supreme courts (Montana and Oregon) estimated the time at more than a year. Institute of Judicial Administration, supra note 26, at pp. 22-27. The 1961 study asked supreme courts for the average time between when a case "goes on the docket" and final decision. The meaning of "goes on the docket" is uncertain, but the most likely interpretation is the arrival of the record or briefs. In any event, the estimates of the responding 35 courts varied widely, but only Alabama, Alaska, Colorado, Minnesota, Nevada, Oklahoma and Oregon estimated ten months or more. Council of State Governments, supra note 26, Table 6.

IV. ADDING AND RESTRUCTURING RESOURCES AND RESTRUCTURING THE SCOPE OF REVIEW

A spectrum of responses is available to a court facing growing caseloads and increasing delay. Some, such as adjustments in calendar management, curtailment of traditional aspects of the appellate process, and use of settlement conferences, seek primarily to allow more efficient use of the time available to judges with constraints imposed by current resources. Others are directed toward adding resources to the appellate courts, either directly (adding judges or staff or creating a new level of courts) or indirectly through restructuring of jurisdiction. The latter set of responses will be discussed in this chapter, the former in the following chapter.

Caution should be exercised as the reader reviews and considers the approaches discussed in this chapter and the next. No single innovation is likely to solve the problems of backlog and delay. This is particularly important to remember because one constantly encounters the assumption that a reform will significantly reduce delay. Much information about "effective" reforms is transmitted by those who are advocates of the changes. They have tried something in their own courts and found that it worked--or at least that it seemed to work. Too often, however, there has been no test of the actual impact of the change. The proclaimed value of the proposed reform often is the result of a) initial commitment to a project before it was tried; b) the perception of change, with change then attributed to the innovation; c) continued later advocacy in support of the change; and d) underreporting of unsuccessful efforts. Many courts either fail to collect data for a period before the change and a similar period after the change or do not attempt data analysis to test the true impact of a change. Without systematic data collection or the use of some experimental controls, however, one cannot be sure that the particular innovation really produced the effects claimed. Even with demonstrated positive effects in one court, success there may be no more than something that worked there with those judges, but is not transferable, because other courts and other judges will be different. Thus, in evaluating the impact of a reform or change, it is appropriate to maintain a degree of skepticism. As Rosenberg has said, "there is no acceptable evidence that any remedy so far devised has been efficacious to any substantial extent."[1]

One also must be cautious in evaluating apparent failures. New approaches may not produce the desired results for a variety of reasons. The various persons and agencies involved

in the appellate process do not necessarily share the same goals or favor the same means for reaching a common goal. For instance, a court and the attorney general's office may see both a problem and possible solutions for it differently. The approach used to achieve a change that failed may have antagonized some judges, the bar, or court staff to such an extent that they worked to undermine the project; if proposed and implemented in a different way, the change might prove successful. Another reason reforms may not work as expected or hoped is that several innovations may need to be used in combination to be effective; that is, some reforms may not work unless other changes are made at the same time. Thus, it may be necessary not only to test the efficacy of a single reform but also to test that reform with other changes in an effort to determine the combined impact. An indication of the possible relationship among innovations can be seen in the comment by Carrington, Meador, and Rosenberg that, "many of our suggestions for efficiency are dependent on the availability of a central staff."[2] Similarly, Hazard suggests that caseflow management by appellate courts requires the development or augmentation of administrative staff to assist in monitoring case progress and to provide appropriate internal information for the court.[3]

As might be expected, the most rapid changes aimed at adding or restructuring appellate resources took place during the eras of rising and high caseloads--the 19th and early 20th centuries and the past two decades. Attempts to meet rising caseloads with additional resources have changed somewhat during the years, however, and have varied from state to state. An important lesson from these attempts is that additions to or changes in the basic level of resources should not be temporary. During the earlier era of high caseloads many of the methods used to increase appellate court capacity were short-term expedients. If the caseloads then remained high, or dropped but became high again, the remedies had to be repeated or new ones found. In recent years it generally has been assumed--and correctly so on the basis of long-term caseload trends--that appellate court caseloads will continue to be high.

In the following pages, a number of "structural" responses--adding judges, creating intermediate courts, reallocating jurisdiction, and the use of law clerks and staff attorneys--will be discussed in detail.

Adding Judges

An adaptation that has been and continues to be important is the creation of additional judgeships or the temporary

addition of judges to a court. The appellate bench originally consisted of judges who spent much or most of their time riding circuit as trial judges. During the early and mid-19th century the states responded to increasing appellate caseloads by slowly abandoning circuit riding. The next step was to remove the judges' trial duties.[4] Although the evidence is skimpy, it seems that the transition to specialized appellate courts was nearly complete by the turn of the century, and in recent years among the state supreme courts only judges of the Maine Supreme Judicial Court have retained a dual trial and appellate role.[5]

The second major adaptation was to increase the number of judgeships. The vast majority of state supreme courts had three to five judges until the mid-1800s and then expanded by at least two judges by the turn of the century. Expansion slowed during the early 1900s and virtually stopped after the 1930s.[6] On the other hand, the number and size of intermediate courts has increased greatly. There were 175 intermediate court judges in 1933 and 184 in 1956. At present there are 498.[7]

Few courts--even intermediate courts--exceed nine members, but in light of the recent explosion in the number of intermediate court judges and the belief of some observers that the ultimate answer to rising caseloads is more appellate judges,[8] the number may well grow. Adding judges would seem to be a way of reducing delay and, indeed, may be necessary simply to keep a court's backlog from getting worse. Caution must be exercised, however, in making the decision to add judges. One of the best statements on the possible effects of this action on delay was made in 1933: "Where the service is an individual one, a saving in time can be effected by increasing the number of judges, but where the service is collective no such gain is possible."[9] This suggests the complexities of the problem. For one thing, the more judges on a court, the more the "managerial" or administrative problems. For example, a three-judge appellate court usually sits only en banc, while a seven-judge court might sit in panels that then must be set up and coordinated. Adding judges produces the problem of integrating new members of a court and raises the possibility of internal doctrinal conflict or inconsistency. When additions to the court are temporary, there is less opportunity for the new members to learn the norms and thought processes operative in the court, even if the new judges are conscientious in their efforts to absorb the court's ways of deciding its cases. As the size of a court increases, the use of and number of panels increases. This leads to increased problems of consistency of decision making among the panels. And large numbers of judges on a court makes convening of en banc courts difficult in terms of both the mechanics of convening the judges and the conduct of oral argument and conference. Finally, in those courts in

which all opinions are circulated among all judges, increasing the number of judges operates to increase the time required to produce each opinion.

Carrington, Meador, and Rosenberg say that "as trial justice becomes more available, fewer litigants settle privately and more remain in the queue to secure the service."[10] For appellate courts, however, they contend that increasing the number of judges does not lead to an increase in the appellate caseload: "Increases in appellate caseload have not, in the experience of any system which publishes statistics, been shown to relate to increases in judgeships."[11] Yet such a result is conceivable. If litigants think that more appeals can be handled by a court with added judges, or if potential appellants believe that additional judges will allow appeals to be concluded faster, then more judges may well produce more appeals--and thus less effect on backlog and delay. If more trial judges are added at the same time new appellate judgeships are created, as in the 1978 federal Omnibus Judges Bill, additional trials generated by the new trial judges will generate more appellate business, again reducing the possibility of making headway against a backlog. Perhaps in the short run new appellate judges can help reduce the pending case inventory, but after a period of time it again will begin to mount.

The addition of judges also must be examined in relation to expected and actual individual judge productivity, defined as dispositions per judge. If judges already on a court "relax" when new judges are added, delay reduction may be less than expected.[12] On the other hand, within limits, productivity can increase without the addition of judges if judges perceive backlog as a problem and adjust their work habits and procedures to improve productivity. (Ironically, such enhanced activity may make it difficult to convince legislators that more judges are necessary. This "Catch 22" situation may affect judges' incentives to increase productivity.)

Even if it is concluded that new judges are needed to achieve a reduction in delay, there clearly are a number of factors beyond the size of the caseload and the extent of delay that influence the decision of a court to seek additional judicial positions and of a legislature and executive to grant them:

- The short-term financial situation of the funding jurisdiction;

- The long-term financial impact of the new position(s), including
  - pension and other fringe benefits,
  - additional support staff, and
  - additional office, library, and, perhaps, courtroom space;
- The present availability of office and courtroom space;
- Other needs and priorities of the court or of the judicial system;
- Concern about diluting the status of the position;
- Present political relations among the three branches of government;
- The public's support for or opposition to "the courts"; and, possibly,
- The present and anticipated methods of selecting new judges.

The influence of each of these factors varies considerably among states and over time within a state. Whether they operate independently of a court's caseload and delay situation or reinforce the need as shown by court statistics also varies, but all states share the reality that data alone do not determine the question.

When adding judges permanently is not preferred, courts may use pro tem judges. State appellate systems have a wide variety of mechanisms to supplement the regularly authorized complement of judges. The major means, usually regulated by statute or constitution, are assigning

- judges from other appellate courts in the state;
- judges from trial courts of general jurisdiction;
- retired appellate judges; and
- retired trial judges.

An assignment may be for only one case, but many times it will be for a more extended period. In some jurisdictions these temporary appointments are authorized only to fill a vacancy or to obtain a substitute for an absent or recused judge. In others, an appointment has the practical effect of increasing the court's regular complement of judges.

Appellate court capacity also has long been supplemented by the use of nonjudicial personnel, although the form of assistance has changed drastically in recent years from the commissioner system to the use of law clerks and staff attorneys. Historically, there have been three procedures for using commissioners and extra judges assigned to an appellate court. Under the most frequent and predominant arrangement, they sit in rotation alongside the regular judges. The second arrangement, which has not been used for 50 years, is creation of a separate division--essentially a separate court outside the supreme court--to decide appeals. In some states the decisions of such a body were not technically final without the affirmance of the supreme court, but their decisions were final in three states: New York (starting in 1870), Texas (1879), and Virginia (1849). Established as temporary measures, these unusual courts lasted for only five years in New York and two years in Texas, but the system was used sporadically in Virginia until 1928. Texas and six other states established panels of commissioners to hear appeals and write opinions that were subject to supreme court approval. The third use of commissioners and retired judges is as "special masters" or "referees" in hearing and deciding cases that are especially complex or require grasp of specialized knowledge to evaluate the issues and arguments. The major objection to the commissioner system is that too much authority is delegated to nonjudges. Largely as a result of this criticism, supplementary personnel are now placed in more subordinate roles, as clerks to individual judges or as staff attorneys.

Law Clerks and Staff Attorneys

Appellate courts have employed law clerks for individual judges for some time; creation of the position of staff attorney, a person who works for the court as a whole rather than exclusively for an individual judge, is much more recent. The creation of staff attorney units is one of the most frequently suggested remedies today for appellate court congestion and delay.

Law clerks working for individual judges ("elbow clerks") are important in assisting the judges with their work, although the tasks assigned to them vary. The volume and quality of the clerks' work have an effect on what judges do. Some judges ask clerks for recommendations or even have them draft opinions, while others limit them to checking the adequacy of the assertions and citations made by lawyers in their briefs. In contrast to staff attorneys, the judges clearly are "in charge" of their elbow clerks. Some judges feel that one clerk is as much as they can handle; more than

two normally is felt to be inappropriate because the amount of time spent supervising a larger number of clerks is said to outweigh the benefit they can provide.[13] Among the undesirable side-effects of a large law-clerk staff are supposed to be a) "the tendency for the judge to confer with his staff rather than with his judicial colleagues," thus decreasing the court's collegiality; b) the tendency for the judge to become less a judge and more an administrator; and c) the possibility that the judge will no longer be taking full personal responsibility for the decisions entrusted to him. It is also argued on the basis of experience that, "there is a fairly low point of diminishing return in judicial productivity resulting from the creation of such clerkships."[14] These reasons may help explain why, when a court decides to hire central staff attorneys, the judges often prefer to work through a single senior staff attorney; even if there is some contact between judges and individual staff attorneys, most of the work is handled through and monitored by the senior attorney.

Clerks, normally being fresh out of law school, bring new ideas to the judges. This is one reason why some judges prefer elbow clerks to staff attorneys, who are more likely to stay on at the court for several years and thus are further removed from the stimulus of law school and are more totally dependent on the court's internal environment.

In using law clerks, the judges can avoid some duplication of labor. Instead of having each elbow clerk prepare a bench memo on every case, the presiding judge of a panel can divide the work so that each clerk has primary responsibility for a particular set of cases. This does not relieve the judges and the other clerks of all work on these cases, of course, because the memoranda from the other judges' clerks will have to be reviewed. Some saving of clerks' time probably occurs, however. Duplication of effort caused by both staff attorneys and elbow clerks preparing memoranda also must be guarded against, because, as Leflar has recently argued, "duplication of their work can be wasteful." While he concedes the value of having double memoranda prepared in complex cases, he sees no need for it in the "mass of cases."[15]

Staff attorneys, who have a number of different titles, including "research analyst" (Arizona), "administrative assistant" (Illinois), "special assistant" (Virginia), and "commissioner" (Ohio, Minnesota, Wisconsin, Michigan, and Indiana), perform a variety of functions. One of their tasks is to prepare memoranda for the judges in designated types of cases coming before the court or, more rarely, for all cases.

If the staff attorneys prepare memos in the easier cases, the elbow clerks will work on the more difficult cases; if staff attorneys prepare memos in all cases, then the law clerks and the judges review and add to those materials.

In some courts staff attorneys may review applications for discretionary review. In the Michigan Court of Appeals, where they are used for this purpose, staff attorneys ("commissioners") prepare reports summarizing the relevant facts, analyzing the legal issues, and proposing an appropriate disposition. Their function is clearly to supplement the applications and briefs of the litigants, which are available when the judges decide whether or not to grant or deny review.[16] To assure that their work is as nearly uniform as possible, the commissioners discuss their reports among themselves before submitting them; they also have an index of reports prepared during the previous 10 years. The standards used by the commissioners in making their recommendations are a combination of formal standards set forth in court rules and informal standards developed by the commissioners themselves over time.

In the United States Court of Appeals for the Fourth Circuit, where more than 95 percent of the court's business passes through the staff attorneys, staff attorneys review pro se petitions and correspond with petitioners to complete a satisfactory record; they then develop petitioners' contentions more logically and effectively. They also review all cases set for full briefing and oral argument, recommending whether they are appropriate for disposition without oral argument. For those cases in which they recommend that oral argument not be held, they prepare proposed per curiam or memorandum decisions that, along with the record and trial transcript, are sent to the panel. When the staff attorneys know the composition of a panel, which they do in pro se cases, they may tailor their work somewhat to fit the panel.

If the staff prepares full memoranda reviewing the cases and, more particularly, drafts opinions in simpler cases, the issue becomes the extent to which the judges accept this work with no, or only cursory, review. Because of the demands on judges in cases receiving full treatment, the judges may accept much of the staff attorneys' work in these simpler cases; in fact, if they did not, there would be little sense in using the staff attorneys because the judges' investment of time in the de novo review would largely eliminate the time savings staff attorneys supposedly provide. Yet if the judges are to remain responsible for the court's work, they must review the staff attorneys' work even if they do so in a cursory fashion. Review by the judges is particularly necessary in the early stages of a staff attorney program so that the staff is fully

aware of judicial policy guidelines and so that the guidelines control staff output. Flanders and Goldman interviewed court personnel and judges in the federal system's Fourth Circuit about the criticism that federal judges have abdicated their responsibility to staff attorneys. On the basis of the responses, the researchers concluded that it was the judges, not the staff, who make the basic decisions.[17]

Despite Flanders' and Goldman's conclusion, problems remain. For one thing, litigating attorneys are unsure of the recommendations made by the staff attorneys to the judges. A forthright solution to that problem, proposed by Carrington, Meador, and Rosenberg, is that, despite courts' reluctance to reveal internal court memoranda, "in every staff-processed case the staff memorandum and staff-drafted opinion be sent to counsel."[18] (See pages 95-96, below.) Another potential problem is that, while staff attorney offices are established to reduce delay, they may actually become a source of it. If their workload is such that a backlog develops in the preparation of memoranda, for example, cases must be sent to the judges without the advance staff work. Carrington, Meador, and Rosenberg say that this should be done if the staff director "cannot assign a case to a staff attorney with a backlog of three or fewer cases," in which situation "he should not assign it at all."[19]

Productivity of central staff also may be hindered if problems of implementing a new staff arrangement are not faced. While informal cooperation can facilitate the transition to a central staff arrangement, "an uncooperative clerk's office can hinder staff operations in numerous ways."[20] Indeed, the authority of the presiding (or chief) judge or the entire court may well be needed to achieve acceptance of the idea. Another danger is that the staff may not be used for work helpful to the court as a whole if judges, unfamiliar with the concept, see the staff attorneys as merely additional elbow clerks.[21] Integrating a central staff into court procedures might well be easier in a well-organized court, for if a court were not well organized, adding another unit such as a staff attorney unit might exacerbate administrative problems rather than assist the court.[22]

The most recent criticism of the use of staff attorneys comes from California, where Chief Justice Bird has warned against the bureaucratization of justice through increased reliance on central staff, particularly because--unlike individual judges' clerks--they are more likely to be permanent employees of the court.[23] As court employees, their accountability to the public is lessened in comparison with the accountability of elbow clerks, achieved through accountability

of the individual judge. Chief Justice Bird also seconds the warning of California Court of Appeal Judge Robert Thompson against the "no-judge" opinion, which results from the judges placing so much confidence in the staff attorneys that the latter's preargument memorandum, prepared in the form of a draft opinion, is accepted without question.[24] She is particularly concerned because the staff-prepared opinions generally become unpublished per curiam opinions; not only might that lead to less careful review by the judges, but review by the practicing bar is foreclosed. Furthermore, because unpublished opinions are supposed to be used where little or no precedential value exists, the cases are not as likely to be granted review by the California Supreme Court.

