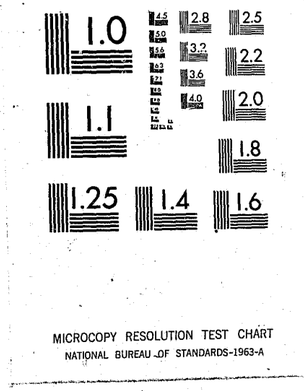

MF-1

Northeastern Regional Office

THE APPELLATE SYSTEM IN KANSAS

Technical Assistance Report No. 2
in the Appellate Justice Improvement Project

National Center for State Courts

Northeastern Regional Office

THE APPELLATE SYSTEM IN KANSAS

Technical Assistance Report No. 2
in the Appellate Justice Improvement Project

Regional Director: Samuel D. Conti

Project Director
and Author: Michael J. Hudson

National Center for State Courts
Osgood Hill
723 Osgood St.
North Andover, Massachusetts 01845

This research was conducted under Grants No. 78-DF-AX-0021 and No. 79-DF-AX-0082, 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.

National Center for State Courts
NORTHEASTERN REGIONAL OFFICE
Osgood Hill
723 Osgood Street
North Andover, Massachusetts 01845
(617) 687-0111

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 Kansas Supreme Court and the Kansas Court of Appeals 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 [illegible] 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. 1 The Appellate System in Oklahoma

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

No. 6 Case Tracking and Transcript Monitoring in Rhode Island: A Guide

No. 7 Transcript Preparation in New Hampshire

No. 8 A Survey of State Supreme Courts with Intermediate Appellate Courts

THE APPELLATE SYSTEM IN KANSAS

Table of Contents

THE APPELLATE SYSTEM IN KANSAS

[The following material was addressed to Kansas Supreme Court Chief Justice Alfred G. Schroeder as part of the technical assistance rendered by the Appellate Justice Improvement Project in September 1980.]

At the request of the Kansas Supreme Court and the Kansas Court of Appeals, I conferred with you and other members of both courts and members of your support staff on February 13 and 14, 1980. The following report contains my principal observations and recommendations resulting from the trip and from subsequent communications with you.

I. The Current Situation

A. Court Organization

Prior to January 1, 1977, the Supreme Court was the only appellate court in Kansas. Some cases were appealed from one level of trial court to another, mostly probate and juvenile cases. On that date, trial court unification was completed and simultaneously an intermediate appellate court was created, the Court of Appeals.

The Supreme Court consists of six justices and a chief justice. The justices are all selected by gubernatorial appointment from names supplied by a nominating committee (the "Missouri Plan"), and serve six year terms, serving additional terms if approved by the electorate. The chief justice is selected by seniority. The Court of Appeals also consists of six judges and a chief judge; the judges serve four year terms, and the chief

judge is appointed by the Supreme Court. The Supreme Court sits in Topeka, while the Court of Appeals sits in various locations around the state but has permanent facilities in the same building in Topeka as the Supreme Court. The clerk of the Supreme Court acts as ex officio clerk of the Court of Appeals. Each justice and judge has one law clerk, and the Court of Appeals has a central research staff of three attorneys.

The Supreme Court and the Court of Appeals are perceived by the legislature, and perceive themselves, as essentially organized along a decisional/precedential division of labor: the Court of Appeals is considered to be responsible primarily for deciding 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, while the Supreme Court is considered to be responsible primarily for deciding those cases which require a more thorough review of, and a greater likelihood of a restatement regarding the legal principles involved in the decisions.

Both courts have original jurisdiction. The Court of Appeals hears most cases in the first instance, with the possibility open to litigants of subsequently filing a petition for review with the Supreme Court, the practical equivalent of a petition for certiorari.

The Supreme Court has original appellate jurisdiction for those cases classified by statute as "Type A" and "Type B" felonies and all cases in which any statute has been ruled unconstitutional.

The Supreme Court also has an arrangement in place whereby it can take cases sua sponte prior to hearing by the Court of Appeals if it considers them to be of sufficient complexity or importance or both. This arrangement is as follows. The central staff attorneys review all cases to determine the degree of complexity and prepare synopses of them containing brief factual summaries and descriptions of the issues. Their assessments (the "Attorney's Worksheets") are in turn reviewed by the Chief Judge and by the Chief Justice. Those cases which the Supreme Court considers appropriate for consideration by it in the first instance are taken by the Supreme Court from the Court of Appeals docket. The Chief Judge uses the worksheets to assist him in assigning cases among panel members and to the summary calendar.

