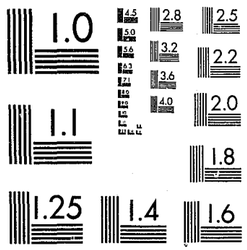

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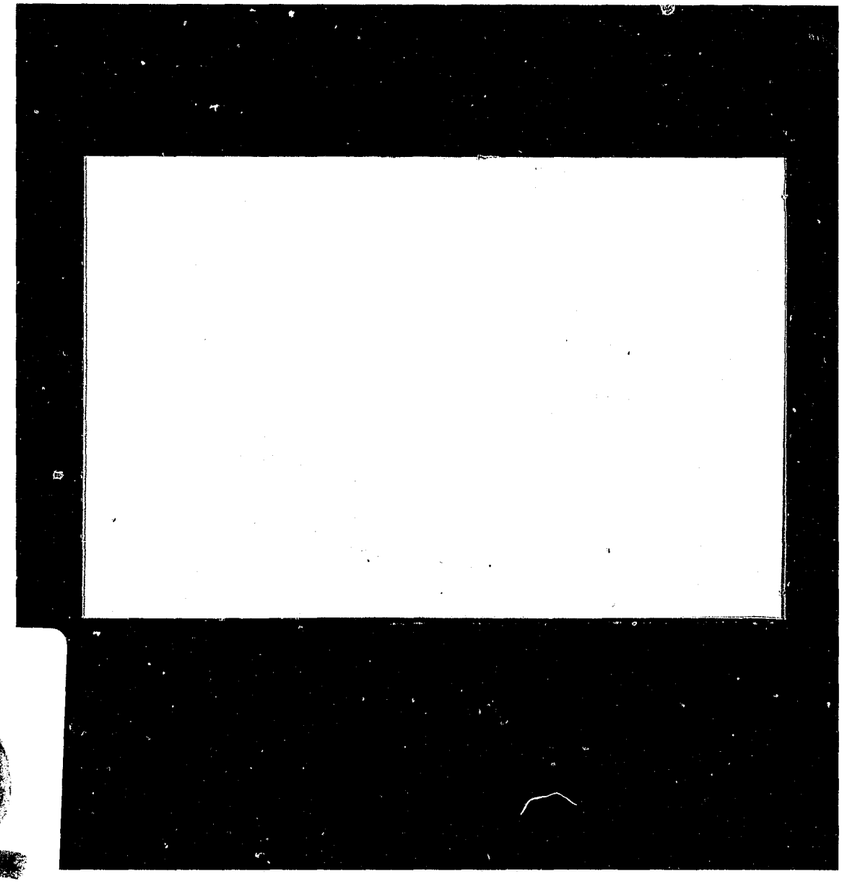

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THE APPELLATE SYSTEM IN OKLAHOMA

Technical Assistance Report No. 1
in the Appellate Justice Improvement Project

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Project Director
and Author: Michael J. Hudson

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Edward B. McConnell
Director

Samuel D. Conti
Regional Director

December 30, 1980

Mr. Nicholas L. Demos
LEAA - Adjudication Division
Office of Crime Justice Programs
633 Indiana Avenue, N.W.
Washington, D C. 20531

Dear Mr. Demos:

Enclosed for your information is a copy of a technical assistance report prepared for the Oklahoma Supreme Court by Michael J. Hudson, Senior Staff Attorney, at our office. This and other reports in the technical assistance series are aimed at providing a diagnosis and analysis of the individual appellate systems. It is our intention to distribute this report as a research product of the National Appellate Project. The opportunity to produce such reports is a tribute to the continuing support and confidence shown in the Center by the Law Enforcement Assistance Administration and by the Charles E. Culpeper Foundation.

If we may provide any further information on this report or its preparation, please call upon us.

Very truly yours,

Samuel Domenic Conti

SDC:bjs
Attachment

Preface

This volume is one of a series of technical assistance reports prepared as part of the National Center for State Courts' Appellate Justice Improvement Project. The National Center is grateful for the continuing support and encouragement of the Law Enforcement Assistance Administration and the Charles E. Culpeper Foundation which have made these reports possible.

Other Reports in This Series

No. 2 The Appellate System in Kansas

No. 3 The Appellate System in the North Carolina Court of Appeals

No. 4 The Appellate System in New Hampshire

No. 5 The Appellate System in Vermont

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THE APPELLATE SYSTEM IN OKLAHOMA

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THE APPELLATE SYSTEM IN OKLAHOMA

[The following material was addressed to Oklahoma Supreme Court Chief Justice Robert Lavender as part of the technical assistance rendered by the Appellate Justice Improvement Project in early 1980.]

At the request of the Oklahoma Supreme Court, we conferred with you and other members of your Court and members of the other appellate courts in the Oklahoma court system on January 23, 24, and 25, 1980. The following report contains our principal observations and recommendations resulting from that trip. These observations and recommendations are directed towards the management of civil appeals by the Court of Appeals and the Supreme Court.