The most important systematic test of the use of central staff was a four-state project directed by Daniel Meador for the National Center for State Courts. The project, carried out in Illinois, New Jersey, Virginia, and Nebraska, was designed to test a series of hypotheses:

1) a central staff would increase an appellate court's productivity, and would do so more than would providing law clerks for individual judges;

2) a court with such staff would retain effective control over decision making;

3) productivity and collegiality would be served more through use of central staff than through the addition of judges;

4) the staff would provide the judges with more time to devote to difficult cases;

5) staff memoranda would be helpful and allow the court to decide some cases with short, unsigned opinions--an hypothesis in turn based on the idea that many appeals are routine and can be so decided; and

6) use of central staff in these ways would be acceptable to lawyers practicing in the appellate courts.[25]

Some of these hypotheses were supported and some were not. Project evidence showed greater appellate court productivity from use of central staff. The hypothesis that such staff would increase productivity more than would elbow clerks was not supported, however, the evidence being too ambiguous to tell one way or the other. There was support for the propositions that a court could retain effective control over its decisional process, that use of central staff memoranda in

routine cases would help in production of short unsigned opinions, that many appeals are of a routine variety so that they can be decided with such opinions, and that the practicing appellate bar would accept staff procedures. There was inadequate support, however, for the proposition that central staff allowed judges more working time on difficult cases and for the idea that central staff would increase productivity and preserve collegiality more than adding judges to a court.[26]

Meador also suggested that the effects of staff assistance would be greater in civil than in criminal appeals, because the latter are often given more prompt treatment by many courts. Moreover, he argued, even if the appellate process were slower once staff had been added, that would not necessarily be negative because staff might be adding elements to the court's consideration of cases that were previously unavailable.

Despite the attractiveness to some observers of the staff attorney mechanism, it is likely that only high-volume courts pressed by their caseloads would be willing to implement the use of central staff and to utilize it effectively. Based on experience in Illinois, though, Meador suggests that it is this very kind of court that may have trouble: The existence of a backlog may interfere with using staff in innovative ways because the judges in such a situation have inadequate time to devote "to thinking about procedural changes."[27]

Intermediate Appellate Courts

The creation of intermediate courts has been a major way to add resources to deal with caseload problems in supreme courts. The first intermediate court was established in New Jersey in the early 18th century. New York followed in 1846, Ohio in 1852, Missouri in 1865, Illinois in 1877, and Louisiana in 1879. These courts were not true appellate courts, though, because their judges, like those in early supreme courts, were mainly trial judges. The first intermediate court specializing in appellate work was established in Ohio in 1883. From then until 1911, 15 more states established true intermediate courts. Three later abolished the courts, however, and until 1958, when the Florida Courts of Appeals were established, only 13 states had intermediate courts. Then, during the past two decades, 14 more states have created second appellate tiers, resulting in the present total of 28.[28]

Appellate courts perform two main functions--error correction and lawmaking.[29] Both functions exist--and are necessary--in an appellate system, but both need not be performed by a single court. To the extent that they are separable, and in some cases they are not, they are thought by

most observers to divide roughly along the present jurisdictional lines of the two levels of appeals in a majority of states. The highest appellate court devotes proportionately more time to lawmaking while the intermediate appellate courts are supposed to engage predominately in error correction.

The advantages and disadvantages of intermediate appellate courts have been stated succinctly by Leflar.[30] The primary advantage, he says, is that they are the best method for dealing with large backlogs. They can significantly decrease the appeals with which the state's highest court has to deal and concurrently make appeal available in more cases. At least initially, they may render a decision in less time than the supreme court when there is only one appeal in a case. Other advantages, such as reduced travel when the court operates in districts and less expensive appeals, benefit the litigant more than the court. The basic disadvantage, Leflar argues, is increased cost to those litigants requiring a second appeal. With respect to delay, the length of time between initiation and termination of appeals may be increased, particularly in two-appeal cases. Costs to the taxpayer also are higher. Moreover, the certainty of precedent may be undermined. Finally, the quality of judicial personnel is said to be lowered.

States have used three basic jurisdictional arrangements, with several variations, to apportion appeals between supreme courts and intermediate courts. The most common is to retain direct appeal to the supreme court for a substantial portion of first appeals, particularly those involving major felony convictions and constitutional issues, with the remainder going to the intermediate court(s). With this arrangement, double appeals (one case appealed to two courts) are less frequent because the types of cases for which it is most likely that review would be sought in the court of last resort go directly to that court. A drawback is that initial jurisdictional alignments, even if based on sound judgments about the importance of various types of appeals, only inexactly route to the supreme court on the first appeal the important issues on which that court should make law. Further, whenever the supreme court continues to have substantial mandatory jurisdiction, the division of jurisdiction may be unclear for many appeals, creating confusion among members of the bar and thus leading to the raising of additional jurisdictional issues that the supreme court must decide. More important, the jurisdictional division is very likely to result in uneven distribution of caseload between the supreme court and the intermediate court. (This should not cause delay, however, unless one level were underworked.) If initial jurisdictional distributions were based on the composition of the appellate caseload when the intermediate courts were established, they may later become

unsuitable if certain types of appeals increase disproportionately. This problem must be addressed by action of the legislature.

The second type of jurisdictional arrangement, favored in the American Bar Association's standards,[31] is found in California, Michigan, Maryland, and Wisconsin, among others. Almost all first appeals are to the intermediate court, leaving the supreme court with discretionary jurisdiction over intermediate court decisions and mandatory jurisdiction only over extraordinary writs. In this arrangement, the court of last resort can select for review, if it wishes, only those issues important for lawmaking, leaving error correction to the intermediate courts.

The third type of jurisdictional division, a relatively recent innovation, exists in only a few states, e.g., Massachusetts and Oklahoma. All appeals are sent initially to the supreme court, which retains some cases and refers the others to the intermediate court. The supreme court has discretionary jurisdiction over intermediate court decisions, but review is seldom granted, so double appeals are a minor problem. Apportionment of workloads between the two levels of appellate court can be adapted easily to resources available. The supreme court can retain the appeals containing issues important for lawmaking, permitting their prompt resolution. This third jurisdictional arrangement is not free of drawbacks, however. The supreme court judges must spend extra time reviewing and allocating the cases, necessarily adding an additional step that may contribute to delay. If the supreme court is not also sensitive about the caseload of the intermediate court, the intermediate court might become overloaded and then delayed.

Beyond these basic jurisdictional arrangements are several important variations than can affect the apportionment of appeals between intermediate and supreme courts and thus affect appellate court delay and backlog. In many states, appeals originally filed in the intermediate court can be transferred to the supreme court. Many states have provisions allowing the supreme court to bypass the intermediate court in cases containing major, important issues that need prompt resolution. The bypass mechanism also can be used to relieve overloaded intermediate courts whenever the supreme court can handle more than its regular caseload.[32] In several states, intermediate courts can certify cases to the supreme court whenever the intermediate court believes the issues are of major importance. This greatly speeds the disposition of those issues. Certification may take considerable judge time, however, since both the intermediate and the supreme courts must review the case.

California has another variation. In addition to having the power to balance caseloads among district courts of appeal by reassigning cases from one district to another, the Supreme Court may take a case sua sponte after it has been decided by the court of appeal, even though no petition for further review has been filed. The high court can use this power to clarify the law and to reconcile rulings of the courts of appeal with its own rulings, either recently released or soon to be announced. This mechanism, clearly part of the court's lawmaking function, is seldom used,[33] but can serve to protect the interests of parties in individual cases, too.

Available information indicates that delay in courts of last resort has been reduced significantly after the creation of an intermediate court. The time from docketing to decision in the Maryland Court of Appeals decreased from 9.4 months in fiscal year 1966-67 to 7.6 months in 1968-69 (20 percent), after the intermediate court was established in 1967. Similarly, the time from receipt of transcript to decision in the New Mexico Supreme Court decreased from 14.5 months to 10.5 months (28 percent) between 1966 and 1968. And time from filing to disposition for criminal cases in Colorado decreased from over two years to 15 months (44 percent) after the intermediate court was created.[34] No court of last resort has experienced an increase in its delay in the first few years after creation of an intermediate court.

These savings of time occur after the case reaches the court of last resort. Probably the most important problem created by the establishment of an intermediate appellate court is the delay and expense of a second appeal. Even if the supreme court denies the petition for further review, extra time has been consumed before the final decision. The magnitude of this problem depends on how often cases are subjected to two appellate reviews and on the extent of delay in the supreme court, which varies from state to state.

It is rare to abolish supreme court review of intermediate court decisions in order to prevent second appeals. Florida appears to be the only state that has attempted to make appeals to the intermediate court the final appeal in more than small categories of cases, and the state's supreme court has expended much effort to define the limitations of its review.[35] Moreover, very few states, among them notably New York, permit many second appeals as of right. A second appeal as of right typically occurs when the intermediate court decision is not unanimous or when the trial court is reversed; capital convictions or decisions ruling statutes unconstitutional may also be allowed a second appeal. One study has concluded that in 11 of the 24 states having intermediate courts in the early 1970s, the courts

were in fact "not intermediate but terminal" because the number of second appeals was exceedingly small.[36]

Available data support the conclusion that second appeals occur in a small percent of cases, although they may be sought in a significant number of cases. The number of requests to appeal compared with the number of intermediate court opinions in recent years was checked for 24 courts of last resort. The smallest percentage of intermediate court cases in which requests to appeal were made was 22 percent, in Oregon. Colorado had the greatest percentage of cases in which requests were made, 54 percent. But the percent of intermediate court opinions in which the requests were granted was markedly smaller: The range was from a low of two percent in Ohio to 12 percent in New Mexico.[37] These data are subject to substantial qualification for particular states, but at least they suggest the order of difference between requests made and requests granted and, generally, the likelihood of two appeals in a case.

To this point the discussion has centered on a single intermediate court. Seth and Shirley Hufstedler have proposed a second intermediate level, to be placed between the trial court and the existing intermediate appellate court. Proposed for California, this court would be designed to decide quickly the large number of appeals that contain no substantial issues of law. Such a court of review would serve primarily the error-correction function, leaving lawmaking for the other appellate courts. Appeal from the new tribunal would be on petition for review, thus, it is argued, substantially lessening the caseload of the intermediate appellate courts.[38] The major argument against such a suggestion is the expense and delay involved in appealing from one intermediate appellate court tier to another. In its initial formulation, the trial judge would have sat with the appellate court judges for at least some proceedings, but that aspect of the proposal was subsequently abandoned.[39] The proposal is not unlike one by Roscoe Pound that, "the basic work of correcting error should be performed by a reviewing panel working within the trial court."[40] Indeed, in both New Jersey and New York, the basic level of review--the Appellate Division--is part of the general jurisdiction trial court.

Thus far the discussion of intermediate courts has assumed that they would have broad, general jurisdiction. At any appellate court level there can be either a single court--in which the judges hear all cases, either through panel assignments or by an en banc procedure--or two or more courts with separate jurisdictions based on subject matter or territory. About half of the 28 states with an intermediate appellate court have created two or more separate courts. The divisions

are along subject matter lines in three states: Alabama and Tennessee have separate civil and criminal intermediate courts, and Pennsylvania has one intermediate court with general jurisdiction and one with jurisdiction over certain appeals in which the state or state officials are parties. Intermediate courts in about a dozen states are divided along territorial lines, that is, different divisions hear appeals originating from specified counties in the state. The number of divisions varies from two in Arizona to 14 in Texas.

A major benefit of having several territorially based courts is said to be that hearings can be held in different cities around the state for the convenience of litigants without the judges having to ride circuit. Moreover, it permits local appeals to be decided by locally elected (or selected) judges. There is the danger, however, that the various courts may produce divergent law more often than one intermediate court with statewide jurisdiction. There is the possibility of workload imbalance, with congestion occurring in some courts while others remain current. Such uneven distribution can be mitigated if the state supreme court has authority to assign judges temporarily to, or to transfer cases away from, the congested courts, but the amount of relief provided to overburdened courts by these strategies is uncertain. For example, while the number of cases disposed of by opinion in the five California District Courts of Appeal varied between 98 and 111 in fiscal year 1975-76, the time from notice of appeal to decision in civil cases varied among divisions from 10 to 22 months during the second quarter of 1976.[41] Similar disparities in the time required for decision appear among the five districts of the Illinois intermediate court.[42] On the other hand, processing times in the threedivisions of the Washington Court of Appeals are quite similar; the medians vary from 15 to 17.4 months.[43]

There also have been numerous proposals for courts specialized along subject-matter lines. At the federal level, there have been proposals for an administrative court to handle all appeals from administrative agencies, for a court of tax appeals, and, most recently, for a "federal court of appeals for the federal circuit," to combine the present Court of Claims and the Court of Customs and Patent Appeals.[44] Now similar proposals are appearing for state courts.[45]

A number of arguments are made with respect to--and mostly in opposition to--specialized courts.[46] One is that they may become captives of the interests that appear regularly before them and that the judges' perspectives will be or will become quite narrow.[47] Most of those arguments do not address the issue of delay. One argument relevant to delay is

that if the jurisdictional scope of a specialized court is unclear, the result may be a court with a large volume of disputes over jurisdiction, disputes that are likely to increase delay.[48] If cases can be brought to the specialized court or to a court of general jurisdiction, there might be quarrels over which is the appropriate court.

A second problem is that the caseloads of the courts may become quite disparate, but the overloaded court is unlikely to transfer cases to the other court because of the second court's limited jurisdiction. For example, Alabama's criminal intermediate courts received 176 new cases per judge in fiscal year 1974-1975, while the civil court received 44 per judge.[49] The median times from filing to decision were 287 and 203 days, respectively, for 1970-1972.[50] Among the Pennsylvania intermediate courts, the Superior Court received 519 filings per judge in 1976 and the Commonwealth Court received 348 filings per judge.[51] Courts of last resort with specialized jurisdiction experience similar disparity. The Texas Court of Criminal Appeals issued 242 opinions per judge in 1976 and has a considerable delay problem. During the past several years, the time from notice of appeal to decision has averaged 15 to 18 months. At the same time, the Texas Supreme Court was issuing 17 opinions per judge, although the judges must also rule on a large number of petitions for review.[52] In Oklahoma the only comparable figure is the number of appeals terminated, excluding cases transferred by the Supreme Court to the intermediate courts that have civil jurisdiction only. In 1976, the Supreme Court terminated fewer than 60 appeals per judge; the Court of Criminal Appeals terminated 296 appeals per judge.[53] On the other hand, the two Tennessee intermediate courts have roughly the same caseload per judge, and the time to decision is only slightly longer in the Court of Criminal Appeals.[54]

Discretionary Jurisdiction

A major form of relief, especially to courts of last resort, comes from transferring appeals from mandatory to discretionary jurisdiction. Most often this is accomplished by permitting an appeal of right to the intermediate appellate court, with discretionary review thereafter to the supreme court.[55] Early in this century, however, several states without intermediate courts gave their supreme courts discretionary jurisdiction over all or sizable portions of their appeals and the Virginia and West Virginia Supreme Courts still have discretionary jurisdiction over the great majority of their cases. In the Virginia Supreme Court, the record and brief accompany each petition for review and the appellant has an opportunity to present oral argument, with a three-judge

panel deciding the petition. If the petition is accepted, the appeal is submitted to full-scale review by the entire court. Denial of leave to appeal seems to be the equivalent of a summary affirmance because the Supreme Court does not turn down cases "where there is shown to have been a substantial possibility of injustice below."[56] Increasing caseload has meant a shift toward accepting cases on the basis of their societal importance, thus placing principal emphasis on the court's lawmaking function and less on the error-correction function. The American Bar Association's Standards Relating to Appellate Courts consider such a procedure justifiable if it involves the essential elements of the opportunity to be heard, because it is like courts that sit in panels with en banc review of panel decisions,[57] but others believe that "'efficiency' has been achieved at a price to litigants in the quality of appellate justice that most Americans and lawyers would or should be unwilling to bear."[58]

Typically, discretionary jurisdiction is limited to a small portion of first appeals. A common example is appeals from general jurisdiction trial courts following their review of decisions of limited jurisdiction courts, because there already has been one appeal. Similarly, appeals from administrative agencies, which typically have internal appeal mechanisms, may be discretionary. Some first-level appellate courts also have discretion in cases not otherwise reviewed, such as civil cases involving small sums or criminal cases involving infractions.[59] Presumably, although there is no documentation of this effect, the extent of this discretionary jurisdiction can greatly affect the workload of an appellate court of first review.

A substantial portion of the relief to a supreme court derived from discretionary jurisdiction is the difference between the time required to decide appeals on their merits and the time required to decide petitions for review. As far back as 1957, Justice Traynor said that the "consideration of these petitions is a major task" in the California Supreme Court.[60] Justice England of the Florida Supreme Court, however, who anticipates an average of roughly 20 minutes for each petition (which is less than five percent of the time needed for a case decided on the merits), has estimated that the process of examining petitions for review required less than 10 percent of his time.[61] These two statements are not necessarily contradictory, however; in 1975, the California Supreme Court had twice the number of petitions for review as the Florida Supreme Court.[62]

Unitary Review in Criminal Cases

Criminal cases have been a major component in the recent, dramatic increase in appellate caseloads.[63] An important

factor in this increase, it is alleged, is that the reviewing court in criminal cases is limited to the issues raised, so some issues are raised on initial appeal, others are raised in state postconviction remedy proceedings, and still others during federal habeas corpus review. The National Advisory Commission on Criminal Justice Standards and Goals noted that the review process for a state criminal case can have as many as 11 different steps, some of which can be repeated.[64] These extend from a new trial motion in the original trial court to a petition for certiorari to the United States Supreme Court asking for review of a federal court of appeals habeas corpus ruling.