B. Volume, Backlog, and Productivity

In 1979, the number of cases pending before the Supreme Court declined from 285 to 186 while the number of cases pending before the Court of Appeals increased from 609 to 765. Since the total number of dispositions by the Court of Appeals during that year was 672 (not counting 62 transferrals to the Supreme Court), the Court of Appeals

in 1979 passed the point of having one full year's worth of inventory of cases to be decided. While the Supreme Court reduced the number of cases pending, both it and the Court of Appeals have cases ready for docketing for oral argument which they can not yet docket: in the Supreme Court this "waiting period" backlog amounted to approximately two months' worth (58 cases) and in the Court of Appeals it amounted to approximately five months' worth (253 cases). The Supreme Court in 1979 averaged 37 opinions per justice and the Court of Appeals averaged 62 opinions per judge. The total filings of both courts increased 92, the total cases pending increased 57. Figures on the caseload as divided between civil cases and criminal cases were not readily available, but if previous years' statistics are any indication, it is probable that the statutory priority given to criminal appeals in both courts operated so that the increase in case inventory occurred almost entirely in civil cases rather than criminal.

(Since the site visit in February, further statistics have become available. As of September 1, 1980, the Court of Appeals' case inventory totaled 868 cases with 362 of them ready for agrument; the Supreme Court's case inventory totaled 154 cases, with only 31 ready for argument.)

Despite the healthy number of opinions produced by each court, there is a perception on the part of the Supreme Court, and by some accounts apparently by some members of the legislature, that the Court of Appeals is writing opinions of excessive length.

in 1979 passed the point of having one full year's worth of inventory of cases to be decided. While the Supreme Court reduced the number of cases pending, both it and the Court of Appeals have cases ready for docketing for oral argument which they can not yet docket: in the Supreme Court this "waiting period" backlog amounted to approximately two months' worth (58 cases) and in the Court of Appeals it amounted to approximately five months' worth (253 cases). The Supreme Court in 1979 averaged 37 opinions per justice and the Court of Appeals averaged 62 opinions per judge. The total filings of both courts increased 92, the total cases pending increased 57. Figures on the caseload as divided between civil cases and criminal cases were not readily available, but if previous years' statistics are any indication, it is probable that the statutory priority given to criminal appeals in both courts operated so that the increase in case inventory occurred almost entirely in civil cases rather than criminal.

(Since the site visit in February, further statistics have become available. As of September 1, 1980, the Court of Appeals' case inventory totaled 868 cases with 362 of them ready for agrument; the Supreme Court's case inventory totaled 154 cases, with only 31 ready for argument.)

Despite the healthy number of opinions produced by each court, there is a perception on the part of the Supreme Court, and by some accounts apparently by some members of the legislature, that the Court of Appeals is writing opinions of excessive length.

C. Caliber of Judges

Careful, discreet, and entirely confidential inquiries made to members of both courts, support staff, and other persons revealed a striking unanimity on one point, that all the justices and judges presently on the courts are of very high quality in terms of intellect, professionalism, respect by other professionals, and dedication. One person stated that "there are no losers at all on either court".

Apparently when the Court of Appeals was created in 1977 there was noticeable skepticism on the part of the practicing bar, resulting from some resentment at having the court interposed between them and the court of last resort. There was some apprehension that attorneys would customarily file for review by the Supreme Court and that review by the Court of Appeals would lenthen the time of appeal. So far this has not happened, although the number of petitions for review rose to 142 in 1979 from 108 in 1978. However, the number of petitions for review granted by the Supreme Court rose from only 11 in 1978 to 17 in 1979. One judge of the Court of Appeals remarked that the court was somewhat "on probation" during its first three years, but that he felt it had increasingly satisfied the practicing bar that it was competent to deal adequately with their appeals. The low rate of acceptance of petitions for review by the Supreme Court indicates that the Court of Appeals has satisfied the higher court as well of its intellectual credentials. Such debate as presently exists is over productivity, not over quality.