I. The Current Situation

A. Court Organization

Civil appeals are dealt with by an intermediate appellate court, the Court of Appeals, and the Supreme Court, the court of last resort for civil appeals. (Criminal appeals are dealt with separately by the Court of Criminal Appeals.) The Court of Appeals consists of six judges sitting in two divisions of three judges each. Division I sits in Oklahoma City in the Capitol Building, where the Supreme Court is also located. Division II sits in Tulsa. Each Division has a presiding judge. There is no chief judge of the Court of Appeals as a whole; case assignment and overall supervision is the responsibility of the Chief Justice of the Supreme Court. Judges do not rotate between the divisions. Judges are elected at general elections and each stands for re-election on a six year term.

The Supreme Court consists of nine justices, sitting in Oklahoma City in the Capitol Building. Eight of the justices author opinions, with the Chief Justice devoting virtually all of his time to administrative matters, although he sits during oral argument and votes. The Chief Justice is chosen by the other justices for two year terms, with rotation by seniority being the primary consideration.

Cases are filed centrally in Oklahoma City. After they are fully briefed the Chief Justice makes the final determination as to whether they are to be assigned to the Court of Appeals or to the Supreme Court, and if to the Court of Appeals, to which division they are to go. The assignment is made in accordance with the general principle that the Court of Appeals, as the intermediate appellate court, is to be a "decisional" court and the Supreme Court is to be a "precedential" court: the one decides those cases in which the proper administration of justice requires only a decision with a statement of the case sufficient to satisfy the litigants that the case was properly identified and reviewed for error; the other decides those cases which require a more thorough review not only of the specific case but of the principles of law involved in its decision.

In addition to the decisional/precedential categorization of cases, the appellate courts have adopted another modern procedure for differentiated case treatment by establishing an appellate settlement conference held by a judge of the Court of Appeals in Oklahoma City.

After cases have been decided by opinion in the Court of Appeals, litigants contesting the result may file petitions for certiorari in the Supreme Court. After cases have been decided by opinion in the Supreme Court, litigants contesting the result may file motions for rehearing in that court. Review of such petitions and motions is done by a five-justice panel (including the Chief Justice); decision of formal appeals is by the Supreme Court en banc.

Each justice and each judge has one "elbow clerk", a personal law clerk to assist him in research. The appellate system as a whole has no central staff, but has adopted from time to time a variety of measures to meet its needs, the most durable being the use of "referees" to assist the Supreme Court by performing preliminary research on petitions for certiorari and motions for rehearing.

B. Volume, Backlog, and Productivity

Currently, statistics are kept by the Supreme Court for internal use only and therefore are not directed towards a variety of ends which this report might otherwise address. This lack of comprehensive statistics is due in our estimation to two factors: the lack of available staff to keep the necessary records, and the fact that the courts have until now focused their attention primarily on judge productivity and not on other management questions, and the statistics reflect this narrow aim. In fact, this emphasis on judicial productivity characterized the attitudes we observed: the judges have been trying to find ways to work harder themselves rather than fully exploring alternative methods of improving overall productivity.

The major difficulties with the current in-house statistics for our purposes are that they do not differentiate between single and consolidated appeals, do not identify final dispositions (as distinguished from opinions followed by petitions for certiorari or motions for rehearing), give no reliable information on cases in the various stages of an appeal prior to full briefing (as discussed below); and do not differentiate between "case inventory" and "backlog". ("Case inventory" means all those cases presently pending before an appellate system; "backlog" means those cases within the case inventory which are not being dealt with as speedily as they should be, at whatever level of the appellate process they may be located.)

With the above qualifications, it appears from the available statistics that the appellate system--which includes both the Court of Appeals and the Supreme Court--had a total case inventory of approximately 1900 cases at the end of 1979; that this included an increase of some 300 cases during that calendar year, or 25% of the case inventory at the end of 1978; and that this was in spite of an overall increase in judicial productivity in case disposition. Another way of looking at this is to say that the Oklahoma judicial system acquired another week's worth of cases every four weeks in spite of having increased its own productivity.

The productivity of both courts during 1979 was remarkable. The Supreme Court averaged 35 opinions per justice (excluding the Chief Justice, as mentioned above), and Division I of the Court of Appeals averaged 96 opinions per judge while Division II averaged 49 opinions per judge. In addition, the appellate settlement conference disposed of 90 appeals.

C. Lack of Information on Cases in Process

The current information available to the appellate system in Oklahoma does not include reliable information on cases in process. The total number of cases fully briefed and ready for submission (oral argument being the rare exception in the state) at the end of 1978 was 18, and at the end of 1979, 174. Beyond those numbers, information is not available on the number of cases in which transcripts were overdue, or in which transcripts were prepared but in which extensions for briefs had been requested, etc. Without such statistics a firm estimate regarding the rate of processing of appeals is not possible; more important, without such statistics the Court of Appeals and the Supreme Court do not have the information necessary to regulate the appeals in their system and to plan to meet emerging developments.