One proposed remedy is for a single, unified review of all elements in the trial, or "unitary review"--a term applied to a rather wide range of procedures. Achieving finality is the goal of these unified review procedures for criminal cases. Without a single unified process for review, finality cannot be achieved because items in the record not raised on appeal--particularly federal constitutional claims[65]--do not get treated in the original appeal.

An early, and perhaps the original, use of the term "unitary review" is found in the American Bar Association's Standards Relating to Post-Conviction Remedies.[66] The Standards advocated a unitary postconviction remedy that would be comprehensive and encompass the functions of habeas corpus and other writs traditionally used in collateral attacks. The ABA proposal would continue the separation between direct and collateral review. In recent years, however, several suggestions have been advanced for a unified review that would combine direct and collateral review. The goal is to mitigate the problems of repetitive review and the lack of finality in criminal cases by greatly decreasing the number of collateral attacks. The two most noteworthy suggestions are those made by Daniel Meador and Paul Robinson.[67] In the Robinson proposal, the trial judge would hold a postjudgment hearing soon after conviction and would consider all issues raised by the defendant, whether or not preserved in the record. Appeals could be taken from this hearing, but issues not advanced, with few exceptions, could not be raised later on collateral attack. The Meador proposal was adopted by the National Advisory Commission on Criminal Justice Standards and Goals, whose Task Force on Courts Meador chaired. Under this proposal, all proceedings leading to the conviction would be examined, as would the sentence; not only would matters asserted in motions for new trial be considered but errors not apparent in the trial court or not raised by trial counsel also could be raised and examined by the reviewing court. (A modification of Meador's basic unified criminal review is a posttrial hearing

in which the court is expected to reach all issues, whether in the record or not. This is called an "omnibus posttrial hearing."[68]

Professional staff may be used to assist the reviewing court to monitor the case, shape the record, identify issues, and screen for appropriate procedural steps and proposed dispositions.[69] The National Advisory Commission's proposal envisions flexible review procedures that would allow, inter alia, receipt of new evidence by the appellate tribunal, referral to the trial court of issues appropriate for decision there, control of issues for briefing and argument, and substitution of sentence, as well as a flexible substantive standard for affirming, reversing, or remanding the lower court decision. Provision of such a unified review procedure is seen as obviating any further review except under limited circumstances, as when new evidence appears after the reviewing court has completed its work, when a constitutional question of considerable significance arises, or when an appellate court would determine that such review would be appropriate. To reinforce the "one-full-review-only" idea, matters previously adjudicated are to be treated as final; that is, courts in the system in which defendant was convicted should not adjudicate claims previously raised and decided.[70] Similarly, if constitutional claims were raised later, earlier factual determinations would be conclusive unless the constitutional violation undermined the fact-finding process.[71]

Many states substantially comply with the ABA unitary review standards, but none has adopted more than limited portions of the Meador or Robinson proposals. Kansas provides a broad postconviction remedy that supersedes habeas corpus and other writs used for collateral attacks.[72] A 1973 study concluded, however, that the Kansas Supreme Court has restricted the remedy through narrow interpretation of the statute, foreclosing many collateral attacks because the issues were not raised upon direct appeal and foreclosing almost all second and subsequent collateral attacks on a single conviction.[73] Kansas Court Rule 183 requires petitioner to complete a lengthy questionnaire, one purpose of which is to determine what other proceedings he has instigated to attack the conviction. A search of the Kansas rules and statutes did not disclose any attempt to broaden the scope of review on direct appeal to encompass issues not raised at trial or upon appeal.

In California the postconviction remedy is habeas corpus, which has been expanded into a broad collateral remedy.[74] Unlike the situation in Kansas, successive collateral attacks are allowed and are frequent,[75] although California Rule of Court 56.5 requires petitioner to complete a questionnaire similar

to that in Kansas. In addition, Rule 56 provides that petitioner inform the court of any related pending state appellate proceeding so that the proceedings can be consolidated. The California intermediate courts also review cases broadly during direct appeals, considering and deciding issues not raised by counsel. Practice varies among the five District Courts of Appeal, however. Staff attorneys in the First District, for example, highlight issues for the court not raised in appellant's papers if they are noticed during study of those issues that are presented.[76] In the Third District, on the other hand, where staff is directed to make a thorough search for new issues, new issues are uncovered and decided in less than five percent of the criminal appeals.[77] Thus, some of California's appellate courts have partly adopted one aspect of the broad unified review, the affirmative searching for issues, but there has been no attempt to implement the second aspect, curtailment of collateral attacks.

The broad scope of review in direct criminal appeals in California is quite common in appellate courts elsewhere, although the practice is usually not formally mandated by statute or court rule. It is especially common in intermediate courts that, like the California Court of Appeal, rely heavily on staff attorneys.[78] While a few states have statutes that direct appellate courts to search the record for error in criminal appeals,[79] their number has decreased in recent years and the actual effect of the rules on the scope of review is somewhat uncertain.[80]

The proposal for unitary review of criminal convictions has not been accepted in full by the state appellate courts, nor have more limited projects been instituted in many courts. Whether the extra effort required to institute a unitary review procedure exceeds the effort required to decide collateral attacks on convictions is unclear. Perhaps now that the availability of habeas corpus review in federal courts is being limited,[81] more attention will be given to these procedures.

Collapsing several reviews into one review is not, however, the only way to deal with the volume of criminal appeals. One of the more unusual proposals for limiting appeals in criminal cases is to create a Criminal Defense and Rehabilitation Fund. The indigent criminal defendant would have an option: He could pursue his appeal at public expense--the present arrangement--or could take a sum of money from the Fund for himself or someone he designates. This, claim Carrington, Meador and Rosenberg, would "force the defendant to think about his case as a non-indigent must."[82] Because the defendant would forego his right to appeal if he accepts the money, there is a strong element of bribery in this situation, just as there is in the alternate

proposal for reducing convicted defendant's sentence by a fixed percentage for a waiver of appeal. The immediate need of indigent defendants for money might cause many to surrender valid appealable points. This is analogous to the pretrial bond procedure when defendants who are in jail for inability to post bond plead guilty in order to "get the thing over with and get back out on the street" quickly.[83] It should be noted that after making this proposal, Carrington, Meador and Rosenberg suggest that neither tightening the standards of review, restricting the right to appeal, nor increasing "the costs of disincentives to appeal" would "produce substantial reductions" in the rate of appeal, and that each of these possibilities "has side-effects which are adverse."[84]

The responses to delay and increasing caseloads discussed in this chapter have been used by most states. Yet they are responses from which it is hard to retreat. Before attempting these responses, it might be preferable to try to restructure the use of time by the judges and staff in order to get greater productivity from existing resources. Techniques for achieving more productive use of time are discussed in the next chapter.

Footnotes -- Chapter IV

1. Maurice Rosenberg, "Court Congestion: Status, Causes and Proposed Remedies," The Courts, the Public, and the Law Explosion (Harry W. Jones, ed.) (1965), p. 55.

2. Paul D. Carrington, Daniel J. Meador, and Maurice Rosenberg, Justice on Appeal (St. Paul, MN.: West Publishing Co., 1976), p. 7.

3. Geoffrey C. Hazard, Jr., "Standards of Judicial Administration: Appellate Courts," American Bar Association Journal, Vol. 62 (1976), p. 108.

4. No comprehensive history of this trend is available, although there are many descriptions of specific states. The Alabama Supreme Court, for example, because a full-time appellate court in 1832. J.O. Sentell, "The Supreme Court of Alabama, 1820-1970--A Glimpse," The Alabama Lawyer, Vol. 31 (1970), pp. 144-146. The Pennsylvania Supreme Court made this change in 1874 after many years of gradual withdraw from trial duty. Erwin C. Surrency, "The Development of the Appellate Function: The Pennsylvania Experience," American Journal of Legal History, Vol. 20 (1976), p. 173, at pp. 180-187. In Maryland the court of last resort consisted of trial judges from 1806-1851, appellate judges only until 1867, trial judges again until 1945, and appellate judges only from then on. John T. Joseph and Henry R. Lord, "A Discussion of the Proposed Intermediate Appellate Court for Maryland," Maryland Law Review, Vol. 25 (1965), p. 300, at p. 303. The Illinois Supreme Court made the final transition in 1848. Walter F. Dodd, "The Work of the Supreme Court of Illinois," Illinois Law Review, Vol. 21 (1926), p. 207, at pp. 209-211.

5. Institute of Judicial Administration, The Supreme Judicial Court and the Superior Court of the State of Maine (New York, N.Y.: Institute of Judicial Administration, 1971), pp. 1, 3.

6. Edward O. Curran and Edson R. Sunderland, "The Organization and Operation of Courts of Review," Third Report of the Judicial Council of Michigan (1935), pp. 61-62. This study gives the number of judges in 34 courts from the beginning of the 19th century until the 1930s.

7. The numbers for intermediate court judges were obtained from: Curran and Sunderland, supra note 6, pp. 156-159; Institute of Judicial Administration, State Intermediate Appellate Courts, Their Jurisdiction, Caseload and

Expenditures (New York, N.Y.: Institute of Judicial Administration, 1956), pp. 5-6; Council of State Governments, State Court Systems (Lexington, KY.: Council of State Governments, 1978), p. 2.

8. Carrington, Meador, and Rosenberg, supra note 2, p. 137.

9. Curran and Sunderland, supra note 6, p. 63.

10. Carrington, Meador, and Rosenberg, supra note 2, p. 139.

11. Ibid.

12. Church remarks, "If adding more judges is to reduce backlog and delay, the existing judges on a court must not decrease their level of effort . . . when new judges are added." Thomas W. Church, Jr., et al., Pretrial Delay: A Review and Bibliography (Williamsburg, VA.: National Center for State Courts, 1978), p. 23.

13. Carrington, Meador, and Rosenberg, supra note 2, p. 48, suggest that there be no more than one staff attorney per judge on an appellate court, thus indicating a similar concern for staff/judge ratios. This is part of their suggestion that of every four professionals working for a court, no less than one be a judge.

14. Ibid., p. 45.

15. Robert A. Leflar, Report to Washington Court of Appeals, December 12, 1977, p. 6 (Unpublished report). In order to facilitate the work of both new staff attorneys and new law clerks, Leflar suggests a "research manual" so that they do not fumble around when they first come on the job. Ibid., p. 7.

16. See N.O. Stockmeyer, Jr., and John H. Stenger, "The Michigan Commissioner System," 59 Judicature (1976), pp. 390-393. It should be noted that the bulk of the legal research for the judges in Michigan is not done by the commissioners.

17. Steven Flanders and Jerry Goldman, "Screening Practices and the Use of Para-Judicial Personnel in a U.S. Court of Appeals: A Study of the Fourth Circuit," Justice System Journal, Vol. 1 (March, 1975), p. 1, at pp. 9-11.

18. Carrington, Meador and Rosenberg, supra note 2, pp. 52-53.

19. Ibid., p. 51.

20. Daniel J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (St. Paul, MN.: West Publishing Co., 1974), p. 86.

21. Ibid., pp. 112-113.

22. Ibid., p. 166.

23. Rose Elizabeth Bird, "The Hidden Judiciary," The Judges' Journal, Vol. 17 (1978), p. 4.

24. E.g., Robert S. Thompson, "One Judge and No Judge Appellate Decisions," California State Bar Journal, Vol. 50 (1975), p. 476.

25. Meador, supra note 20, pp. 24-25.

26. Ibid., passim.

27. Ibid., p. 190.

28. The early history of intermediate courts is discussed in Curran and Sunderland, supra note 6, pp. 152-203. Recent figures can be obtained from Council of State Governments, supra note 7, p. 2.

29. Carrington, Meador, and Rosenberg, supra note 2, pp. 2-3.

30. Robert A. Leflar, Internal Operating Procedures of Appellate Courts (Chicago, IL: American Bar Association, 1976), p. 66.

31. American Bar Association Commission on Standards of Judicial Administration, Standards Relating to Court Organization (Chicago, IL: American Bar Association, 1974), Standard 1.13; American Bar Association Commission on Standards of Judicial Admninistration, Standards Relating to Appellate Courts, (Chicago, IL.: American Bar Association, 1977), Standard 3.10.

32. For some time the bulk of the New Jersey Supreme Court's caseload consisted of appeals removed from the intermediate court. See Arthur T. Vanderbilt, "Improving the Administration of Justice--Two Decades of Development," University of Cincinnati Law Review, Vol. 26 (1957), p. 155.

33. The Clerk of Court has indicated to Project staff that the Court has used this mechanism less than once a year in recent years, although no data are kept on precise numbers.

34. Data from, respectively, Administrative Office of the Courts, Annual Report 1968-1969 (Baltimore, Maryland), p. 26; Annual Report of the Director of the Administrative Office of the Courts, State of New Mexico (Santa Fe, N.M., 1969), p. 19; Annual Statistical Report of The Colorado Judiciary, July 1, 1977 to June 30, 1978 (Denver, CO.), p. 41.

35. William D. Rives III, "Erosion of Final Jurisdiction in Florida's District Court of Appeal," University of Florida Law Review, Vol. 21 (1969), p. 375.

36. Graham C. Lilly and Antonin Scalia, "Appellate Justice: A Crisis in Virginia," Virginia Law Review, Vol. 57 (1971), p. 3 at p. 46.

37. Taken from an unpublished analysis by Theodore B. Marvell in November 1978 for the District of Columbia Court of Appeals.

38. See, for example, Seth M. Hufstedler, "California Court Reform --A Second Look, Pacific Law Journal, Vol. 4 (1973), p. 725; Shirley Hufstedler, "New Blocks for Old Pyramids: Reshaping the Judicial System," Southern California Law Review, Vol. 44 (1971), p. 901. Seth M. Hufstedler and Shirley Hufstedler, "Improving the California Appellate Pyramid," Los Angeles Bar Review, Vol. 46 (1971), p. 275. For a discussion of the results of an experiment based on the Hufstedlers' proposal, see pages 92-96, infra.

39. Seth M. Hufstedler, supra note 38.

40. Roscoe Pound, "Principles and Outline of a Modern Unified Court Organization," Journal of the American Judiciary Society, Vol. 23 (1940), p. 225, at p. 228.

41. Judicial Council of California, Annual Report of the Administrative Office of the California Courts (Sacramento, CA.: 1977), pp. 190, 194. In California, three of the five intermediate courts are divided into two to five divisions.

42. Administrative Office of the Illinois Courts, 1976 Annual Report to the Supreme Court of Illinois, p. 98.

43. Office of the Administrator for the Courts, Judicial Administration in the Courts, State of Washington, 1977 (Olympia, WA: 1978), p. 14.

44. E.g., Paul D. Carrington, "Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law," Harvard Law Review, Vol. 82 (1969), p. 542; Erwin Griswold, "The Need for a Court of Tax Appeals," Harvard Law Review, Vol. 57 (1944), p. 1153; "Carter Proposes Bills to Streamline Courts," The Recorder, Wednesday, February 28, 1979, p. 1, col. 5. See also Roger Handberg, "Should We Try Special Courts for Special Kinds of Disputes," Judicature, Vol. 62 (1979), p. 318.

45. E.g., Steve Martini, "Bill to Establish State Tax Court Introduced," Los Angeles Daily Journal, Friday, March 30, 1979, p. 1, col. 3.

46. See generally Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedure: Recommendations for Change (Washington, D.C.: Government Printing Office, 1975), p. 28.

47. See Laurence Baum, "Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals," Law and Society Review, Vol. 11 (1977), p. 823. Baum points out that affected interests played a role in the selection of CCPA judges, with effects on outcomes, but that otherwise the CCPA was not particularly the captive of those interests.

48. Carrington, Meador, and Rosenberg, supra note 2, p. 170.

49. See 1975 Annual Report, Alabama Judicial System, pp. 3, 4.

50. National Center for State Courts, Report on the Appellate Process in Alabama (Denver, CO.: National Center for State Courts, 1973), p. 46.

51. See Administrative Office of Pennsylvania Courts, 1976 Report (Philadelphia, PA.: 1977), pp. 36, 38.

52. See Texas Judicial Council, Forty-Eighth Annual Report (Austin, TX.: 1977), pp. 64, 97, 101, and Texas Judicial Council Forty-Seventh Annual Report (Austin,TX.: 1976), p. 85.

53. See State of Oklahoma, Administrative Director of the Courts, Report on the Judiciary, 1976, pp. 40, 47.

54. See Executive Secretary, Supreme Court of Tennessee, 1976 Annual Report, pp. 51, 52; Resource Planning Corporation, Tennessee Court Study: Profile of the Tennessee Courts (Washington, D.C.: Resource Planning Corp., 1977), pp. 2-15, 3-11.

55. This approach is endorsed by the American Bar Association. See Standards Relating to Appellate Courts, supra note 31, Standard 3.10 and Commentary.

56. Graham C. Lilly, The Appellate Process and Staff Research Attorneys in the Supreme Court of Virginia (Denver, CO.: National Center for State Courts, 1974), p. 24.