D. Relationship with the Legislature

Relations with the legislature are strained but not antagonistic as yet. The chief problem appears to be one of communication. The legislature has a markedly small percentage of lawyers in it, which apparently has led to some misunderstanding as to the role of the judiciary, both in such constitutional areas as separation of powers and in such practical areas as understanding how a judge spends his work day. This can result in unfortunate disputes ranging from "how much opinion" a Court of Appeals judge should produce (a point on which no clear consensus is yet apparent among the two courts themselves, it should be noted), to how much support staff is necessary. It has very likely also resulted in Kansas having a salary scale for the Supreme Court which ranks 47 in the nation and salaries for the Court of Appeals which ranks 30 of the 30 states which have intermediate appellate courts. Both the courts and the legislature have given indications recently of a desire to bridge this gap.[1]

II. Conclusions

A. The Role of the Court of Appeals

There is at present considerable confusion concerning the

---

[1] Note: Legislation effective 7/1/80 has substantially increased salaries and ranking. Laws of 1980, Chapter 20.

appropriate role of the Court of Appeals and whether that court is properly fulfilling its role. This confusion is to be expected (it parallels the experience of many other states and is due in the main to the following factors:

1. The Increase in Filings

With the final steps of trial court unification completed on January 1, 1977, probate and juvenile cases were no longer to be appealed from one level of a trial court to another, but instead were appealed to the Court of Appeals, created on the same day. Previously, these cases were, barring a few rather rare exceptions, dealt with finally by trial court judges whose decisions were incorporated in orders and occasionally brief memoranda. Now these cases are dealt with in more formal fashion and the decisions incorporated in opinions. In fact, the case law in Kansas regarding juvenile cases and probate cases is largely a product of the last three years.

At the same time as the changes discussed above, Kansas revised its rules of appellate procedure to eliminate the requirement of a printed record, substituting a paginated trial court file. This laudable reduction in the cost of appeals to litigants produced an accompanying increase in filings. In 1977 appeals tripled and the volume has continued to rise since then. One problem in assessing the proper role of the Court of

Appeals is that since it was created at the same time as these changes which increased the volume of appellate filings, the perception of the Court may not be only that it was created to deal with the anticipated increase, but that somehow it has itself been the cause of the increase. This is a common logical fallacy (technically denoted post hoc ergo propter hoc). Stated simply, the unarticulated and largely unexamined attitude that has to some extent developed is: before we had this new court we didn't have all those filings; therefore, they caused them. This reasoning is obviously wrong, and should be explicitly so recognized.

2. The Perception of the Difficulty of Cases

There is a general misconception (not by any means confined to Kansas) that cases filed in the Supreme Court are necessarily more difficult than those filed in an intermediate court. This is not so. In fact, Type A and B felonies, as admitted by several Supreme Court justices, are quite often easy to decide, and low visibility, "dog bite" cases may often be quite hard. Rather, the distinction is twofold. First, the Supreme Court, since it has the power to overrule the intermediate court on points of law, and is therefore the last word on the interpretation of law within the state, is the appropriate forum for considering those cases which for one reason or another prompt or require

a substantial reexamination of existing law. Second, the Supreme Court is the appropriate forum to decide those cases which, whether they require reexamination of the law or not, are for other reasons cases which the citizens of Kansas feel should receive high visibility. The cases which the Supreme Court receives which involve the overturning below of a state statute for alleged unconstitutionality are of the first category, since they invariably require careful reexamination of existing law. The Type A and B felonies are for the most part of the second category, since, whether or not they involve difficult points of law, the community considers them serious enough in other ways that it wants their final decision to be made by the court of the highest visibility.

This issue of the proper role of an intermediate appellate court vis-a-vis a court of last resort is made more complex by the "decisional/precedential" terminology. There is currently a fashion for creating intermediate state appeallate courts and designating them "decisional" courts while simultaneously re-classifying the courts of last resort as "precedential" courts. In my opinion, this classification is of limited value, is generally not well understood, unless it is carefully defined, can even be

a substantial detriment to an appellate system. I offer the following personal observations on the subject.

First, I suspect (though I cannot prove) that the terminology is rooted as much in political considerations as in jurisprudential ones, i.e., a proponent of the creation of an intermediate appellate court can present the argument that, since there are at least two types of decisions to be made by appellate courts, precendent-setting (or precedential) and law-applying (or decisional) there should be two courts to make them. The difficulty with this argument is that it assumes that appeals can reliably be sorted into these categories prior to decision. The Appellate Justice Improvement Project of the National Center has completed a massive data collection and analysis effort involving appellate courts in ten states, and the results of that empirical investigation (which will be published later this year) provide no support for this assumption and in fact provide some slight evidence against it. Specifically, when the cases filed in the courts in the ten states examined were analyzed by subject matter, with civil cases divided into 18 different categories and criminal appeals into 20,[2] no statistically significant

---

[2] A copy of one of the court studies (Ohio) is enclosed with this memorandum. The categories are listed on page 61 of that study.

differences were found in any court among these categories in either the total processing time for the appeals or in any step in the process, including the opinion writing step. Project staff have attributed this lack of processing time difference primarily to the enormous effect the established appellate system in each court has on processing tiem; but another cause may be that none of these subject matter categories is consistently and substantially more or less difficult than another in terms of legal or factual complexity. Again, a "dog bite" case can present very challenging issues, including jurisdictional ones, while a first degree murder case can be legally and factually very straightforward.