D. Desire to Take Necessary Steps in Cooperation with the Other Branches of Government

One aspect of the current situation which very much impressed us was the readiness of the appellate judiciary to take necessary steps to improve the

appellate process in Oklahoma and its desire to cooperate with the executive and legislative branches in such an effort. This attitude was in noticeable contrast to attitudes observed in appellate courts in some other states. In Oklahoma, the judges and justices we interviewed showed a genuine desire to focus on the problems of processing and deciding appeals with appropriate speed and attention as their first priority, and no interest was shown in securing appropriations or engaging in politics as enterprises in themselves. There was a pronounced emphasis on problem solving.

II. Conclusions

A. Judicial Productivity

The appellate judges in Oklahoma are producing a high number of opinions for the types of opinions they see it their job to produce. These comments are made in knowledge of the fact that there are no reliable objective national standards for appellate judicial productivity, and that any such statement must therefore necessarily be subjective on our part. Having acknowledged that, it is our opinion that the appellate judges in Oklahoma differ in their perception of the length of opinions that are appropriate to different appeals, but that they are producing at a relatively high level in view of their varying perceptions.

In the Supreme Court, the eight justices who regularly write opinions produced this last year an average of 35 opinions each. When one considers that this is the court of last resort for civil cases in the state, and that the cases before this court are pre-selected to insure that they are those which require more careful attention to the precedents set as well as to the accuracy of the individual decisions, this is a healthy rate of productivity. As a subjective estimate, it might be possible to increase this level of productivity a little more, but not much without endangering the quality of the decisions in return for increased quantity.

Division I of the Court of Appeals has during 1979 produced a truly phenomenal number of decisions. Three judges have produced an average of 96 opinions each for its three judges, in addition to 90 dispositions by settlment from the settlement conference presided over by one of the three judges. It appears that this level of productivity is not due to general attitudes and work practices alone but is due at least in part to the unique personalities of the judges in the division.

Division II of the Court of Appeals produced during 1979 an average among the three judges of 49 opinions each. The contrast between this number and that of Division I should not obscure the fact that this is a respectable output. The difference is in all likelihood due to a difference in perception between the two divisions as to the length and type of opinion which should

appropriately be produced by the intermediate court of appeals. Division I, located in Oklahoma City, with offices in the same building as the Supreme Court, probably finds it easier to accept its role as a "decisional" court and to see that role as one of a full and equal partner in the appellate process. Division II in Tulsa, deprived of this physical proximity and conscious of its undoubted perception by the local bar as "the" appellate court for the locality (despite its receiving appeals state-wide), very likely tends to view its function as more "precedential" and less "decisional". It is our opinion that the difference between the productivity of the Oklahoma City division and the Tulsa division is due primarily to the geographical locations, with the difference in exposure to the Supreme Court, producing different perceptions as to the types of products required, and not to any difference in willingness. Nonetheless, this difference in agreement as to the type of opinion which is appropriate can undermine the organization of the appellate system as it presently exists, as one explicitly divided between a decisional court and a precedential court.

B. The Decisional/Precedential Distinction

In explicitly allocating "decisional" cases to one court and "precedential" cases to another, Oklahoma follows current thinking in the appellate field. This method of case differentiation recognizes that some appeals need post-trial review by an appellate court simply to determine whether the process by which a judgment was arrived at was proper according to accepted principles of law, while other appeals require review and re-evaluation of the principles of law involved.

Such an allocation among courts, however, can produce friction if extra care is not taken to reassure the decisional court of its importance to the proper administration of appellate justice. The decisional court can lose sight of its role as a full partner in the appellate system and begin to perceive itself as being relegated to a subordinate role of handling the less unique and therefore less important appeals. Left to fester, this can develop into an attitude of competition, a desire to seize any opportunity to write an opinion on a "precedential" case.

This potential for friction among the appellate courts is greater where, as in Oklahoma, the courts sit in different geographical locations, and is still greater where the precedential court, the Supreme Court, makes the initial decision as to what cases are to be assigned to each court. This method of assignment, while efficient, carries with it the danger that the decisional court may come to view the decisional/precedential division of labor as not one of partnership but one imposed by the Supreme Court, that it is keeping the "good" cases for itself and assigning the "little" cases to the intermediate appellate court. It is our conclusion that the difference between the number of opinions produced in Division I and

Division II of the Court of Appeals is due in part to a growing lack of agreement between the judges in that division, and the other judges and justices, as to the appropriate form and length of opinions by the intermediate court. This lack of agreement is, as stated above, an incipient danger in an appellate system which explicitly adopts the decisional/precedential division of labor, and has in all likelihood been aggravated to a considerable degree by the geographical distance between Division II and their brother appellate judges.

C. Addition of Appellate Judges

It is our conclusion that the addition of more appellate judges should not be the first response to the difficulties facing the Oklahoma appellate system; that such addition may eventually be necessary, but that if so it should be done in the Court of Appeals, not in the Supreme Court; and that under no circumstances should the addition of judges result in the creation of a third appellate court location in addition to the Oklahoma City and Tulsa locations already established.