57. Standards Relating to Appellate Courts, supra note 31, pp. 14-15.

58. Carrington, Meador, and Rosenberg, supra note 2, p. 133.

59. See Standards Relating to Appellate Courts, supra note 31, Standards 3.10, 3.80.

60. Roger J. Traynor, "Some Open Questions on the Work of State Appellate Courts," The University of Chicago Law Review, Vol. 24 (1957), p. 211, at p. 214.

61. Arthur J. England, Jr., and Michael P. McMahon, "Quality Discounts in Appellate Justice," Judicature, Vol. 60 (1977), p. 442, at pp. 446-449.

62. See Table 2.1, supra page 8. See also pages 87-88 for the American Bar Association's view of the use of discretionary jurisdiction to screen out appeals completely.

63. See pages 20, supra.

64. National Advisory Commission on Criminal Justice Standards and Goals, Courts (Washington, D.C.: 1973), p. 113.

65. It should be noted that the initial proposal for unitary review was developed before the Supreme Court began to refine the "deliberate bypass" rule in such a way as to limit severely the issues which could be raised in a federal habeas corpus proceeding. See also Stone v. Powell, 428 U.S. 465 (1976), making habeas corpus unavailable to test search-and-seizure issues already reviewed by the state courts.

66. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies (Chicago, IL.: American Bar Association, 1968), pp. 23-27.

67. Meador's suggestions can be found in several publications: Daniel J. Meador, Criminal Appeals: English Practices and American Reforms (Charlottesville, VA.: University of

Virginia, 1973), pp. 178-184; National Advisory Commission on Criminal Justice Standards and Goals, supra note 64, pp. 112-137. Robinson's proposal is outlined in Paul H. Robinson, "Proposal and Analysis of a Unitary System for Review of Criminal Judgments," Boston University Law Review, Vol. 54 (1974), p. 485. See also Paul Nejelski and Ellen Emory, "Unified Appeal in State Criminal Cases," Rutgers-Camden Law Journal, Vol. 7 (1976), p. 484.

68. Carrington, Meador and Rosenberg, supra note 2, p. 113.

69. National Advisory Commission on Criminal Justice Standards and Goals, supra note 64, Standard 6.2.

70. Ibid., Standards 6.5 and 6.6. See also ibid., Standard 6.8.

71. Ibid., Standard 6.7.

72. Kansas Stat., Title 60, section 1507.

73. Keith G. Meyer and Larry W. Yackle, "Collateral Challenges to Criminal Convictions," University of Kansas Law Review, Vol. 21 (1973), p. 259, at pp. 300-336. For a recent effort by the Supreme Court of Missouri to limit and more fully define the right to post-conviction review in that state, see Fields v. Missouri, 572 S.W.2d 477 (Mo. 1978).

74. Cal. Penal Code, sec. 1473-1508.

75. See Y. Avichai, "Collateral Attacks on Convictions (1): The Probability and Intensity of Filing," American Bar Foundation Journal, Vol. 2 (1977), p. 319, at p. 337.

76. Meador, supra note 20, p. 211.

77. Information about the Third District was obtained from conversations with the court clerk and principal staff attorney of the court.

78. See, for example, Carrington, Meador and Rosenberg, supra note 2, at p. 110; T. John Lesinski and N.O. Stockmeyer, Jr., "Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity," Vanderbilt Law Review, Vol. 26 (1973), p. 1211, at p. 1233.

79. Ala. Code, sec. 12-22-240 (1975); Ariz. Rev. Stat. Ann., Title 13, sec. 4035 (1977); Tenn. Code Ann., Title 40, sec. 3409 (1955); Mass. Ann. Laws, ch. 278. sec. 33E. The latter applies only to capital cases. The operation of the

Alabama rule is discussed in National Center for State Courts, Report on the Appellate Process in Alabama (Denver, CO.: National Center for State Courts, 1973), pp. 143-150. The report recommended against the "search the record" rule.

80. A 1973 study lists six states with such statutes (not including the narrow Massachusetts statute). Douglas Rendleman, "The Scope of Review in Criminal Appeals and the Iowa Judgment on the Record Statute," Drake Law Review, Vol. 22 (1973), p. 477, at p. 481. The provisions have since been repealed in three of the states, Iowa, Minnesota, and Missouri. See Iowa Code, sec. 814.20 (1978); Minn. Rules Crim. Proc., Rule 29.02 (1976); Mo. Rules of Crim. Proc., Rule 28.02 (1976). Although definite proof was not available, Rendleman concluded that the old Iowa rule probably increased the scope of review in criminal cases.

81. Stone v. Powell, 428 U.S. 465 (1976).

82. Carrington, Meador, and Rosenberg, supra note 2, p. 94.

83. Jonathan D. Casper, Criminal Justice: The Consumer's Perspective (Washington, D.C.: U.S. Government Printing Office, 1972), p. 10.

84. Carrington, Meador, and Rosenberg, supra note 2, p. 129. They are also unsure whether the unified review process would produce "a certain economy" in the appellate process, but point out that this cannot be known until the procedure is tried in some American jurisdiction. Ibid., p. 111.

V. MAKING MORE EFFICIENT USE OF RESOURCES

The addition of judges or staff, the creation of an intermediate court, or restructing the jurisdiction of a state's appellate courts dramatically changes a state's appellate process. Each state has reached the point where such a major change has been needed. Before reaching that point, however, most courts with growing caseload and delay problems try to make more productive use of the judges and staff they have. This chapter will discuss those efforts to use more effectively the time which is available. The first portion of the chapter will review procedural adjustments that can be made; the second portion will examine two administrative areas in which changes can affect the use of judges' time. The discussion of procedural changes will start with a general review of caseflow management and then follow the course of an appeal through the appellate process, from prehearing settlement conferences to oral argument and opinion production.

Procedural Adjustments

A. Caseflow Management

When courts are referred to as passive institutions, the reference usually is to the fact that courts must wait for litigants to initiate cases. There is another sense, one relevant to delay, in which the courts also generally have been passive: They have not "taken command" with respect to moving cases. By and large, the American appellate process has operated in two parts in terms of initiative and control. In the early part, the initiative is that of the litigants and their counsel. Included here are the filing of the appeal, the preparation of the record, filing motions, and the submission of briefs. Only when briefs are submitted does the second stage--and court control--begin. The second part includes oral argument, the judges' postargument conference, and the writing, announcement, and publication of the opinion.[1]

Church has pointed out that "adoption of an aggressive role in moving cases . . . is not universally accepted as the proper role of courts."[2] He was referring to trial courts, but the statement is equally applicable to appellate courts. Also applicable to appellate courts is Maureen Solomon's writing about caseflow management in the trial courts. She defines "caseflow management" as "something broader than calendaring, docketing, case scheduling or case assignment," suggesting that it embraces "the continuum of activities through which cases move within a court," or all the functions related to moving a case to final disposition.[3] She asserts that "policy-level

commitment by judges to control of caseflow and speedy disposition of backlog" is a key element in a successful caseflow management system.[4]

The feeling that lawyers bear the primary responsibility for moving cases because they know best what is important strategically is approved by many commentators.[5] A growing number of judges, however, now believe that a passive posture no longer is appropriate, if it ever was. The idea that appellate courts should take an active role in the management of appeals underlies the American Bar Association's Standards Relating to Appellate Courts. As Hazard states it, "The theme of the standards is that the appellate court should assume administrative control of an appeal from the time that notice of appeal is filed, rather than postponing active concern for a case until the briefs have been completed."[6] He argues that experience shows that delay will result if the court waits to assume control until after the record and briefs have been received. Further, if a court waits until after briefs are filed, it loses "an opportunity to forecast the composition of its docket and to adjust its calendaring accordingly."[7]

In Standard 3.1 of its Standards Relating to Criminal Justice, Criminal Appeals, the American Bar Association also argues strongly for "continuing, authoritative supervision" of cases "from docketing through hearing and submission." It is suggested that a single judge, perhaps with the help of an administrative assistant, superintend cases and resolve procedural questions. As is noted in the Commentary, judicial administration in appellate courts suffers from the lack of simple machinery through which the judges can authoritatively and efficiently oversee the progress of cases from the institution of an appeal to the submission of the controversy to the court for decision. The clerk of court can help move cases along, but often does not have the appropriate status vis-a-vis the lawyers to exert effective leverage.

There can be a positive return for courts that actively manage their caseflow. Robert A. Leflar has recently pointed out with respect to Washington's intermediate appellate court that until recently control over the process of taking appeals had rested with the trial courts and with counsel, with the result "that frequently there were long and unnecessary delays in the completion of appeals . . . ." Now that the process of superintending appeals has been assumed by the appellate courts, "a large part of the grounds for criticizing delay in the appellate process in the State"[8] has been eliminated. Data from two recent trial court studies suggest that those courts with a routine system for processing cases in their preliminary stages have shorter times to disposition than do

courts that do not exercise such control.[9] Similarly, a routine caseflow management system in appellate courts could improve time to disposition, although data on this point are not yet available.

Perhaps those courts that have begun to develop techniques for monitoring criminal cases will begin to see the virtue and need for doing so with civil cases, too. One way of doing this is to set prompt dates for argument (or submission) of appeals, giving the lawyers a target at which to aim, even if delay is allowed for cause shown.[10] This procedure allows the court, not the lawyers, to remain in control. If the target is a moving one that can be delayed at the lawyers' convenience, however, it will not have substantial effect in reducing delay.[11]

Closely related to the concept of appellate case management is the idea of "strong administrative leadership." Even if the best possible set of rules has been promulgated, little may happen if those in charge--the court administrator and the chief judge(s)--do not make clear their commitment to see that the rules are followed. In effect, the chief judge can help diminish concern on the part of other judges and the bar by a strong and explicit commitment to proposals aimed at reduction of delay. If caseflow management is to be used so that "the goal of the prompt and just determination of appeals" can be realized,[12] the presiding judge must assume supervisory tasks and the other judges of the court must adhere to the court's procedure. Moreover, there must be an administrative staff to assist the court in monitoring the progress of each case and to provide appropriate internal information generated as a result of such monitoring.

Maureen Solomon has developed a list of the key elements in an effective caseflow management system in trial courts.[13] No comparable list has been developed for appellate courts, but the trial-level list may be instructive and at least partially applicable to the appellate level:

- Continuing consultation among bench and bar;
- Established procedures for caseflow management and judicial commitment to following those procedures;
- Centralized judicial responsibility for operation of the caseflow management system;
- A simple record system to facilitate management;
- Time standards and system performance standards that have been developed and adopted by the judges and administrators;

- Continuous measurement against those standards, with feedback leading to system modification;

- Minimizing attorney schedule conflicts; and

- Use of a court administrator as coordinator and innovator in the caseflow management process.

Improved caseflow management will not by itself necessarily produce more effective use of judges' time, because its principal effect will be to lessen the time to disposition. Yet it should induce more attention by attorneys and judges to the passage of time and also create pressure on all to use their time more efficiently. As a new caseflow management system is implemented, techniques needed to make the system work may be identified and initiated. Some of these techniques will be discussed in the following sections.

B. Prehearing Settlement Conferences

A much-discussed innovation designed to reduce judges' workloads in civil appeals and to expand their available time is to divert appeals by achieving settlements as a result of prehearing settlement conferences (PHSC). Opposing counsel meet with a judge or a staff attorney, mainly for the purpose of settling a case before the court considers the appeal. The conferences are said to foster settlement because a respected and competent mediator should be able to induce settlements that would not otherwise occur; both parties may be reluctant to initiate settlement discussions on their own for fear of damaging their bargaining positions.[14] Settlement conferences are used in only a few courts; almost all are intermediate courts.[15] This section will describe the several variations in PHSC procedures, and discuss attempts to determine their effectiveness.[16]

i. Elements of PHSC's. There are several elements common to PHSC's. Attorneys in civil cases meet with a court mediator who attempts to arrange a settlement. The proceedings are confidential. If settlement is not reached, the judges hearing the appeal have no knowledge of what was said at the conference; the mediator is not involved in the later substantive consideration of the appeal. The purpose of these restrictions is to foster free discussion and to eliminate bias in the decision caused by activities or comments in the settlement conference. Beyond these few common elements, however, the operation of PHSC's differs from court to court in numerous major respects.

The mediator usually is an active-duty judge. In a few courts, however, he is a trial judge, a retired appellate judge, or, rarely, a staff attorney. The typical reason for using a judge instead of a staff attorney is that counsel may give a judge's views greater respect. Mediators may be passive or active. Some simply listen to the parties' views, infrequently guiding the discussion or suggesting compromises. Others firmly and forcefully state their views about the parties' arguments. The length of conferences also varies. The average length seems to be about an hour, but judges may shorten or prolong the discussion depending on circumstances.

Mediating is a fine art. The skill of the particular mediator-judge is likely to be an important factor in the success of a conference. Some mediators prepare thoroughly for PHSC's; others learn about the issues almost solely from counsel's presentations at the conference. Evidence is lacking as to which approach is more effective.

Courts generally require a "preconference memorandum" or "docket statement" before PHSC's are held. This short outline of the issues and arguments advanced by appellant provides the mediator with rudimentary information about the case. Other sources of information sometimes available are the transcript, briefs submitted to the trial court, and the pleadings and other papers filed below.

Almost all PHSC's are held before briefing is begun; the transcript may or may not have been ordered and prepared. Presumably parties would be more likely to settle if settlement would save the transcript expense, but some courts fear that PHSC's without any expense to appellant may tempt lawyers to take an appeal that otherwise would not be filed.

Generally, all PHSC's are held at the court. This may mean that conferences are not scheduled for appeals from distant locations. At least one court, the Colorado Court of Appeals, holds conferences throughout the state. While this saves attorneys' travel expenses, it entails a considerable expenditure of judge time.

One very important aspect of the PHSC procedure is the identification of appeals in which settlement conferences will be held. Some courts hold conferences only when requested by one or both parties. Others hold them in all civil appeals. Still others order them only in selected civil appeals, chosen on the basis of information in the preconference memoranda. In these latter courts, appeals from awards or denial of money damages often are considered prime candidates for settlement, although other types of appeals also are submitted to PHSC's.

A judge or a staff attorney may select the cases, but in either case courts do not have--or at least do not publish--detailed criteria for selecting these appeals.

In addition to fostering settlements, some courts use their settlement conferences to restrict the scope of the appeals that are not settled. The mediator may try to persuade counsel to narrow or refine the issues, to delete insubstantial issues and arguments, to restrict the size of the transcript, or to submit an agreed statement of facts. A time schedule for briefing and oral arguments also may be established.

The attorneys may or may not be required to have their clients' permission to settle cases. Also, the court may or may not require that the clients be present at the PHSC or, at least, be readily accessible by telephone. Settlements are probably more likely and speedier when one of these arrangements is required.

If settlement is not reached at the PHSC, the court may or may not delay transcript production and briefing for the period during which a settlement seems likely. Presumably, the more freely these stays are granted, the greater the number of settlements--but also the more delay in cases not settled.

ii. Benefits and Drawbacks. The major benefit expected from PHSC's is lessening the number of appeals considered by the court and, thus, lessening the judges' workload. Narrowing the issues or the facts presented may also lessen their workload. Litigants may gain because settlements sometimes lead to less expense and delay.

These benefits must be weighed against the drawbacks. The time spent on settlement conference activities by the mediator represents time that could be spent on other activities. This is especially important when the mediator is an active-duty appellate judge and the settlement work is at the expense of the judge's regular decision-making work. Another drawback is delay in cases submitted to PHSC's but not settled; preparation of the transcript is often delayed several weeks until the settlement negotiations have terminated. A third drawback is the expense and time required for attorneys and clients to participate in the conferences. Finally, the availability of a structured settlement procedure may prompt more appeals by litigants who want the benefit of that structured procedure.

iii. Results of Evaluations. Unlike most reforms proposed for appellate procedure, the PHSC's have been the object of several evaluation attempts. The available evidence suggests that PHSC's can be effective, although there also is opposing

evidence. The implications of the evaluation evidence for a court considering adoption of the procedure, however, are difficult to assess because of the variation from court to court in procedures and operations, as well as in delay and other characteristics of a court's caseload that can affect how well PHSC's work. For instance, one court may receive more appeals amenable to settlement than another, or the bar in one state may attempt settlements without court impetus more frequently than the bar in another state. Another area of difference is that courts may have more or fewer cases with new counsel on appeal; without the transcript, new counsel will be less likely than trial counsel to be able to discuss settlement on the merits intelligently. Thus, both positive and negative evaluations, while instructive, must be generalized to other courts with caution.

Three attempts have been made to evaluate state court PHSC's and the Federal Judicial Center (FJC) has evaluated the PHSC's at the United States Court of Appeals for the Second Circuit. Although the results are inconclusive, all but the last suggest that the PHSC's are effective.

By far the greatest focus of attention has been the extent to which the PHSC's decrease the number of appeals reaching the decision-making stage. The major problems are to determine if any more appeals are settled because of these conferences, and, if there is a greater number, how many more. The most ambitious study of these questions is the FJC evaluation of the Second Circuit's settlement conference procedure. The Second Circuit's mediator, a staff attorney, selected civil appeals he thought amenable to PHSC procedures; from these the FJC randomly selected about three-quarters for PHSC procedure and a quarter for regular processing. The experiment included 302 appeals over one year. Fifty-four percent of the PHSC cases and 62 percent of the "control cases" were adjudicated by the court, that is, they were not settled or withdrawn.[17] The classification "adjudicated cases" included appeals dismissed for lack of jurisdiction. If attention is focused only on appeals decided after briefing and argument, the difference between the two groups is reduced to three percent (54% of the PHSC cases were briefed and argued compared with 57% of the control cases).[18] Both the eight percent and three percent differences could have occurred by chance. Thus, a greater percentage of appeals were settled as a result of the PHSC procedure, but not a sufficient number to conclude with certainty that the result is attributable to the PHSC's.