In some jurisdictions, the court of last resort reviews the appeals and determines which of them appear appropriate for its decision and which for decision by the intermediate appellate court. (The emerging term used to describe this system is "reflectional jurisdiction"; i.e., cases are "reflected" back to the intermediate court.) Even with such a system, I question how accurately and consistently the legal and factual complexity of appeals can be determined prior to submission and decision.

Whatever the method employed to assign appeals to the appellate courts, and regardless of the terminology involved, I suspect that the main principle involved in this selection process is something different from whether a case is essentially "precedential" or "decisional". In my opinion, the most frequent reason for determining that certain cases are appropriate for decision by a court of last resort is that, for societal reasons quite apart from their legal or factual complexity or the likelihood that they will have precedential value, it is felt that those cases should be decided in a manner affording the decisions high visibility. One example would be a capital punishment case. Such a case is, as far as we know, no more nor less likely than any other to involve difficult or complex issues of law or fact; but because a person's life is at stake, society determines that the appeal should be decided in a manner which affords the decision high visibility. Therefore, capital punishment cases are customarily assigned to courts of last resort rather than to intermediate appellate courts.

As a result of receiving appeals which for one reason or another have been determined by the legislature or perhaps by the court itself to be appropriate for decision in a forum which confers higher visibility on

the decision, the Supreme Court may be said to be deciding "harder" cases - but only in the sense that they are harder because of those elements (such as potential punishment) which led to their being viewed as needing higher visibility of decision, and not in the sense of factual or legal complexity. It is only in the sense that the Supreme Court serves as a court of final precedent, in resolving apparent conflicts of authority, that it is likely to be confronted with cases of unusual legal complexity, and this is a function which the intermediate court also performs to some degree.

3. The Question of the Length of Opinions

There is presently some debate in Kansas as to the appropriate length of appellate opinions. One point needs to be made clearly at once: this debate is over two entirely different subjects which should not be confused. The first is the subject of unpublished opinions. The second is the role of the Court of Appeals in writing opinions.

Both the Supreme Court and the Court of Appeals produce published and unpublished opinions. Both courts have had their unpublished opinions cited in trial courts, apparently with some success. Both courts recognize

that this is a problem. Both courts also recognize that the longer an unpublished opinion is, the greater the temptation is likely to be to a future litigant to cite it in a trial court if it supports his position, and to this extent opinion length is a problem facing both courts. We have agreed to furnish both courts with available literature on this subject, but as yet we are aware of no clear solution to the problem: producing unpublished opinions runs the risk of producing a "hidden body of law", while publishing every opinion runs the risk of needless proliferation of opinions with some accompanying increase in legalities and technicalities.

The second problem is whether an intermediate court, striving manfully to fulfill its tacitly assigned role as the "decisional" court, should limit the length of its opinions, and whether it is proper to criticize it for excessive opinion length.

Since the Supreme Court has a mechanism in place for bringing up to it those appeals of extreme complexity (regardless of subject matter), one would expect it to produce opinions of slightly longer average length than the Court of Appeals. The fact that the Supreme Court

also takes the cases of highest visibility would operate to increase the length of its opinions beyond the average length of those in the Court of Appeals, since the Supreme Court may be obliged to explain the facts of the cases and the reasoning involved in reaching its decisions at greater length than the court dealing primarily with cases of lesser public interest. However, to the extent that this is true, the key word is "average". Any given opinion by the Supreme Court may be quite short if it deals appropriately with the case, and by the same token any given opinion of the Court of Appeals (allowing for the published/unpublished problem) may need to be quite long in order simply to answer adequately the questions properly raised on appeal. The point is not whether an opinion is especially long or short, but how long it takes to produce it and whether or not it is to be published.