An appellate judge, as the judges and justices we spoke to readily agreed, is an expensive investment. In addition to a salary which should be substantial enough to attract well qualified people, a judge must have one law clerk, a secretary, an office, a library, and health and retirement benefits. Furthermore, there can come a point of diminishing returns, as each judgeship added to an appellate court means not only one more person writing opinions but one more person who must review all other opinions written by the other judges; the alternative is lack of uniformity in the decisions produced by the court. Consequently, while the addition of judges to an appellate system may indeed be necessary in many instances, it is a step which if possible should not be taken without first examining the alternatives, and it should never be considered a cure-all.

D. The Settlement Conference

It is our conclusion that the settlement conference, currently being held by Judge Reynolds in Division I of the Court of Appeals, is extremely valuable and should definitely be retained. Conversations with attorneys participating in the settlement conference procedure revealed that both the procedure itself and Judge Reynolds as the settlement judge are held in very high regard. Observation of the procedure itself in one rather complex case revealed that Judge Reynolds is very capable in this capacity, bringing to the job a wealth of experience in both legal and business matters. In our opinion the settlement conference procedure is being conducted superbly.

III. Recommendations

A. Increase Information on Case Processing

The statistics currently being kept by the Supreme Court should be expanded and refined to provide it and the Court of Appeals with information on the processing of cases from the first moment of filing the Petition in Error (the filing that effectively initiates an appeal) through each subsequent step until the appellate file is finally and permanently closed by whatever method--mandate, settlement, dismissal or withdrawal. Currently, the statistics are aimed at providing the appellate courts with information on individual and collective productivity: opinions written, motions ruled on, etc. The first order of business is to increase the information available to the courts on cases filed at all stages of the appellate process, so that they may affirmatively manage and control the progress of those cases. Increased information on the total appellate caseload will enable the appellate system better to diagnose its own needs and to plan what resources it needs and what actions it should take to provide better service to the litigants.

This increase in the scope and detail of information to be made available to the appellate courts is the first step towards increasing the appellate courts' ability affirmatively to manage their own caseload. Case management, including the tracking of appeals, the development of alternative methods of case disposition, and the planning to cope with emerging trends in the appellate caseload as soon as they become discernible, is a top priority in our recommendations.

Since case management is the first priority in the steps to be taken to improve the appellate system in Oklahoma, and increased information on the caseload at all levels of the appellate process is the first step to achieving the capability to manage the cases, Oklahoma should move immediately to make such increased information available on a regular basis. Any available resources should be directed first to increasing the courts' day to day information on the total appellate caseload. Increased information on the cases in the appellate system would enable the courts to make several constructive steps. Among them would be:

--Identifying the most delinquent cases filed in the appellate system at each level; e.g., cases most delinquent in transcript preparation; cases most delinquent in the preparation of the appellant's brief; etc.

--Determining whether at a given moment the case processing time is, on the average, getting shorter or longer, both in total and in each separate stage of the appellate process.

--Deploying available personnel to the tasks most likely to have the greatest benefit on the overall appellate process.

--Ascertaining whether and when additional personnel are necessary, and what sort--judges, justices, referees, central staff attorneys, stenographers.

--Reviewing the appellate process, including the formal rules prescribing how appeals are to be filed and processed, to make necessary changes in the rules and procedures to meet changes in volume or case processing time.

B. Establish Central Management of Transcript Preparation

At present, court reporters deal directly with attorneys regarding the order, payment, and delivery of transcripts for use on appeal. The court reporters are not centrally managed and neither is the preparation of the transcripts. We are sure that this works to the disadvantage of all concerned. We recommend that the court reporters be centrally managed.

This current arrangement hampers the operation of the appellate system. There is no efficient method of determining whether a particular court reporter is keeping up with commitments to produce transcripts or is far behind in meeting those commitments. A reporter in one court may be overloaded with orders for transcripts while one in another court may be underworked. Central management of the court reporters would enable the reporters to be deployed where most needed, providing more prompt production of transcripts and more efficient use of the reporters and therefore of the taxpayers' money.

The current arrangement also operates to the detriment of the court reporters. It is almost certain that two scenarios are commonly occurring in Oklahoma as they have been observed to occur in other states with similar systems. First, there is the scenario where an attorney orders a large and expensive transcript but only pays the reporter a fraction of the estimated cost on deposit. The reporter is left with less motivation to complete that transcript than others where the full amount has been paid in advance, and may in fact subsequently encounter difficulties in collecting the balance. Second, there is the scenario where the attorney orders a transcript, pays a deposit (whatever the amount, all or a fraction of the estimated cost), but asks the reporter to defer starting on the transcript until further notice. The reporter is then left not knowing whether that transcript is really owing or not.

We recommend that the court reporters be put under central management, and that ordering a transcript, in order to perfect an appeal, be defined as depositing the full estimated cost of the transcript in advance with the

central manager, with the sum to be paid to the court reporter immediately upon, but not before, delivery of the completed transcript to the manager. This system could work somewhat as follows:

1. Upon completion of a trial, the court reporter estimates the length of the transcript (experience shows that this can be done with great accuracy) and files with the manager of court reporting a statement that the court reporter recorded that particular trial and an estimate of the length of the transcript.