The FJC study also included questionnaire returns from judges and lawyers. The judges were asked with respect to each appeal in the experiment whether they believed a PHSC would

result in a settlement in the case. Thirteen percent responded "yes" in the cases submitted to PHSC's and 15 percent responded "yes" in the control cases.[19] It appears, therefore, that in cases the judges believed would be likely to settle, the conferences actually produced settlements in only a few additional cases. The attorneys interviewed included those whose cases were subject to the PHSC's and were settled. They were asked whether the PHSC "caused the settlement." Two-thirds said it did, but one-third said it did not.[20]

The most thorough evaluation of state court PHSC's is that of the California Third District Court of Appeal, where PHSC's were initiated at the beginning of 1975.[21] In the first three years of operation, from 54 to 59 percent of the appeals in which conferences were held were settled.[22] There was no control group for comparison, but during these three years 34 percent of the civil appeals were dismissed, compared with only 17 percent during the previous three years--a sizable difference.[23] Since the total number of appeals (1900 during the six years) is much larger than that in the FJC study, there is less likelihood that the apparently favorable results from the PHSC's were due to chance variation. On the other hand, there is a slight chance that the change in dismissal rate was largely caused by changes in the nature of cases appealed or by a general trend throughout the state toward more settlements.

The evaluation of the Third District Court of Appeal's PHSC procedures included a questionnaire sent to attorneys who participated in the PHSC's during 1975 and 1976. They were asked, "Would the settlement have occurred without conference?"[24] Of the 142 answering attorneys whose appeals were settled, 58 percent said that the settlement would not have occurred without the PHSC, 38 percent said settlement was unlikely to have occurred, and only four percent said it would have occurred. These responses support the effectiveness of the PHSC's more strongly than the results from the FJC survey of Second Circuit lawyers. The California questionnaire included several more questions about the operation of the conference, including whether the conference judge was fair, whether he exercised the proper amount of control or influence, and whether the PHSC was helpful. The answers were overwhelmingly favorable.[25] All the answers in this survey are somewhat suspect, however, because the survey emanated from the court, so that only those with favorable opinions may have wished to convey them to the court and because the questions referred to PHSC's that took place from one to three years before the questionnaire was mailed, so that respondent's memories could have faded or their views ameliorated over time.

The two remaining evaluations also claim favorable results but are much less persuasive. At the New York State Supreme Court, Appellate Division, Second Department, a retired appellate judge conducted PHSC's from December 1974 to June 1975 and a trial judge conducted them from July 1975 to May 1976. Fifty percent of the 468 cases mediated by the first judge were settled. Forty-three percent of the 1,016 cases mediated by the second judge were settled.[26] There was no comparison group of cases; perhaps this many cases would have settled without the conferences. The seven-percentage-point difference between the two judges may suggest, however, that the mediator's effectiveness is important, a possibility reinforced by the fact that the first judge, in addition to settling more cases, obtained stipulations of law or fact in about half of the cases not settled. The settlement rates were slightly higher in negligence cases than in contract or matrimonial cases.[27]

The final discussion of the effectiveness of a PHSC system is by Judge Otis of the Minnesota Supreme Court. During the first ten months of the Minnesota PHSC system, 376 conferences were scheduled. "Thirty-four of these cases were dismissed without conference, and 129 were disposed of after conferences."[28] Judge Otis believes that the 34 cases may have been settled because the appellants did not want to bring weak appeals to the conference. As he admits, however, that theory is quite uncertain. After deleting the 34 cases, 38 percent of the cases were settled, a somewhat lower percentage than is typically obtained. There is no information about how many cases might have been settled without the conferences.

iv. Questions Remaining Open. Two unresolved issues lurk behind all these studies. First, decision-making time and effort varies greatly from appeal to appeal. The statistics presented above underestimate the effectiveness of PHSC's if the settlements occurred mainly in more time-consuming appeals--for example, those involving long records. Judges may concentrate their settlement efforts on these appeals and attorneys may be more willing to settle cases when appeals probably will require much more work. On the other hand, of course, the statistics would overestimate the effectiveness of PHSC's if the settlements produced are mainly in appeals that can be decided with little effort. One might expect more settlements when the sums involved are small, perhaps an indication of simple issues because in such cases the cost of transcribing and briefing is likely to consume much of the potential recovery. No evidence on this topic is available, however.

Second, the availability of PHSC's may prompt more appeals. Little is known about the effect of the availability of a PHSC on the decision to appeal, but parties losing at the trial level may appeal when they otherwise would not because they believe the required settlement negotiations will provide relief at minimum expense. Because of concern about this possibility, several courts, including the California Third District Court of Appeal, require preparation and submission of a transcript before a settlement conference is held. The California Third District Court of Appeal's survey of attorneys asked: "Did the availability of a settlement conference affect the decision to appeal?" Eighty-two percent said "no," but 18 percent said "yes."[29] An increase in appeals as large as 18 percent can virtually eliminate the effectiveness of the PHSC's, but the report on the Third District's PHSC's found "no indication" of extra appeals induced by the PHSC's, because civil appeals in the Third District increased at about the same rate as in other districts.[30]

The judges' workload can be alleviated by PHSC's even if appeals are not settled. Probably most PHSC mediators attempt to persuade the parties to limit or refine the issues and to agree on the facts that need to be sent to the court when settlement is not achieved. Little information is available about the success of these efforts, except for the PHSC program in the Second Circuit, and none is available about the time-savings for the judges that they produce. One of the PHSC judges in the New York Supreme Court, Second Appellate Division, tried to persuade attorneys to limit facts or issues. He was successful in about half the cases not settled--or a quarter of the cases submitted to PHSC's.[31] It is difficult to translate this into time-savings for the judges, however. In the FJC Second Circuit study, the judges believed that cases subjected to PHSC's contained extraneous or redundant issues less often than did non-PHSC cases,[32] an opinion that suggests some benefit from the PHSC. Counterbalancing this, though, was the judges' belief that more PHSC appeals failed to include essential issues.[33] It appears that PHSC's, at least in the Second Circuit, have little effect on the issues or on the general quality of the cases presented to the court for decisions. Again, the savings in judge time are uncertain.

Settlement conferences may benefit the parties as well as the courts. Settlement normally results in disposition earlier than would a decision on the merits. The cost of appealing may be less because briefs are not submitted, oral argument is not held, and often the transcript is not produced. These benefits

are not as certain as they appear at first glance, however. The settlement agreement often is not reached until several weeks or months after the conference, particularly if the clients have not authorized their attorneys to settle at the conference. Not only do the time savings become more problematic, but briefing may be required in this period. In addition, there may be a long delay between the agreement to settle and the actual dismissal of the appeal, that is, its formal final disposition. For example, in the California Court of Appeal the required paper work may consume as much as a year.[34] In the Second Circuit, however, settled cases are terminated in less than half the time of other appeals, and cases settled after PHSC's are terminated substantially sooner than non-PHSC cases settled.[35] Thus, the PHSC may induce quicker settlement terminations than would occur if the settlement negotiations were conducted solely at the parties' initiative.

Delay in cases not settled is another issue with PHSC's. The FJC study of the Second Circuit procedures compared the time between notice of appeal and final decision in both the PHSC cases and the control cases that were briefed and argued. There was little difference between the two types.[36] On the other hand, the PHSC's at most other courts tend to delay appeals, although exact figures are not available. In California, PHSC's are not scheduled until after the record is received. The time for briefing is suspended at least until the conference, and if settlement negotiations continue, often it is suspended for some time afterwards. Settlements are generally reached during these continuing negotiations rather than in conference. In Minnesota and Colorado the transcript is not prepared until after the conference, probably resulting in delay of at least several weeks. It should be noted that these delay-producing factors are all procedures designed to induce settlement by relieving the parties or their attorneys of major expenses should settlement occur, so time is being traded for costs.

Cost savings from PHSC's are speculative. No study has attempted to calculate, or even guess, the extent to which the resources used in PHSC's have detracted from other operations of a court. An appeal settled will have required less attorney time on the average than an appeal decided on the merits, but whether this represents savings to the litigant depends on the fee arrangement, a matter about which information is not available.

The time and expense incurred because attorneys--and the litigants themselves in some jurisdictions--must attend the

PHSC's also must be taken into account. If settlement results, the effort probably is worthwhile. The absence of settlement, however, does not necessarily mean that the PHSC caused time loss or expense, for the attorneys might still have met to explore settlement if there were no required conference. No attempt has been made to calculate the extent of this potential cost. One can safely say, however, that it is a greater problem when the bulk of appeals originate far from the court's seat, unless, as in Colorado, the judges travel around the state to hold the PHSC's.

From the court's perspective, the major resource consumed in PHSC's is the mediator's time, his secretary's and, perhaps, time spent by law clerks or other staff. The extent of this cost varies from court to court. At some courts, such as the Minnesota Supreme Court, the judges' time spent in PHSC's is at the expense of time that would otherwise be used deciding appeals.[37] At the California Third District Court of Appeal, the conference judge is relieved of little of his normal duties; he donates extra time to the court.[38] If the mediator is someone not authorized to sit on appeals, e.g., a staff attorney, or is not a regular member of the court, e.g., a retired judge or a trial judge, little or nothing is taken away from the judge time available to decide appeals. On the other hand, if the mediator did not handle PHSC's, his time could be spent on other staff activities, such as screening appeals or preparing prehearing memoranda.

As noted above, little can be said with certainty about the effectiveness of PHSC's and about which type of PHSC procedure works best. Evidence presented by the California Third District Court of Appeal suggests that its PHSC has greatly alleviated the judges' workload. The PHSC's in New York even have been credited with reducing the court's backlog from 20 to three months.[39] Although published accounts are favorable, information about other state courts is insufficient to indicate whether their PHSC's are worthwhile. The effectiveness of the PHSC at the United States Court of Appeals for the Second Circuit is uncertain. Further efforts and evaluations will be needed before the picture is clarified. The Appellate Justice Improvement Project is currently engaged in projects designed to provide some such clarification.

C. Transcripts and Briefs

If the case cannot be settled, it must be prepared for decision by the court. One way to reduce appellate delay is to provide judges with the facts and the law as quickly and conveniently as possible. The problem with respect to both briefs and records in relation to delay and backlog is two-fold.

First, the length of time required to produce them contributes to delay. Second, and more important, the time the judges must spend--or feel they should spend--to read them contributes to their workload.

In years past the record was delayed because case papers had to be printed or they had to be rewritten in narrative form. Today the record typically consists of the original papers, so the issue now has become whether the size of the record can be condensed by stipulation of the parties, with the trial judge's assistance, or by direction of the appellate court. Considerable material usually is included in the record from the trial court; the record may include all or some of the following:

--papers submitted at trial, such as pleadings, depositions, affidavits, briefs and motion papers;

--the trial judge's order and opinion (if any);

--a verbatim transcript of the testimony; and

--the trial court docket.

The jury charge and exhibits also may be included. In some courts, the transcript, if there is one, is sent to the appellate court separately from the record. The production of transcripts will be discussed initially, then the issue of limiting the record.

The trial transcript is a critical part of the appellate process. Without it, appeals can be delayed and briefs may be less adequate and appellate court review less complete than if the transcript were available. Many observers believe that the preparation of a trial transcript is one of the principal causes of appellate delay. The American Bar Association's Task Force on Appellate Procedure argues that "one of the largest single delay factors in appeals is the production of transcripts." The Task Force notes that most observers of the appellate process feel that it is "intolerable" to permit what is essentially a mechanical process to "tie up the appellate system."[40]

The reporting of a proceeding normally is done by a court employee--full-time, part-time, or per diem--responsible to the court for the reporting function, but production of the transcript traditionally has been regarded as a private, separate business of the reporter, regardless of his employment status with the court. To that extent, at least, court reporters are semiautonomous in relation to the courts.

Normally, there is little or no administrative pressure to compel production of the transcript. The reporter is employed by and responsible to the trial judge or trial court, but the trial judge or court has only incidental interest in production of a transcript for the appellate process. Piece-work compensation of court reporters (payment for and only when each transcript is completed) is supposed to induce prompt production of the transcript, but in fact this compensation "carrot" does not seem to be sufficient.

Sanctions against court reporters who fail to deliver transcripts on time are possible, but are difficult for appellate courts to administer because the judges lack administrative control of court reporters. Nonetheless, a range of sanctions can be devised, to be implemented in cooperation with the trial court. These include a) assigning a reporter to a courtroom less likely to produce transcript requests, b) hiring a pro tem reporter to be paid by the regular reporter until the delinquent transcript is finished, c) reducing the amount of compensation if delivery occurs more than X days from the date of order, d) holding the reporter in contempt of court, and e) removing the reporter from employment.[41] Although it is to be hoped that transcripts can be obtained without the imposition of sanctions, a range of sanctions should be identified and agreed upon with the trial courts.

A substantial proportion of the transcripts are filed after the prescribed period, apparently regardless of the length of that period.[42] The appellate court needs the transcript, but has no administrative authority over the court reporter and many times is not even aware that an appeal has been filed and the transcript delayed because the appellate court may not receive notice of an appeal until the record is complete and filed by the trial court clerk with the court. Thus, monitoring of production of the transcript often can "fall through the cracks" of the trial and appellate courts' record keeping. In many states, the trial court is responsible for receiving and passing upon requests for extensions to complete the transcript and many factors combine to produce virtually automatic grants of additional time by trial judges. To avoid these problems, several states now give the appellate court sole authority over all requests for extensions or over all such requests after the first.[43] It also is possible for the appellate court to be notified when the notice of appeal is filed so that it can monitor the time taken at the trial level for production of the record, including the transcript. This type of appellate supervision may be necessary if delay caused by transcript production is to be overcome.

The time allowed for production of transcripts in some states is substantial, often 60 days or more.[44] Both the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals suggest 30 days.[45] For two-thirds to three-quarters of all appellate transcripts, 30 days should be fully sufficient.[46] States that presently allow 60 or more days to produce all transcripts might either reduce the time period for all or at least for shorter transcripts or be particularly stringent in granting extensions.

Rules as to which transcripts are to be prepared in which order and the setting of workload standards and time limits have been suggested.[47] Establishing a single, fixed period for production of a transcript regardless of the proceeding or the use of the transcript is considered "the least desirable alternative standard."[48] Different time limits for different lengths of transcripts are feasible and can be administered so as to be fair to the reporter and to meet the needs of the appellate court. Whatever the length of the initial period, however, extensions should be for the shortest time possible and granted only for good cause shown.[49]

Some of the delay involved in transcript production occurs because preparation of the transcript is not started until it is ordered and--in some nonindigent cases--a deposit paid to the reporter. There is increasing likelihood, however, that most if not all criminal cases will be appealed or subject to other postconviction review. Therefore, one proposal is to have a transcript prepared automatically in all criminal cases.[50] It then would be ready or nearly ready when the notice of appeal is filed. Another proposal is to have the attorney order the transcript not later than the date on which the notice of appeal is filed, rather than waiting until some later date.[51]

The use of technology will not overcome all transcript delay, but its use may help. Computer-assisted transcription (CAT) of court reporters' notes can be used to accelerate the production of transcripts. In this process, the court reporter uses the usual stenographic machine, but it is modified to produce a tape that can be read by a computer, at the same time the standard paper tape is produced. The computer translates the electronic signals and produces a first draft of the transcript within a few hours or days. For transcripts of 200 pages or less--the length of about half of the transcripts in the court where the principal evaluation was carried out--the production time is 67 percent less with CAT than with traditional transcript methods.[52] It is estimated that 75 percent of all transcripts can be produced within 15 days and 95 percent within 30 days using CAT.[53] CAT cannot be used by

every reporter or in every court, but when the volume of transcript pages is large enough and the skill of the reporters is sufficient--or becomes sufficient through training--CAT can virtually eliminate the delay attributable to transcript production.

Problems caused by delays in preparation of the transcript and by the bulk added to the record by the transcript have led some courts to experiment with limiting the record and transcript. In some situations, transcripts are not to be filed, even if prepared, unless requested by the appellate court. In other situations, the court can call for only particular parts of the transcript to be prepared, based on the record, the issues raised, or an abbreviated narrative of the evidence. Most courts make provision for an agreed-upon narrative to replace the verbatim transcript.

The number and length of briefs also can affect the speed of the appellate process. The normal procedure with briefs in cases given full treatment has been to allow the filing of appellant's brief, then appellee's brief, and then a reply brief. The third brief is not always necessary; it has been suggested that reply briefs be allowed only when the court feels they will be helpful. This process could be initiated two ways: a) appellant could file a motion requesting the right to file a reply brief, or b) the brief would be prepared and filed only if requested by the court. Only the latter approach will save the court time, because the former would require review of and decision on the motion plus review of the reply brief, if allowed. One could take the briefing question further and suggest that appellee's brief be waived if the appellant has not made out a reasonable case in the opening brief, i.e., if it is clear at that point that the case is frivolous. This would be like the practice at oral argument in some courts where the appellant argues but the court suggests that appellee not argue unless new or difficult questions are raised in appellant's presentation.

Briefing practices in petitions for review differ considerably from state to state. Some supreme courts receive full briefs, some receive very short briefs, and some rely on the briefs and opinion from the intermediate court. The form of briefing must suit the court's procedure for processing the cases. If staff attorneys or law clerks prepare thorough memoranda for the judges, then the supreme court probably needs only the intermediate court opinion, the intermediate court briefs, and a short memorandum from counsel listing the issues appealed and any additional arguments needed to supplement the briefs. Oral argument on petition for review is no longer available, except in the Virginia Supreme Court where the

litigant losing in the trial court does not have an appeal of right and where only the appellant can argue.