2. An attorney wishing to order a transcript goes to the manager and informs him of the order, stating the trial and the name of the court reporter.

3. The manager looks in the file of the court reporter in question, figures the cost of the transcript from the reporter's estimate of its length, and collects the full amount of the estimated fee in advance.

4. The manager notifies the court reporter that the transcript has been ordered and directs the reporter to begin as soon as possible.

5. When the reporter completes the transcript he delivers it to the manager and collects the full fee due; the manager is responsible for handling any refunds or further amounts due as the result of any inaccuracies in the estimates.

6. The manager delivers the transcript directly to the trial court which logs it in and notifies the attorney that it has arrived and that the briefing schedule has begun. (The attorney would be permitted to check out the transcript to prepare the brief if necessary.) After the parties have had a reasonable and specific time to examine the transcript it is forwarded to the appellate court by the trial court as prescribed by rule.

This procedure would have several advantages over the current system:

--Court reporters would not be in doubt at any time as to how many transcripts they owed.

--Court reporters would not have to chase attorneys for the remainder of their fees upon completion of the transcripts.

--The manager would know at all times precisely how many pages of transcript were owing from each reporter and how well they were keeping up with their orders. (The manager would be empowered

to reassign reporters as necessary and to pull them out of court in extreme cases to devote their full time to completing transcripts ordered.)

--The state could collect the interest on the money deposited for pending transcripts.

--The court reporters would have an incentive for completing the transcripts: when they finish, they get paid in full.

--The manager could keep the appellate courts informed of the status of the transcripts in all cases. (Among other things, this would enable the courts to identify those cases in which an appeal had been filed but no transcript ordered.)

--Litigants would be compelled to consider at the very outset of the appeals whether or not they wished to pursue the appeals. Under the present system, it is quite possible for an attorney to file an appeal, order the transcript, and receive the transcript and bill several months later, at which time the attorney may for the first time inform the client of the full amount of the expense for which the client is then liable. This can lead to many appeals being pursued in ignorance of the financial consequences. Under the proposed system, the client would at least be informed of the full amount of the transcript cost at the beginning, enabling him to make a more informed choice as to whether to pursue an appeal. (Ordering the transcript could be made a specific prerequisite to filing a non-voidable petition in error.)

--We also recommend that the current time allowed by rule for the preparation of transcripts be re-examined to determine whether the full time currently allowed is really necessary.

C. Explore the Current Proposal for Case Differentiation

We were informed of a proposal currently being developed by the Supreme Court to identify cases early in the appellate process according to the most appropriate method of decision: full signed opinion, memorandum opinion, order, or immediate oral decision from the bench. We were unable due to the press of time to examine this proposal in the detail it merits and therefore are unable to give a conclusive opinion as to its worth; but we can say that from what we saw, it looks very good indeed. It incorporates the principle of case differentiation which is the generally accepted innovating principle in the field and which we endorse, and it appears to be capable of being smoothly integrated into the existing case differentiation procedure embodied in the decisional/prededential framework of the Court of Appeals and the Supreme Court. Our inability fully to express a conclusive opinion regarding this proposal should in no way be taken as veiled skepticism--it is not; it is simply a reluctance to express a full opinion on the basis

of three days' condensed observation of the entire system, on a proposal which obviously is the product of a good deal of thought. We recommend that you continue to explore and develop the proposal, and we offer the following suggestions regarding it:

1. We urge you in this matter as in all others to try to enlist the cooperation of the practicing bar in developing the proposal. Attorneys could be informed in detail of the classification system and of the trade-offs involved in each classification (full opinion=longer case processing time; shorter time=shorter opinion; etc.) and asked to indicate their own suggestions for appropriate classifications in each of their own appeals. It should be noted that care would have to be taken to convince the attorneys that classification in one category or another would in no way prejudice the chances of either side=that, for example, designating an appeal as one for an oral decision from the bench would not be taken by the judges as a confession of a weak appeal, but merely an indication that the decision is not one requiring lengthy written treatment. An example would be an appeal in which the only issue on appeal is a question of prejudicial comment during the trial; such a case may be difficult to decide and may be decided either way, but does not require lengthy briefing or a lengthy opinion.

2. We recommend that if you include oral dispositions in the alternatives you expand the oral arguments in such cases, to provide clients with greater opportunity to observe the decision making process to compensate for their not receiving the usual formal written opinion.

3. We must express some hesitance regarding the rise of outside attorneys to serve on the proposed classification panel. There would seem to be some potential for ill will in having some practicing attorneys participating in the review of other attorneys' appeals. This function might better be performed by court employees such as research staff.