A number of suggestions have been made for limiting the length of briefs.[54] One must recognize that page limitations on briefs are not favored by many attorneys yet further recognize that very few issues or cases need the kind of extended treatment often provided by counsel. Usually if a limitation is imposed, the rule is accompanied by a further provision that a more lengthy brief may be permitted if the attorney requests and the court allows it. This normally provides a sufficient safety valve, yet care still must be exercised. If the court comes to grant the extensions routinely the rule may only add to the time involved: Reading a long brief may take more time than essential, but may take less time than reviewing a short brief, plus dealing with a motion for a longer brief, plus reading the extended brief. Furthermore, this latter arrangement breaks up the times at which material would be received.

Another way to limit briefing is for counsel to submit a "statement of points."[55] After receiving the statement and appellee's response, staff attorneys could indicate which items should be fully briefed; their recommendations could be approved by the judges or could go directly to counsel. Carrington, Meador, and Rosenberg argue that "most defense counsel . . . often recognize meritless issues and would welcome a court directive relieving them of the briefing burden."[56] For such an arrangement to result in substantial savings of time, however, the preferred arrangement would be for judges not to review staff attorney recommendations.

A "docketing statement" or "information statement" is similar to a "statement of points," in that it provides a quick overview of the basic facts and legal issues involved in the appeal. The docketing statement required by local rule of the United States Court of Appeals for the Tenth Circuit, for example, indicates the nature of the proceeding; dates or revelant judgments and orders; "a concise statement of the case containing the facts material to a consideration of the questions presented"; the questions presented by the appeal (short and concise and expressed in terms of the case's circumstances); a list of supporting cases; and an indication of whether oral argument is desired.[57] The statement must be filed within 30 days after the notice of appeal is filed.

A docketing statement is useful from several perspectives. For one thing, it helps--or forces--the attorney to think through the issues in the appeal promptly after the conclusion of the trial. It can be used to identify points to be briefed,

which can be particularly useful if briefing is limited, and provides the appellate court with a document that can serve in part as the basis for screening. As Hazard notes, it also further simplifies and speeds the process of identifying cases involving similar issues.[58]

It would be imprudent to change traditional aspects of appellate procedure solely because they are traditional, but at the same time the procedures need not become sacrosanct. Through careful analysis of the nature of cases in which the procedures are used and of the benefits versus the costs of those procedures for those type of cases, it should be possible to identify practices appropriate for modification or curtailment.

D. Screening

Delay will not be reduced if all cases are subject to full appellate treatment.[59] Screening to determine which cases will and will not receive full treatment can be accomplished by judges without the assistance of central staff, but screening and the use of central staff tend to be associated. The modern staff attorney idea developed in the Michigan Court of Appeals, although the U.S. Court of Military Appeals was probably the first appellate court in the United States to create a central attorney staff in 1951, while screening in its most thorough-going form was developed by the U.S. Court of Appeals for the Fifth Circuit.

Screening commonly has two principal purposes related to delay reduction. One is to arrive at a determination that oral argument can be dispensed with or that shortened oral argument is appropriate. The second has to do with disposition: Through screening, cases can be identified in which a memorandum opinion or order can be substituted for a full opinion. A third purpose, less prominent than eliminating oral argument or full opinion, is to make oral argument more effective by indicating questions to be asked.

Screening for whether or not to have oral argument takes little time. Therefore, although it may be an added step in the process, for those cases that result in no argument it saves time because it takes far less time than the argument. If judges are not listening to oral argument, they can be writing opinions and thus increasing their productivity.[60] If screening takes more time than oral argument, not only is there no gain, there is a loss. In the Fifth Circuit, screening is said to increase productivity, suggesting that screening takes less time than oral argument.[61] On the other hand, the judges of the Fifth Circuit live all over the circuit

CONTINUED

1 OF 2

and thus oral argument requires travel time to New Orleans; when judges of a court are all in the same building, the saving of time--and thus the reduction of delay--may not be as great.

If screening is for the second purpose, to determine which cases warrant summary disposition, time is saved if less time is devoted to writing shortened, simpler opinions than is added by screening. In some courts there may be a double saving: If the screening judge also drafts the opinion to be circulated to the panel, it is faster than if one judge is responsible for preparation of a bench memorandum before argument and a second judge writes the opinion after argument.

When organizing a screening program, a court must determine who will do the screening. There is divergence among courts in this regard. Judges may initially review all cases and decide which will receive staff treatment. In some courts this function is performed by a panel rather than each judge individually, with membership on the panel rotating among the judges annually or more frequently. In other courts, a senior staff attorney performs the function with only occasional checks by a judge. More often when screening is by a staff attorney, there is routine checking of the decision by a judge. If a staff attorney makes the initial decision, it may be important in the initial stages of the program for the judges to review all of the cases, to assure that the court and staff attorney share common perceptions about cases appropriate for screening. Review also will develop or confirm general policy guidelines for the staff attorney's decisions. After a period of time, more cursory or minimal review may be acceptable. After the screening decision has been made and the case determined to be appropriate for summary disposition, there is the further question of the extent of review of central staff's work by the judges. (See page 48 above.)

Haworth examined the Fifth Circuit's screening and summary procedures and found that comparison of cases from 1965-1968 with those decided in 1970-1971 showed a statistically significant relationship between restrictions on the use of oral argument-- the screening procedure--and affirmance of the lower court for private civil cases and for all cases; those cases subject to the screening procedure are slightly more likely to be affirmed.[62] While careful not to suggest a causal relationship, he concluded after comparing his Fifth Circuit results with cases from the Third Circuit, which did not have comparable docket control and where there was a slight decrease in affirmances, that screening had some impact.[63]

Screening after the appeal is filed and some or all of the briefing completed should be distinguished from preappeal

screening. The 1971 American Bar Association Standards Relating to Criminal Justice oppose preappeal screening devices as "impractical and unsound in principle,"[64] even if the goal is to eliminate frivolous appeals from appellate court dockets. The Standards endorse flexible procedures that would result in an appeal being terminated "at the earliest practical stage of its consideration in the appellate forum,"[65] but reject screening devices such as requiring leave of court to appeal at the first appellate level as adding "a useless stage to most appeals at a considerable burden to the court."[66] The accompanying Commentary acknowledges that obtaining leave to appeal does not pose constitutional questions but argues that it adds considerably to appellate court workload, because the case has to be prepared for the leave-to-appeal motion in much the same way as would an appeal on the merits. Overall, the position taken in the Commentary is that, "it can be doubted whether the savings effected by the elimination of frivolous appeals (through pre-appeal screening) would outweigh the effort expended in isolating them."[67]

E. Oral Argument

Oral argument allows attorneys to focus on the more important parts of their argument; it provides an opportunity for judges to ask, and lawyers to answer, questions; and it provides personal contact between judges and counsel, an indication that the court is "there," actually listening to and determining the case. In this country, as compared with Great Britain, oral argument is intended to supplement the briefs, not to be the primary means of communication between counsel and court.

One study has shown that oral argument itself consumes very little time when the judges are located in the same city.[68] If judges are scattered throughout the state and must commute to a central location, of course, the total time attributable to argument can be great. Preparation for oral argument takes considerable time, but that time often would be spent preparing for the case even if oral argument were not held. On the other hand, if arguments were not scheduled, the cases could be addressed as soon as briefing is completed, which might eliminate several weeks from the total disposition time.

Over the years, the length of time allowed for oral argument in a single case has been reduced and now is often no more than 15 minutes per side. Reduction in oral argument seems to come only when a court is hard pressed to keep up with its caseload. Yet full oral argument, say one hour per side, is hardly necessary in all cases, and reduction in the amount of time might be considered even before a particular court

finds itself compelled to adopt the practice. Experimenting with reduced time for argument when pressure does not demand such a change would allow a court to assess the impact of and response to shorter arguments independent of and without pressure created by growing delay or backlogs. Another possibility is for the judges to cut off oral argument when it seems to be unproductive. On the other hand, when oral argument reveals a new point--where questions arise at oral argument that did not appear from the briefs and record, or that did not appear as significant as they do at oral argument--the judges can extend the time or ask for supplemental argument at a later date or for supplementary briefing if, as is likely, later argument is difficult to arrange. Allowing attorneys extra time does not seem to be as much of a problem as reducing time when reduction is appropriate.

In addition to the trend to allocation of reduced time for oral argument when it is held, there seems to be general recognition that oral argument can be dispensed with in some cases, although lawyers seem to be more resistant than are judges to this prospect. In a 1974 survey by the American Judicature Society, state judges did not see oral argument as consuming a large proportion of their time, but a majority favored reducing the number of cases in which oral argument was held. Only half of those favoring fewer arguments thought this reduction would affect delay, however.[69] In a 1977 survey of appellate judges in the Ninth Circuit and some of the lawyers who have argued in that court, all of the judges felt that oral argument could be eliminated in some cases, like those deemed to be "strictly factual," those involving a question of sufficiency of evidence, a single-issue case, or a case in which the trial lasted one day and the jury instruction was criticized. Cases in which the result was clear also were thought appropriate for elimination of oral argument. Perhaps not surprisingly, the lawyers were very closely divided on the question, with only a bare majority agreeing that it could be dispensed with.[70]

A more extensive survey of judges' and lawyers' attitudes was made by the Federal Judicial Center. The lawyers surveyed practiced in the Second, Fifth and Sixth Circuits; all federal judges were included in the judges' survey. Judges "were near unanimous in their acceptance of limiting (but not eliminating) oral argument," but almost 90 percent agreed that occasions existed when eliminating oral argument was acceptable.[71] The majority of both circuit and district judges thought oral argument essential, however, "in cases that involve matters of great public interest, despite the absence of substantial legal issues."[72] For both lawyers and judges, whether oral

argument is essential varies with the type of case, with the lawyers regularly exhibiting stronger feelings that oral argument is essential in more types of cases.[73] In the Ninth Circuit survey, it was clear that the judges believed complexity should determine the need for oral argument in a particular case.[74]

If one is deciding whether or not to dispense completely with oral argument, the options available are important. If the choice were one hour per side or nothing, few would choose nothing. On the other hand, if the choice were between the relatively short time allowed for oral argument in an increasing number of courts, e.g., 15 minutes per side or less, some lawyers may feel that little more will be lost by dispensing with argument entirely. As Carrington, Meador and Rosenberg point out, "time limits have been cut to such short periods that the arguments cannot really develop points" and "because judges do not expect much from oral argument, they are led to reduce the time allowed for it."[75]

Carrington, Meador and Rosenberg urge "invited waiver," retaining argument only if any party requests it after the judges have agreed the briefs are sufficient or that one side's position is hopeless.[76] One should not assume, however, that a waiver "invited" by the court can be refused easily. It might be better--or at least appear to be better--for the court to say directly that argument will not be held, leaving that decision to be challenged by counsel. This approach is suggested in the American Bar Association's Standards Relating to Appellate Courts.[77] This puts greater burdens on the lawyer, but in the Ninth Circuit, where this approach is used, counsel have had oral argument restored after the court decided argument was not necessary, indicating that at least some attorneys are not hesitant and can prevail. If waiver is invited, the phrasing of the invitation may be important. In one division of the First District Court of Appeal in California the number of waivers increased when the invitation was changed from saying that argument was thought to be unnecessary but it would be granted if counsel requested it, to saying that argument was scheduled but the case would be taken off the calendar in two weeks unless counsel requested that it stay on.[78]

Technology may be used so that not all parties need be in the same location for oral argument. Of course, one of the primary advantages of oral argument is that at least once in the process attorneys and judges are brought face-to-face. But the time and expense of travel for argument of emergency motions may be such that use of a conference call or of video procedures may be preferable. The increasing use of videotaped

depositions, and even of state administrative hearings being conducted by telephone, suggests the possible value of technology in this setting.

Two fairly recent suggestions put greater emphasis on oral argument rather than seeking its reduction. The first is the widely publicized proposal of the Hufstedlers to rely largely on the trial papers and oral argument to identify and decide quickly those cases presenting only the need to correct trial error.[79] Their hypothesis is that the error-correcting function can be performed immediately after trial, while cases involving the court's law-making function can be passed on for further consideration.

The Hufstedlers' proposal was modified and tested in Arizona. Three experienced appellate lawyers sat with the trial judge during oral argument on motions for new trial or judgment notwithstanding the verdict in 75 cases. Hearing on posttrial motions were chosen for the simulation because they are similar in many respects to the type of appellate hearing envisioned by the Hufstedlers. The lawyers were to act as if they were an appellate court panel, although with none of its power, so this procedure was not a substitute for appeal in these cases. The lawyers did not ask any questions during the trial judge's hearing, which they observed, but later, outside the trial judge's presence, they conducted additional oral argument if they thought it necessary. The written motion, a law-student-prepared staff memorandum that focused on the issues raised, and the oral argument were the basis for the mock judges' decision. Following argument they indicated through questionnaires whether they were able to decide the case on the basis of the materials presented, and if so, what their decision would be. The advocates also completed extensive questionnaires.

The simulation produced the following conclusions:[80]

- A majority of cases could be decided by a summary procedure shortly after trial using limited materials from the file, with the support of staff memoranda and extensive oral argument.

- Oral argument, counsel, and staff memoranda were considered adequate or more than adequate in a sizable majority of cases.

- Motor vehicle tort cases tended to lend themselves to this procedure. Contract cases seemed least amenable to it.

- The greatest single disadvantage appeared to be the lack of a transcript.

- There was a significant degree of agreement on the principal positive and negative aspects of the procedure among advocates and experimental judges.

- Savings of judicial time can result from speedy hearing and shorter written materials to review.

- Use of this procedure would result in substantial savings of counsel time, with resultant saving of cost to litigants.

- The bar is generally receptive to an expedited procedure of this type.

- The generation of more appeals was not seen as a significant disadvantage.

The results also cast some doubt on the basic Hufstedler hypothesis that error-correcting cases can be decided best by this procedure and that institutional (law-making) cases require further appellate proceedings for decision.

Based on these conclusions, it was determined that an appellate procedure with the following aspects appears to be feasible:[81]

- The notice of appeal should be filed within 30 days from the judgment or denial of posttrial motions.

- The appellant's opening memorandum, which should not exceed 20 pages, should be filed within 15 days of the notice of appeal and all briefing completed within an additional 20 days.

- The trial court record, excluding transcripts, should be transmitted to the appellate court within 30 days of the notice of appeal.

- The staff memorandum should be prepared within 15 days and oral argument should be set to occur within 30 days of the completion of the record. Each side should have not less than 30 minutes for argument.

- In all cases determined not to require a published opinion, the court's decision should be made known immediately, either in the form of an oral opinion or in brief per curiam opinions. For cases requiring a published opinion, normal assignment procedures should be followed.

- When a decision cannot be based upon the available materials, the court should isolate the reasons for its inability to reach a decision and take such steps as are necessary to correct the deficiency.

- Review of the decision should be discretionary, either through application for rehearing or by appeal to the court of last resort.

Based on the results of the Arizona simulation, a modified procedure, retaining the concept of accelerated review but placing less reliance on oral argument, is being tested in the Colorado Court of Appeals. The procedure provides for prompt notice of appeal, a limited record, use of a statement of issues, no trial transcript unless staff attorneys advise the court reporter to prepare a full or partial transcript after examination of motion papers, short periods for briefing, very limited use of preargument conferences, circulation of a memorandum to counsel prior to argument, limited or no oral argument, and the use of only memorandum or full, published opinions.[82] Preliminary results from use of this approach, started in May 1978, are expected to be announced by the end of 1979.

Although the Colorado procedure does not place the same reliance on oral argument as did the Arizona simulation, it includes a second proposal made to enhance the effectiveness of oral argument, circulation of a staff or judicial memorandum to counsel for written preargument comment or for use as a guide to the points upon which counsel should focus during oral argument. If other courts test this procedure, the document to be shared with counsel could take several forms: a) a draft opinion; b) a letter or memorandum indicating the key points or issues; or c) an issues memorandum indicating tentative conclusions on some issues and the issues that remain open.

The merits of sharing this type of document with counsel are said to be several. First, counsel can focus on points of interest to the judges, with oral argument becoming more like a conference discussion than a rigid presentation. Second, oral argument can serve as a final check on the judges' conclusions and understanding of the facts. Third, argument might be shortened because both counsel might waive argument after seeing the memorandum, or because the tentative winner would feel less need to argue. A further benefit is said to be reduction in the number of petitions for rehearing because many rehearing petitions are based on the argument that decisive information was not considered; if counsel have an opportunity to see what the court has considered and comment on it before the decision is made, that basis for reargument is eliminated.

There is also the related possibility that the ultimate written opinion could be shorter, because it would not need to touch on every issue in order to assure counsel that all issues have been considered; lesser issues could be addressed only in the preargument memorandum. A final benefit is that circulation of the memorandum would blunt arguments that central staff and law clerks have an undue influence on decisions; the lawyers would see what the judges review and have an opportunity to respond, with the final decision more clearly being the judges', based on the staff's work and the written or oral responses of counsel.