D. Prepare an Appellate Attorney's Handbook

We have provided you with a sample of the handbook currently being provided attorneys by the Missouri Court of Appeals, Eastern District. This is a good example of the sort of document we mean: a not-for-citation, plain English, step by step description of the appellate process, provided by the appellate courts to the attorneys as a procedural guide. Such a document could be prepared immediately, presented in a low cost form (in Missouri, the local legal printing firm volunteered to produce it free as a public service; another alternative would be mimeographing), and changed as often as appellate procedures changed significantly--issued in updated versions with covers of different colors, for example. Made available at all clerks' offices, such a document could make the appellate procedure more readily comprehensible to attorneys not previously

experienced in the appellate process, explain in more detail than what would be appropriate in formal rules those aspects which experience proves are for one reason or another not likely fully to be understood by the attorneys, and inform attorneys on a wide scale of all significant changes in the process as they were made, such as the transcript ordering procedure recommended above. The document need not wait on such changes, however, but can be produced immediately describing the existing procedure. This will if nothing else reduce some of the demands of the clerk's office to provide explanations to attorneys on the same recurring points.

E. Design a Voluntary Fast Track

At present, the Court of Appeals, the decisional court, serves as a fast track procedure in the Oklahoma appellate process. To some extent it is at least theoretically possible for attorneys to get their cases on this track by not designating them as preferably to be decided by the Supreme Court.

We recommend that you go further with this procedure by designing a voluntary fast track procedure to be applicable to both courts. This procedure might operate along the following lines:

1. Either attorney or both attorneys would at the beginning of an appeal indicate a preference that the appeal should be dealt with as an expedited appeal.

2. By so indicating their preference, the attorney(s) would be agreeing in return to order no more of the transcript of the proceeding than should clearly be necessary to decide the points anticipated to be raised, to prepare shorter briefs (a specific length could be decided upon by all the judges), and to request no extensions for briefing. Any requests for extension would automatically return the appeal to the "regular track".

3. The designation of an appeal as a candidate for the fast track would not be binding on the court; after all, a case that the attorneys consider simple may have complexities apparent to the appellate judges. However, such designations would be given due consideration in deciding on the method of disposition. This is similar to the classification of cases under the proposed system mentioned above, and would not in any way displace it.

4. If an appeal was so designated, and the appellate courts agreed with the designation, and no extensions were requested, the appellate courts would give the appeal immediate consideration over other pending appeals so far as possible (allowing for such matters as statutory precedence, election cases, etc.), whatever route it eventually took. For example, if such a designated case were deemed to be appropriate for decision by the Supreme Court as a case involving consideration of the precedents of law, it would so far as possible be decided ahead of other cases in that category; the same would be true if it were deemed to be decided by the Court of Appeals, or under the proposed system by, e.g., memorandum opinion.

F. Retain the Settlement Conference

The National Center for State Courts is currently conducting appellate settlement conferences in several states as controlled experiments, and evaluations of these procedures will eventually be published. We encourage you to review these evaluations as they become available, since they will contain the first empirical evidence on the effectiveness of appellate settlement conferences in state courts. Pending their production, we must rely on subjective evaluations and observations. Having said that, it is our opinion that the settlement conference procedure currently being used by the Court of Appelas incorporates all the aspects most likely to produce successful resolutions of appeals except one. It is voluntary, it is generally inclusive, it is confidential, it is conducted by a respected jurist. We recommend that it be continued. We do offer one suggestion, however: we recommend you to explore, now or in the future, the possibility of assigning part (or if you desire, all) of the conferences to a respected and able retired judge. There are three main reasons for doing this: first, a retired judge would have more time and opportunity to pursue the possibility of settlement in follow-up telephone discussions, letters, and conferences. Second, the addition or substitution of a retired judge would help the court to cast as wide a net as possible in issuing invitations to counsel in appeals, by avoiding the possibility that some cases might not receive invitations due to the press of the judge's duties in deciding active appeals; third, there would be no danger of eventual disqualification so far as concerned the conferences held by a retired judge.

We recommend that Judge Reynolds be retained as settlement judge. Any retired judge should be added in support of and in addition to Judge Reynolds, and at such time as Judge Reynolds retires he should be solicited to continue to hold the settlement conferences. He is now and undoubtedly would be then a superb man for the job.

We recommend further that he be consulted to determine whether he could profitably use any additional funds or support staff in conducting the conferences. We were unable to examine the operation in full detail regarding the resources it employs, but it is our experience that a smoothly running appellate settlement conference is cheap at twice the price, since the price is usually quite low and increasing the number of judges deciding appeals and writing opinions is one of the few alternatives to it; the process also increases the flexibility of the appellate system in crafting results that are just. If Judge Reynolds needs additional secretarial help or additional physcial facilities to accommodate the procedure we recommend that he receive them.

G. Any Central Staff Should be for Limited Periods of Employment

You may conclude, as information on the caseload becomes more comprehensive, that the addition of central research staff would be useful. Pending the development of such information, we cannot make a firm recommendation either way on whether or not to add such staff. We can, however, make some recommendations based on our personal experience and observations in other appellate courts as to how such staff should be organized if they are added.

1. The most important recommendation is that any central staff should be hired for a short period of time, probably around two years, and not for an indefinite period. There are a number of reasons for this.

   a. Any staff members must of course receive at least a token cost of living increase each year. A central staff attorney who remains on the payroll can in a surprisingly short period of time become as expensive as two new attorneys would be. In view of the fact that most of the attorney's duties are and should be of a nature not requiring extensive experience, long-term staff in such positions are an unnecessary luxury.

   b. Central staff are as a rule most effectively employed on low-level screening duties. These include checking briefs with elementary issues to make certain that there are no unnoticed issues of jurisdiction or plain error and that in fact the case described in the briefs is the same as that reflected by the transcript and not (as is too often the case) the result of a bored or desperate attorney's imagination. Our observation and experience is that it is difficult to keep an intelligent and appropriately qualified central staff attorney working on low-level cases in large

numbers for more than about one year. After that, they tend to go stale or reach for more demanding (and therefore less efficient) work, or both.

   c. If central staff remain too long, they tend for a variety of reasons gradually to usurp judicial functions. If a judge has been receiving memoranda from an attorney for five years, for example, and those memoranda have been almost always flawlessly correct (which can well be the case with a highly competent person dealing for the most part with elementary cases), the temptation increases to simply concur in the attorney's analysis without going to the necessary effort of independent examination of key points and independent application of the judge's own judicial instincts--his "nose for the issues". The result all too often is the creation of a "shadow judge" in the person of the permanent staff attorney, and a lack of accountability on the part of the real judge.

   d. As central staff remain, they tend increasingly to be less and less flexible in the assignments to which they may be put. A junior member without any lasting seniority may be assigned to research simple cases, writs, motions, proposed changes in the appellate rules, time lapse data on cases, proposed legislation, and so forth; a staff member who has been with the court too long is more difficult to deploy in such a wide-ranging manner.

In view of the above stated considerations, we recommend that if, after more information has been obtained on the appellate process as a whole, you decide to create a central staff of attorneys, that they be organized somewhat along the following lines:

1. All attorneys would be hired with the explicit understanding that the job is for a maximum of two years, allowing of course for the vicissitudes of job hunting.

2. Attorneys would be hired immediately out of law school.

3. Attorneys would be under the direction of one full-time, permanent or semi-permanent attorney, with the appropriate designation of "research director" or "referee".

4. During the first year of employment, an attorney would perform basic screening duties, handling as many cases as possible, reviewing them to help determine their depth and writing memoranda on the simple ones, with draft memorandum opinions as appropriate, for the court to use as a first draft if it concurs in the result. The main purpose of this effort would be to review those cases that seem to be straightforward and to make sure that in fact they are straightforward so that the deciding judge can devote his efforts to following his "nose for the issues", and not to double-checking that which can be double-checked by support staff--the statement of the facts, the propriety of jurisdiction, the timeliness of the filing, and so forth. During this first year, the attorney would try to produce a respectable "box score" of such researched cases.

5. During the second year, the attorney would be a "senior research attorney" and would be available to be deployed by the central attorney on any tasks which were deemed appropriate. These would, wherever possible, involve direct contact with the appellate judges (a primary incentive for well qualified law graduates to commit themselves to a two year job prior to seeking a permanent position somewhere else). These tasks could include providing short-term assistance to any judge whose assignment of cases has turned out to be unusually difficult; providing additional assistance in the decision of any case which has turned out to be extraordinarily complex; researching petitions for writs; researching motions; assisting the settlement judge in pursuing settlement beyond the initial conference; researching caseflow; etc. When not working on such varied tasks, the attorney would be expected to continue researching the simple cases as during the first year.

6. The attorney would be expected to try to obtain other employment as soon after the expiration of the second year as is reasonably feasible.

7. During the second year, the research attorney would be paid the same as the judge's personal law clerk. Observation has indicated that this reduces the potential for non-productive, even counter-productive rivalry between research attorneys and law clerks.

Three observations are in order. The first is that such a research staff should of course be integrated into any additional differentiated case treatment procedures which may be adopted, such as those discussed

above. The second is that it is important to avoid having the central research attorneys simply working on Court of Appeals cases the first year and Supreme Court cases the second. This would not only be a less than optimum use of their abilities, but would tend to exacerbate any incorrect but predictable feelings of inferior relegation to which the Court of Appeals is, by the nature of the decisional/precedential split, prone, as discussed above. The third is that these observations concerning central staff are to only a slightly lesser degree applicable to law clerks: in particular the observation that after too long a time (whatever that may be) a law clerk becomes a shadow judge.

H. Judges Should Be Added Only as a Last Resort

It may be necessary to add judges to the existing system. If so, they should be added only after careful examination of the other options available, and only after an opportunity to examine more complete information on the appellate caseload as a whole.

If judges are added to the present number, they should only be added to the Court of Appeals. Under no circumstances should they be added to the Supreme Court--that would only increase the topheaviness which may already be just beginning to be discernible: the Supreme Court should probably be deciding fewer cases than the Court of Appeals by a wider margin than now exists, but the gap is narrower than we would normally expect due to the fact that the Supreme Court is half again as large as the Court of Appeals.

If judges are added to the Court of Appeals, the Chief Justice of the Supreme Court should appoint a Chief Judge of the Court of Appeals to deal in the first instance with questions of morale, productivity, conflicts among opinions, and so forth.