The procedure is not without difficulty, however. Many judges feel uncomfortable making a less-than-polished document public. There is fear that if the document is to be circulated to counsel, additional time will be spent by all judges tentatively agreeing on what the memorandum should say and then by one judge to polish it, so that one or more judges would have to decide upon and write, in effect, two opinions--one before argument and another after. The process could add to total disposition time, too, because counsel would need time to receive, review, and then comment upon the memorandum. It also is feared that the side that is the tentative loser will seek to argue longer during oral argument rather than less, in an effort to overcome the judges' initial decisions. This would increase rather than reduce the time devoted to oral argument. And some fear that the judges will be less open to changing their minds if their tentative conclusions are made public in writing before argument--or at least that counsel will believe that a different conclusion is precluded.[83]

Modifications in the handling of oral argument might not appear at first to affect the writing of opinions, but if there is preargument circulation of a memorandum that affects the breadth of the final written opinion, or if the oral argument is structured to facilitate a possible oral decision, the opinion writing process also may be changed. The next section reviews some of the issues associated with the writing and publishing of opinions.

F. Written and Unpublished Opinions

Two problems related to delay occur with respect to opinion writing. One concerns the speed with which opinions are produced; the other is their length. One proposed solution to both problems is nonpublication of opinions.

Internal rules designed to speed opinion production are used in some courts. A typical rule is that judges must submit

draft opinions within 60 days of argument.[84] Another is that a judge must furnish all separate opinions before he writes his own majority opinions, or at least that majority opinions receive priority, so that other judges' cases can be cleared.[85] Lists of each judge's opinion production are often compiled and, in some courts, made public. Some states have constitutional or statutory regulations that judges will not be paid if they have any cases pending before them for a certain period.[86] Supplementing these formal regulations, and often of at least equal force, are the informal rules and peer pressure put on judges by their colleagues. These tend to be particularly important because there are no formal sanctions other than the rare salary cut-off rule--easily bypassed by the courts--to enforce the formal regulations.

Efforts to reduce the length of opinions include greater use of per curiam or memorandum opinions, although the former may be as long as full, signed opinions. A problem with use of such opinions as a way of trying to reduce judges' work time is that the opinions may say just enough to allow lawyers to cite the case as authority or to subject the court to criticism for not having said more. In short, an "Affirmed. See Rule 21." affirmance may be sufficient and better protection from criticism than a several-line opinion which begins to explain the result.[87]

Justice English has suggested that if trial judges were to write memoranda in support of their decisions, fully reviewing the facts and applicable law, the appellate court could affirm on the memorandum of the trial judge.[88] Litigants then would have received a reasoned statement at some stage of the process, although there might still be concern that the appellate court had not given the case adequate consideration. There is the added danger that a reduction in appellate court delay might be achieved only at the cost of greater trial court delay resulting from the memorandum writing. When the trial court has written a thorough opinion, and there is no disagreement by the appellate court, courts normally will balance the risk that the absence of a higher court opinion will be felt by the attorneys as inadequate consideration of the lower court's action in favor of a summary affirmance ("Affirmed, for the reasons stated in the lower court opinion."). When the lower court opinion is not published, however, such a ruling decreases the public's access to the reasoning of both courts.

Unpublished opinions are said to be a way to reduce delay. Appellate courts normally are expected to justify their actions in writing, but it is possible to separate the idea of having written opinions from the question of whether or not they

should be published.[89] The concept of unpublished opinions is based in some measure on the distinction between error-correction and institutional review. A decision that articulates a new, revised, or expanded view of the law for the particular jurisdiction should be published, and local rules of some courts make clear that when the point of law is new the opinions should be published. When the court is only deciding the particular dispute, especially if the law is clear, far less information is necessary. Thus, unpublished opinions may be shorter than published opinions.[90] In addition to their reduced length--perhaps no longer than a paragraph reciting the basic facts and issues and a citation to a governing precedent--they need not be as polished as published opinions. With the latter, there is an expected "grand style" that judges are supposed to follow and on the basis of which attentive publics--lawyers and court-watchers--tend to judge their competence. And reputation is not an irrelevant consideration in opinion writing, particularly if a judge might be considered for elevation to a higher court.

The Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice suggested that it would assist the courts if a "tentative determination" could be made at an early stage as to whether an opinion was to be published, so that the writing judge would know what effort was to be involved.[91] The time saved in writing nonpublished opinions could "better be utilized for consideration and resolution of critical issues."[92] An early decision not to publish also would "be an aid to the presiding judge in allocating the workload by assigning the writing of opinions to members of the court."[93] The Committee believes that if the publication of opinions is not to be erratic, standards are necessary. They propose that opinions be published if:[94]

- "The opinion lays down a new rule of law, or alters or modifies an existing rule."
- "The opinion involves a legal issue of continuing public interest."
- "The opinion criticizes existing law."
- "The opinion resolves an apparent conflict of authority."

So long as the individual judges or panels control totally the decision as to whether or not to publish, divergent decisions can be made. Some monitoring device, perhaps a committee with representatives of all panels of a court where there are fixed panels or a senior staff attorney to "flag" questionable cases for the judges to reconsider would be

appropriate. In a few states the decision on publication is made by a group independent of the court producing the opinion.[95] This approach might produce greater uniformity in applying the publication criteria then if each court or judge decides, but for a high volume court it could be very time consuming and costly.[96]

John Frank has argued that unpublished opinions might result in several problems:

- "the loss of valuable instruction to the bench and bar";
- the use of unpublished opinions "as a means of ducking the tough problems";
- the possibility of increasing internal inconsistency; and
- improper selection of cases for nonpublication.[97]

He also argued that questions of fact and of law cannot be fully separated, and pointed out the risk of more opinions conflicting if the criteria for nonpublication are not applied strictly. On the other hand, he believes the costs of occasional "diversity" is not too high to absorb.

Opinions that are not published still are available to the parties and thus are available to their attorneys to cite in other appeals; they often become available to other attorneys, as well. This gives the regularly appearing attorneys, particularly governmental law offices, a tremendous advantage. Therefore, in order not to provide an undue advantage to parties lacking access to these opinions, most states have a rule precluding citation of unpublished opinions. The reasons for or against citation do not directly affect delay, but nonetheless may have to be considered by a court considering use of unpublished opinions. The rule does facilitate opinion-writing, however, because the author of the opinion need not be concerned about the prospect of the case becoming the law of another case and the other panel members need not review the opinion as closely as they would an opinion with precedential value. The governmental and institutional law offices that have the unpublished, uncitable opinions nonetheless retain access to the court's reasoning and can direct their arguments accordingly. A trial judge to whom the opinions are cited might feel bound by them regardless of the rule. Finally, noncitation may permit a conflict among panels to remain unresolved because it cannot be pointed out and argued. For these reasons, Carrington, Meador, and Rosenburg reject the no-citation rule.[98]

The reduction or elimination of oral argument and of written opinions is designed to increase the time available for decision making and to reduce delay, but it carries a price in terms of traditional appellate practice. It is interesting to note, therefore, that both judges and lawyers responding to a Federal Judicial Center survey were more willing to accept limitation of argument than limited written opinions.[99] But when judges were forced to choose between oral argument and written opinions, they reached a different result, clearly preferring oral argument and more use of memorandum opinions or "reasoned oral dispositions."[100]

Particularly important in relation to the question of delay is the fact that a "large proportion" of the judges surveyed by the Federal Judicial Center felt that retaining both oral argument and written opinions was worth waiting longer than the current time to disposition.[101] Lawyers also wanted both oral argument and written opinions even if it meant that more time would be consumed by the cases.[102] Indeed, the lawyers' survey revealed that, "the speed with which opinions are rendered is a matter of relatively low priority," with few lawyers feeling that eliminating oral argument or limiting opinions is "the most acceptable way to avoid long delays in the court's calendar when the docket becomes crowded."[103] Roughly 75 to 80 percent of the attorneys responding were willing to wait longer than the current amount of time--as they perceived that time--in order to retain the traditional practices.[104] Clients' attitudes in this regard have unfortunately not been authoritatively surveyed.

Administrative Adjustments

Each of the sections to this point in the chapter has reviewed various changes in procedure that may improve the judges' use of their time. Administrative changes in the way in which the court organizes itself or its work also can result in better use of available time. Two such changes will be discussed in the balance of this chapter.

A. Delegation of Decisions to Panels and Divisions

A standard way to expand the total decision-making time of a court is to delegate much of the decision making to one or a few judges. This takes two forms: formal delegation through the use of panels and de facto delegation because some judges pay little attention to cases assigned principally to other judges. Panels allow less than the full court to hear and decide an appeal. Their use became more frequent in years past as court size increased. The California Supreme Court was

apparently the first court to sit in panels, beginning in 1879. Half of the state supreme courts have used panels at one point or another since then; the courts often used panels for several years and then reverted to full court hearings as caseload pressures decreased. The number of state supreme courts sitting in panels seems to have remained quite stable during this century. Nearly all intermediate courts sit in panels of three whenever the court or a geographical division of the court has more than three judges.

Attitudes regarding the use of panels, divisions, or departments within appellate courts has varied over time. On the one hand, the United States Supreme Court always sits en banc. When state supreme courts had mandatory jurisdiction, from time to time they were forced by the pressure of cases to sit in divisions or departments, largely reserving en banc proceedings for cases:

- identified in advance as particularly crucial;
- in which a division split sharply; or
- in which the panel result was challenged by a request for rehearing en banc.

As states developed intermediate level courts of appeals, some of the supreme courts returned to sitting en banc for most or all cases. For one thing, their workload decreased. For another, it is considered by some to be inappropriate for an intermediate appellate court to be reversed by only a division or department of the supreme court. Still another consideration is that the intermediate appellate court can exercise the error-correction function, leaving the law making function primarily to the supreme court, and for that function the full court is thought to be necessary.

Where there is geographic dispersion of the judges as in all but two of the federal circuits and in some states, bringing the judges together for an en banc hearing may be particularly difficult. Where the courts have heavy caseloads, an en banc hearing cuts heavily into the work of the panels, which must be suspended while the en banc court meets. Time necessary for the circulation of materials for en banc sessions and to resolve disputes after argument also is considerable. One might argue, however, that if the most important cases are reserved for en banc treatment, they deserve the time they take. The decision as to what is an "important" case, however, may vary with the pressure of the caseload.

If a court is to operate in panels, one way of avoiding inconsistency is for all opinions to be circulated to other members of the court before they are released, although there is the strong possibility that this procedure will induce further delay. When the other members of the court already are working hard, they have little time available to read the other opinions without having to put aside their own work. With or without a rule that a judge should turn to incoming opinions before his own,[105] the length of time before disposition will be increased. When the Ninth Circuit tried this approach, it proved ineffective and was dropped. In federal circuits with fewer judges, it is reported to have worked effectively.

An issue related to the use of panels is the de facto delegation of decision making to a single colleague. This subject received much attention in the past, but remains rather murky. There is a substantial likelihood that a common way to cope with rising caseloads in the last century and in much of this century was a substantial delegation to the judge assigned to write the opinion. The literature contains numerous complaints about "one-judge decisions"--decisions made, in effect, by the opinion-writer with the concurrence of colleagues who have little knowledge of the briefs and who may not otherwise study the case.[106] Whether the amount of writing about one-judge opinions actually reflects their pervasiveness in the early 1900s is not clear. Nor is it certain that the much reduced attention in recent years reflects their absence. Depending on a court's or panel's workload, though, the practice may be unavoidable.

B. Calendaring and Case Assignment

Once a court determines how it will organize its judges to hear and decide appeals, it must determine how to assign and calendar the appeals. This decision is a particularly important aspect of the caseflow management discussed at the beginning of this chapter.

About three-fourths of state supreme courts use an automatic method of case assignment, with cases assigned to individual judges by lot or by rotation, either when briefs arrive or at the postargument conference. In the other state courts and in the federal appellate courts, assignment is made by the presiding judge of a panel or by the chief judge after argument. Advocates of rotation claim that over time it distributes the caseload more evenly and limits resentment of some judges at receiving the more complex and time-consuming cases. It also relieves the chief judge of the additional chore of balancing assignments. On the other hand, assignment by the chief or presiding judge provides more flexibility,

allowing some consideration of particular judges' interests and competence. If senior judges or trial judges are serving with the court, as in the United States Courts of Appeals, there is additional reason to take workload into account: Trial judges' own workload militates against assigning them more difficult cases, while senior judges can take heavier cases more easily.

Particularly if assignment is made before argument and the judge assigned the case prepares a preargument memorandum, the rotation system may result in only one judge being fully prepared and knowledgeable about the case. Rotation also brings the judges all types of cases; this may be a plus for the judges, but it forecloses specialization, which might be a way of reducing time spent on cases. Rotation also increases the likelihood that slower working judges will build a large inventory of pending cases.

One way of reducing backlog if a court--and the parties--are willing to depart from the regular pattern of taking cases essentially in the order filed (except for statutory priorities and emergency matters) is to establish an accelerated docket. At times this is largely a "crash program." For example, in one federal appellate court, special panels work for a week to dispose of a large number of appeals of "lesser difficulty."[107] Cases for the special panel are chosen from those weighted by staff attorneys as 0 or 1 on a scale of 10; they include cases where oral argument is not possible because a defendant is incarcerated, pro se appeals, or cases in which the Supreme Court's decisions have settled the issue. Taking 50 cases for the week instead of the normal 25, the judges meet in an office or conference room and dispose of most of the cases. If they decide that a case has been weighted too lightly, they return it to the regular calendar. All the cases in which the judges think some oral argument will be useful are set on a single day, with only minimal time allowed for argument. Argument is not held in all these cases because at least some litigants or lawyers believe they cannot present their cases in a short time. This type of accelerated docket procedure needs an effective screening process to identify appropriate cases. The most common screening procedures have been discussed earlier in this chapter.

The practices and procedures discussed in this chapter are obvious candidates for an appellate court looking to make more effective use of available time. The amount of time that will be saved, the relationship between that time saving and delay, and the precise parameters of the change in a particular court vary for each of the changes reviewed here. In those courts for which the more permanent, structural changes are inappropriate, however, the effort to gain more effective use of time for the judicial and staff resources would seem to be both necessary and productive.

Footnotes -- Chapter V

1. Paul D. Carrington, Daniel J. Meador, and Maurice Rosenberg, Justice on Appeal (St. Paul, MN.: West Publishing Co., 1976), p. 15.

2. Thomas W. Church, Jr. et al., Pretrial Delay: A Review and Bibliography (Williamsburg, VA.: National Center for State Courts, 1978), p. 32.

3. Maureen Solomon, Caseflow Management in the Trial Court (Chicago, IL.: A.B.A. Commission on Standards of Judicial Administration Supporting Studies, No. 2, 1973), p. 4.

4. Ibid., p. 2.

5. See sources cited in Church et al., supra note 2, p. 32.

6. Geoffrey C. Hazard, Jr., "Standards of Judicial Administration: Appellate Courts," American Bar Association Journal, Vol. 62 (1962), p. 1015, at p. 1017.

7. Ibid.

8. Robert A. Leflar, "Report to the Washington Court of Appeals," December 12, 1977, p. 4 (Unpublished report).

9. Steven Flanders, Case Management and Court Management in the United States District Courts, (Washington, D.C.: Federal Judicial Center, 1978); Thomas W. Church, Jr., et al., Justice Delayed: The Pace of Litigation in Urban Trial Courts (Williamsburg, VA.: National Center for State Courts, 1978), pp. 46, 71.

10. Cf. Church et al., supra note 2, p. 35; Church et al., supra note 9, p. 46.

11. Church et al., supra note 9, p. 69. The use of automated caseflow management and docketing might be considered as a way to assist a court to monitor the process. For an example of a feasibility study, see Minnesota Supreme Court Automated Caseflow Management and Docketing Feasibility Report (St. Paul, MN.: National Center for State Courts, 1977).

12. Hazard, supra note 6, p. 1018.

13. Solomon, supra note 3, pp. 2-3.

14. William C. Mack, "Settlement Procedures of the U.S. Courts of Appeals: A Proposal," Justice System Journal, Vol 1 (March 1975), pp. 26-27. The term "settlement" in this discussion also includes withdrawals by the appellant without modification of the lower court judgment.

15. Statistics about how many courts use PHSC's are not available. It was estimated in 1976 that 18 states were undertaking PHSC's projects. Sam O. Johnson, "Appellate Judges' Conference," Judges' Journal, Vol. 15, (Fall 1976), p. 11.

16. Information about PHSC's in state courts comes from the following sources:

California Court of Appeal, Third District: George E. Paras, Supplemental Report on Settlement Conference Program, Third District Court of Appeal (unpublished report, Sacramento, 1978), and Jerry Goldman, "The Appellate Settlement Conference: An Effective Procedural Reform?," State Court Journal, Vol. 2 (Winter 1978), pp. 4-5.

Colorado Court of Appeals: Information was obtained from NCSC staff study of the court as part of the Appellate Justice Project.

Minnesota Supreme Court: James C. Otis, "Prehearing Conferences--A Help or a Hinderance to Appellate Litigation?," Hennepin Lawyer, Vol. 46 (1977), pp. 18-20, 29; Minnesota State Court Report 1976-77 (Minnesota Supreme Court, 1977); Robert J. Sheran, The State of the Judiciary 1977, pp. 7-8 (Minnesota Supreme Court, 1977).

New York Supreme Court, Appellate Division: The First and Second Departments are discussed in Goldman, supra, p. 5, and A. David Benjamin and Eugene J. Morris, "The Appellate Settlement Conference: A Procedure Whose Time Has Come," American Bar Association Journal, Vol. 62 (1976), p. 1433, at pp. 1435-1437. The Second Department is discussed in Arthur Birnbaum and Stephen Ellman, "Pre-Argument Settlement Process in an Intermediate Appellate Court: the Second Department Experience," Brooklyn Law Review, Vol. 43 (1976), pp. 31-46.