Under absolutely no circumstances should any more Court of Appeals locations be created in addition to the two which already exist in Oklahoma City and Tulsa, no matter what the membership of the Court of Appeals might eventually be.

I. Judges Should Have Only One Law Clerk Each

At present, each judge has one law clerk to assist in research. If more staff are added, they should not be in the form of additional clerks amounting to more than one per judge. If additional research assistance is needed, it should be in the form of central staff attorneys made available for limited periods of time to individual judges. There are two reasons

for this. First, it can actually aggravate some judges' work habits to have more than one permanent research assistant, since some judges will then insist on having all research duplicated. Second, having more than one law clerk per judge can lead to unproductive competition between the law clerks at least so far as they work on the same cases, with each trying to discover issues of law overlooked by the other. The creation of a central staff of research attorneys along the lines discussed above would be preferable, as long as they are adequately supervised.

IV. Summary

The appellate judges in Oklahoma are working quite hard but the number of appeals filed each year has increased to the point where the present appellate system is unable to dispose of appeals promptly. The situation is getting worse. At present the appellate courts are only disposing each year of 75% of the cases filed in them during that year.

The first step is for the appellate courts to obtain and maintain more information on its cases and on the flow of those cases through the appellate system. This information can help the courts to design methods of reducing delay at each point in the appellate process; to avoid appeals getting "lost" in the system; to determine where available resources can be most effectively used; to determine what additional resources may be required, when, and where; and in general to enable the appellate courts to plan to meet situations as they develop so as best to provide a high level of appellate justice despite changing legal and social conditions. The first priority is to improve case management and the first step towards that is to improve caseflow information.

As part of this effort to obtain information on caseflow and to begin affirmatively to manage the appellate process at all levels, the appellate courts should establish central management of court reporting services as described in detail earlier in this report.

Simultaneously, the appellate courts should prepare and distribute an appellate attorney's handbook along the general lines of the one currently in use in the Missouri Court of Appeals, Eastern District, a sample of which has been previously provided. This document would help reduce uncertainty concerning the present operation of the appellate system and could be conveniently and economically updated as procedures are changed.

The appellate courts should continue to explore all proposals for more sophisticated differentiated case management. Such proposals should be designed to afford attorneys the opportunity to contribute to the designation

of cases as appropriate for one method of disposition or another. The attorney's handbook described above could be used to help inform the appellate bar of such procedures.

The appellate courts should explore the possibility of designing a voluntary fast track procedure whereby the attorneys designate the appeals they deem appropriate for expedited processing, with the appellate courts retaining the final authority to pass on such designations. Such a procedure, like all procedures of differentiated case management, should be designed to operate as early as possible in the life of an appeal.

The settlement conference should be retained.

Staff should be added in accordance with the following priorities (some categories may overlap):

1. Personnel necessary to help the appellate courts obtain and maintain comprehensive information on the cases filed in them and on the flow of those cases through the appellate system.

2. Personnel necessary to help the appellate courts manage the caseflow in view of the information acquired; e.g., a manager of court reporting services, and support staff; clerical staff necessary to conduct dismissal dockets for extraordinarily delinquent cases.

3. Staff to assist with the case differentiation necessary to implement any alternative case disposition procedures, including classification for eventual opinion length, inclusion in a voluntary fast track procedure, and additional support staff (if needed) for the current appellate settlement conference.

4. Court of Appeals judges and central research attorneys. (It is difficult to determine at this time which might become necessary first, since central research staff might be used to assist in case differentiation mentioned above.)

No additional positions should be created for Supreme Court Justices.

No additional locations for the Court of Appeals should be created.

If any additional positions are created for Court of Appeals judges, a position should be created for a Chief Judge of that court, to be responsible for productivity, morale, and consistency among opinions. This Chief Judge should meet regularly and often with the Chief Justice.

With the possible exception of the Chief Justice, no judge or justice should have assigned to him more than one full-time law clerk.

The appellate courts may eventually need to examine the possibility of some sort of rotation of Court of Appeals judges between the two locations to increase collegiality in that court, if the productivity of the two divisions continues to exhibit substantial disparity.

The appellate courts may wish to examine the feasibility of encouraging regular settlement discussions to be held by the trial judges immediately after the entry of judgment and prior to the filing of the appeal. This would depend on the personality of the individual trial judge and might need in some instances to be supplemented by the services of a referee or other official; if such a procedure should prove to be successful it would reduce the pressure on the appellate system and the cost to litigants. Such a procedure would, of course, have to be totally voluntary.

Finally, we have not explored the possibility of eventually reducing the size of the Supreme Court from nine to seven justices, by attrition, or of integrating the Court of Criminal Appeals into the Court of Appeals and the Supreme Court. We recommend that both options be examined. Such a reduction would have to accompany an increase in the size of the Court of Appeals and should by no means be made until both appellate courts have had the opportunity to pursue and evaluate all the other procedures outlined above. In the event of such a reduction, both courts should consider establishing procedures whereby judges of the Court of Appeals could sit on the Supreme Court in ad hoc situations. This would provide flexibility for the Supreme Court and emphasize the fact that both courts are partners in the administration of appellate justice.

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