The PHSC in the United States Court of Appeals for the Second Circuit is described in: Goldman, supra, pp. 5, 42; Jerry Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Washington, D.C.: Federal Judicial Center, 1977) (This

will be referred to as the Second Circuit Evaluation); and Irving R. Kaufman, "The Pre-Argument Conference: An Appellate Procedural Reform," Columbia Law Review, Vol. 74 (1974), pp. 1094-1103.

17. Goldman, Second Circuit Evaluation, supra note 16, p. 36.

18. Goldman, "The Appellate Settlement Conference," supra note 16, pp. 43-44.

19. Goldman, Second Circuit Evaluation, supra note 16, pp. 73-74.

20. Ibid., pp. 84-85. The report, however, states that this question was poorly worded, and the number of attorneys responding was much less than the number of attorneys participating.

21. Paras, supra note 16.

22. Ibid., p. 1.

23. Ibid., p. 7. The percentages for each year are not given in the report; by our calculation they are 19, 11, and 20 percent for 1972-1974 and 36, 32, and 35 percent for 1975-1977. Roughly a fifth of the "civil appeals" are juvenile cases and other appeals of a criminal nature; it is unknown how many of these were settled and whether they differed substantially from the earlier period to the later period.

24. Ibid., Appendix C. The wording of the question invites speculation by the respondents, of course.

25. Ibid.

26. Birnbaum and Ellman, supra note 16, pp. 44-45.

27. Ibid. These three categories constituted the great bulk of appeals submitted to PHSC's.

28. Otis, supra note 16, p. 18. He suggests, however, that settlement negotiations were still continuing in 30 to 40 of the appeals. Ibid., pp. 18-19.

29. Paras, supra note 16, Appendix C. Only 115 attorneys answered this question; presumably appellees did not answer. The problems with this survey, discussed previously, also apply here. Also, the report indicates that this question was poorly phrased: Attorneys may have

interpreted the word "affect" to mean either that the PHSC's were the principal reason for appealing or that they were only a lesser reason.

30. Ibid., pp. 8-9.

31. Birnbaum and Ellman, supra note 16, pp. 44-45.

32. Goldman, Second Circuit Evaluation, supra note 16, pp. 62-67. The questions were asked with respect to briefs and to arguments. The differences between the PHSC cases and the control cases varied from 6 to 11 percent. The study also found that the judges believed the quality of advocacy to be somewhat higher in the PHSC cases (Ibid., pp. 70-72).

33. Ibid., pp. 67-68.

34. Paras, supra note 16, p. 8.

35. Goldman, Second Circuit Evaluation, supra note 16, pp. 47-51.

36. Ibid., pp. 50-51. The median times for the PHSC cases and control cases were 223 and 246 days. The PHSC cases were subject to scheduling orders to control and monitor the progress of appeals, however. This procedure may have speeded PHSC appeals enough to compensate for a delay caused by the PHSC's. The report did not indicate how often preparation of the record or briefs was delayed in cases submitted to PHSC's.

37. Otis, supra note 16, p. 19.

38. Paras, supra note 16, p. 6. But the PHSC judge fell behind on his regular duties by the end of 1977, and a second judge began conducting some of the conferences.

39. Benjamin and Morris, supra note 16, p. 1436.

40. American Bar Association Task Force on Appellate Procedure, Efficiency and Justice in Appeals: Methods and Selected Materials (Chicago, IL.: American Bar Association, 1978), p. 12. See also National Advisory Commission on Criminal Justice Standards and Goals, Courts (Washington, D.C.: 1973), pp. 140-41.

41. See also J. Michael Greenwood and Douglas C. Dodge, Management of Court Reporting Services (Denver, CO.: National Center for State Courts, 1976), pp. 16-17.

42. For instance, in Maryland in 1974, 46 percent of all transcripts were completed after the prescribed 60 days. The 1975 figure was roughly the same, 45 percent. National Center for State Courts, Mid-Atlantic Regional Office, Court Reporting Services in Maryland (Williamsburg, Va.: National Center for State Courts, 1976), Appendix B. In South Dakota, 42 percent of the transcripts filed in 1975 and 1976 were filed after the prescribed 60-day period. National Center for State Courts, North Central Regional Office, Court Reporting Services in South Dakota: Findings and Recommendations (St. Paul, MN.: National Center for State Courts, 1977), p. 34. Connecticut requires only that transcripts be delivered "within a reasonable time" (Connecticut General Statutes, Section 61-51), but in 1976 the average delivery time in the superior court for criminal transcripts was 172 days and for civil transcripts 71 days. National Center for State Courts, Northeastern Regional Office, Transcripts by Connecticut Court Reporters (North Andover, MA.: National Center for State Courts, 1978), p. 3.

43. For example, see Maryland Rules of Court, Rule 825b (1975).

44. See footnote 42 for examples.

45. National Advisory Commission on Criminal Justice Standards and Goals, supra note 40, Recommendation 6.1, pp. 140-141; American Bar Association Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts (Chicago, IL.: American Bar Association, 1977), Standard 3.52.

46. Alexander B. Aikman, "Measuring Court Reporter Income and Productivity," State Court Journal, Vol. 3, No. 1 (1979), p. 16, at pp. 22-23.

47. Greenwood and Dodge, supra note 41, pp. 5-6.

48. Ibid., p. 6.

49. See, e.g., Court Reporting Services in Maryland, supra note 42, pp. 39-41.

50. Donald P. Lay, "Reconciling Tradition with Reality: The Expedited Appeal," U.C.L.A. Law Review, Vol. 23 (1976), p. 419, at p. 424.

51. Greenwood and Dodge, supra note 41, pp. 4-5.

52. National Center for State Courts, Users' Guidebook to Computer-Aided Transcription (Denver, CO.: National Center for State Courts, 1977), p. 34.

53. Ibid., p. 37.

54. Daniel Meador, Appellate Courts: Staff and Process in the Crisis of Volume (St. Paul, MN.: West Publishing Co., 1974), p. 101.

55. Carrington, Meador, and Rosenberg, supra note 1, p. 89.

56. Ibid.

57. United States Court of Appeals for the Tenth Circuit, Rule 7 (1977).

58. Hazard, supra note 6, p. 1016.

59. Meador, supra note 54.

60. Charles R. Haworth, "Screening and Summary Procedures in the United States Court of Appeals," Washington University Law Quarterly (1976), p. 257, at p. 282.

61. Ibid.

62. Ibid., p. 313.

63. In evaluating the extent of that impact, the possibility of a different mix of cases in the two samples should be considered. If the cases in the sample from the more recent years included a greater proportion of "frivolous" or simple, single-issue cases, one might expect a greater proportion of cases to be affirmed; this and other factors may account for the greater rate of affirmances after the screening procedures were instituted or at least for some of that change.

64. American Bar Association Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals (Chicago, IL.: American Bar Association, 1974), Standard 2.4.

65. Ibid., Standard 2.4(a)(ii).

66. Ibid.

67. Ibid., Standard 2.4.

68. Federal Judicial Center, "Summary of the Third Circuit Time Study," (1974) (Unpublished memorandum). See also, Standards Relating to Appellate Courts, supra note 45, Commentary to Standard 3.35.

69. M.O. Osthus and R.A. Shapiro, Congestion and Delay in State Appellate Courts, (Chicago, IL.: American Judicature Society, 1974), p. 21. The results of this study must be considered as approximations, because the response rate ranged from about one-third to one-half, varying with the category of judges and the specific questions.

70. Stephen L. Wasby, "Oral Argument: The View from Bench and Bar," (1978) (Unpublished manuscript).

71. Jerry Goldman, "Attitudes of United States Judges Toward Limitation of Oral Argument and Opinion/Writing in the United States Courts of Appeals," (Washington, D.C.: Federal Judicial Center, 1975).

72. Ibid., p. 8.

73. Ibid., pp. 9-10.

74. Wasby, supra note 70.

75. Carrington, Meador, and Rosenberg, supra note 1, pp. 21-24.

76. Ibid., p. 18.

77. Standards Relating to Appellate Courts, supra note 45, Standard 3.35.

78. Information supplied by First District Court of Appeal to Appellate Justice Project staff.

79. Shirley Hufstedler, "New Blocks for Old Pyramids: Reshaping the Judicial System," Southern California Law Review, Vol. 44 (1971), p. 901. Shirley Hufstedler and Seth M. Hufstedler, "Improving the California Appellate Pyramid," Los Angeles Bar Bulletin, Vol. 46 (1971), p. 275; Seth M. Hufstedler, "Appellate Court Reform--A Second Look," Pacific Law Journal, Vol. 4 (1973), p. 724.

80. Eino M. Jacobsen and Mary M. Schroeder, Reducing the Time and Cost of the Appellate Process: Arizona Appellate Project Report (Arizona Appellate Project, 1976), pp. 19-21.

81. Ibid., p. 22. The time frames indicated could be adjusted, of course.

82. "CBA Judiciary Section's Proposed Expedited Appeal Process," Colorado Lawyer, Vol. 6 (June, 1977), pp. 1133-1139.

83. See Gordon L. Files, "Oral Argument: Before or After the Decision?", California State Bar Journal, Vol. 54 (1979), pp. 88-90.

84. In Arkansas, the judge must write a memorandum explaining why his case has not been decided within 60 days. See George R. Smith, "The Appellate Decisional Conference," Arkansas Law Review and Bar Association Journal, Vol. 28 (1975), p. 425, at p. 429.

85. E.g., Internal Practices of the Court of Appeals of the State of Oregon (1979), p. 20; District of Columbia Court of Appeals, Internal Operating Procedures (1978), p. 10. In some United States Courts of Appeals, the rule is that when a judge gets a draft opinion from another judge, he must turn to it before continuing with his own work; the rule does not mean the judge has to interrupt an opinion in the middle of writing it, but that before he goes on to another case, he will examine in-coming opinions to see whether or not he agrees with them.

86. See, e.g., California Constitution, Art 6, sec. 19; Washington Revised Code, secs. 2.04.090, 2.06.060 (1977).

87. "Enough has to be said to explain why the case is so easily decided. If that is done, then the court has revealed at least a tiny facet of its reasoning process. This aperture into the court's reasoning and logic then enables commentators and lawyers either to invoke the case as authority or to criticize the court for its result or lack of explanation for the reasons behind the decision." Haworth, supra note 60, p. 272.

88. See Robert F. English, "Crisis in Civil Appeals," Chicago Bar Record (February 1969), p. 231, at p. 236.

89. See Committee on Use of Appellate Court Energies, Advisory Council on Appellate Justice, Standards for Publication of Judicial Opinions (1973), p. 2.

90. "The judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that

sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision." Ibid., p. 3.

91. Ibid., p. 5.

92. Ibid., p. 7.

93. Ibid., p. 12.

94. Ibid., pp. 15-17. For another set of standards, see Charles W. Joiner, "Limiting Publication of Judicial Opinions," Journal of American Judicature Society, Vol. 56 (1972), p. 195, at pp. 195-199. See also, Bernard E. Witkin, Manual on Appellate Court Opinions (St. Paul, MN.: West Publishing Co., 1977), pp. 27-31.

95. Witkin, supra note 94, p. 31.

96. Ibid., pp. 31-32.

97. John P. Frank, "Remarks Before the Ninth Circuit Judicial Conference," The Judges' Journal, Vol. 16 (Winter 1977), p. 10, at pp. 11-12.

98. Carrington, Meador, and Rosenberg, supra note 1, p. 39.

99. Goldman, supra note 71, p. 5.

100. Ibid., p. 12.

101. Ibid., p. 14. Nor was there much variation among categories of cases.

102. Ibid., p. 15.

103. Thomas F. Drury, Leonard H. Goodman, and William B. Stevenson, Attorney Attitudes Toward Limitation of Oral Argument and Written Opinion in Three U.S. Courts of Appeals (Washington, D.C.: Bureau of Social Science Research, 1974), pp. 32, 34.

104. Ibid., pp. 33, 34. Table 25, pp. 35-36, indicates the median number of months the attorneys perceive required to obtain a final disposition and the median number of months they are willing to wait to have both oral argument and written opinion. For example, in patent cases, the perceived present times were 3.9, 7.4, and 4.6 months for the Second, Fifth, and Sixth Circuits, respectively, and the attorneys were willing to wait, respectively, 9.2, 12.0, and 9.9 months.

105. See text at note 85, above.

106. For examples of writings on this topic, see Laurance M. Hyde, Methods of Reaching and Preparing Appellate Court Decisions (Chicago, IL: Section of Judicial Administration, American Bar Association, 1942), pp. 6-8, 43. Arthur T. Vanderbilt, Minimum Standards of Judicial Administration (New York, NY: Law Center of New York University, 1949), pp. 438-443.

107. United States Court of Appeals for the Ninth Circuit, Internal Operating Procedures (1977), pp. 14-16.

VI. EPILOGUE

One of the challenges and difficulties inherent in this review of the literature is the absence of an answer to one of the most basic questions: What is the relationship between the volume of cases that appellate courts face today and any delay they are experiencing? As indicated in Chapter III, the relationship is unclear at best. When one examines the changes appellate courts consider and implement, however, it appears that they are responding to problems of volume rather than of delay. It may turn out to be the case that reducing volume will reduce delay, but if the principal problem of appellate justice is delay, perhaps the reforms implemented should have a different focus or emphasis than the reforms often seen in appellate courts. On the other hand, the two problems, delay and volume, may be so intertwined that addressing one necessarily means addressing the other. The present literature and research do not provide the answer. It is hoped that future research and thinking will provide more guidance.

COUNCIL OF STATE COURT REPRESENTATIVES

Alabama
C. C. Torbert, Jr.
Chief Justice, Supreme Court

Alaska
Roger G. Connor
Associate Justice, Supreme Court

Arizona
Frank X. Gordon, Jr.
Justice, Supreme Court

Arkansas
C. R. Huie
Executive Secretary, Judicial Department, Supreme Court

California
Ralph J. Gampell
Director, Administrative Office of the Courts

Colorado
James D. Thomas
State Court Administrator

Connecticut
John P. Cotter
Chief Justice, Supreme Court

Delaware
William Duffy
Justice, Supreme Court

District of Columbia
Larry P. Polansky
Executive Officer, Courts of the District of Columbia

Florida
Arthur J. England, Jr.
Chief Justice, Supreme Court

Georgia
Hiram K. Undercofler
Presiding Justice, Supreme Court

Hawaii
Tom T. Okuda, Deputy Administrative Director of the Courts

Idaho
Allan G. Shepard
Justice, Supreme Court

Illinois
Robert C. Underwood
Justice, Supreme Court

Indiana
Richard M. Givan
Chief Justice, Supreme Court

Iowa
Robert G. Allbee
Justice, Supreme Court

Kansas
David Prager
Justice, Supreme Court

Kentucky
Charles D. Cole, Director of the Administrative Office of the Courts

Louisiana
Pascal F. Calogero, Jr.
Associate Justice, Supreme Court

Maine
Sidney W. Wernick
Associate Justice, Supreme Judicial Court

Maryland
David Ross
Associate Judge of the Supreme Bench of Baltimore City

Massachusetts
Edward F. Hennessey
Chief Justice, Supreme Judicial Court

Michigan
John Fitzgerald
Deputy Chief Justice, Supreme Court

Minnesota
Robert J. Sheran
Chief Justice, Supreme Court

Mississippi
R. P. Sugg
Associate Justice, Supreme Court

Missouri
Robert T. Donnelly
Justice, Supreme Court

Montana
John Conway Harrison
Justice, Supreme Court

Nebraska
Norman M. Krivosha
Chief Justice, Supreme Court

Nevada
John Mowbray
Chief Justice, Supreme Court

New Hampshire
John W. King
Associate Justice, Superior Court

New Jersey
Arthur J. Simpson, Jr.
Acting Administrative Director of the Courts

New Mexico
Dan Sosa, Jr.
Chief Justice, Supreme Court

New York
Herbert B. Evans
Chief Administrative Judge

North Carolina
Joseph Branch
Chief Justice, Supreme Court

North Dakota
William L. Paulson
Associate Justice, Supreme Court

Ohio
Frank D. Celebrezze
Chief Justice, Supreme Court

Oklahoma
B. Don Barnes
Justice, Supreme Court

Oregon
Loren D. Hicks
State Court Administrator

Pennsylvania
Samuel J. Roberts
Justice, Supreme Court

Rhode Island
Walter J. Kane
Court Administrator

South Carolina
J. Woodrow Lewis
Chief Justice, Supreme Court

South Dakota
Roger L. Wollman
Chief Justice, Supreme Court

Tennessee
Ray L. Brock
Chief Justice, Supreme Court

Texas
Joe R. Greenhill
Chief Justice, Supreme Court

Utah
Thornley K. Swan
Chief Judge, Utah Judicial Council

Vermont
Franklin S. Billings, Jr.
Associate Justice, Supreme Court

Virginia
Albertis S. Harrison, Jr.
Justice, Supreme Court

Washington
Charles T. Wright
Justice, Supreme Court

West Virginia
Fred H. Caplan
Chief Justice, Supreme Court of Appeals

Wisconsin
Nathan S. Heffernan
Justice, Supreme Court

Wyoming
A. G. McClintock
Justice, Supreme Court

American Samoa
Richard I. Miyamoto
Chief Justice, High Court

Guam
Paul J. Abbate
Presiding Judge, Superior Court

Puerto Rico
Jose Trias-Monge
Chief Justice, Tribunal General de Justicia

Virgin Islands
Eileen R. Petersen
Judge, Territorial Court

END