4. Summary: Speed of Opinions

The Court of Appeals is presently receiving a small but increasing amount of criticism for producing opinions that are "too long". The Court of Appeals has responded by a) trying to write still shorter opinions, and b) contesting the allegations of length. The court should not implicitly accept without examination the premise that

long opinions coming from the Court of Appeals are bad, since this is not clear. The average length should probably be shorter in the Court of Appeals than in the Supreme Court, but on any given case the length of the opinion should be dictated by the needs of the case and not by the number of pages. Some cases require an extensive discussion of the facts simply to show why certain alleged points of law are not involved, before providing a quick decision on the few points of law that are. Some judges by their work habits require more room in which to express themselves--they "think at the end of their pencil"--and not until they have written the opinion at length in their own words are they satisfied as an ethical matter that they have in fact decided the case correctly. For such judges, these are the work habits of a successful career, and insisting on short opinions in every case is very nearly the equivalent of asking them to be less than certain of their decisions which they know will affect the lives of the people involved.

The question is not one of pure length, but one of speed. The Supreme Court, with its duty of careful deliberation and its high visibility, may be analogized

to a police commissioner, setting policy for the police force. Its opinions are the chief means through which it expresses that policy. The Court of Appeals may be analogized to the policeman on the beat, who deals with each situation independently and tries to provide swift assistance. Neither can work without the other. These analogies are over-simple, of course. In handling many appeals the Supreme Court may find no policy decisions involved, in which case it is proper for it to supply simple answers to the questions raised in the appeals as quickly as possible; and the Court of Appeals may in many instances find itself grappling with appeals which are of substantial difficulty, in which event it is proper for it to decide the cases correctly, even if this requires slightly more decision time, so that the Supreme Court may, upon reviewing petitions for review, be satisfied that the appeals were fully and correctly decided, deny the petitions accordingly, and thereby save the litigants time in the long run. All in all, however, a decision from the Court of Appeals should on the average be faster than one from the Supreme Court. The statistics show that such is the case at present, at least after the cases are argued, although the increasing backlog will soon extend the pre-submission

interval to an unacceptable length.

Aside from the question of published versus unpublished opinions, then, the focus should not be on the length of the opinions of the Court of Appeals but on the speed with which they are rendered. Such empirical evidence as is presently available indicates that, statistically speaking, the relation in appellate courts between opinion length and the time it takes to produce opinions is consistent but weak. On the average, the Court of Appeals should probably produce shorter opinions, and on the average it should produce faster opinions; but as long as those averages are maintained, the presence or absence of any particular opinion of any particular length is of no importance except as it may involve the published/unpublished question, a problem common to both the Court of Appeals and the Supreme Court.

B. Expedition of Appeals

Thus far the appellate system in Kansas has been concentrating on expediting appeals through the simple means of applying more judges to a dramatically increased appellate caseload. It appears that the only alternatives presently being widely dicussed involve the addition of more judges or the imposition of rules on maximum opinion length. These discussions ignore the alternatives being explored elsewhere. In various states, appellate courts are experimenting with a range of methods of expediting appeals, including appellate level settlement conferences conducted under the auspices of the appellate courts, expedited dockets, special dismissal dockets,

oral decision dockets, and criminal case screening dockets. These are all avenues worth exploring, especially in the Court of Appeals which has a more varied caseload.

C. Present Dangers

There are at present two major dangers which face the Kansas appellate system.

1. Pre-Submission Breakdown

The Kansas appellate system at present is not facing a substantial transcript preparation problem but it is, in our opinion, headed directly for one. The first symptom is a backlog at the stage of submission of appeals, a backlog only now beginning to become apparent; the second symptom is long delay in the preparation of briefs, as attorneys realize that there is little point in preparing briefs promptly since the waiting period after that is long; the third symptom is delay in preparation of the transcripts as court reporters, not centrally supervised and beset by a growing number of transcript orders of varying degrees of seriousness, and realizing in turn that their cases will not be promptly briefed or heard upon the completion of their part in the appellate process, begin to delay and defer transcript preparation. These stages of the appellate

process are increasingly difficult to repair once they deteriorate into chronic delay. The stage of accepting cases for decision is the easiest to repair, the stage of preparation of briefs is more difficult, and the stage of preparation of transcripts is the most difficult of all.

At present, transcript preparation is the primary responsibility of the court reporters and the attorneys, and so far has not become a substantial problem. This may be expected to end as the rising caseload begins to overload the current ability of the court reporters to respond to transcript orders. Without central supervision of court reporters this problem will be much more difficult to solve, so as a matter of planning for contingencies the Kansas appellate system should begin to formulate methods of centralized supervision. It should be noted that central supervision offers benefits to reporters. With centralized supervision it becomes possible to collect the full amount of the estimated transcript cost at the beginning of an appeal, thereby saving the reporter the difficulty of collecting a large balance due when the transcript is completed; and centralized management makes it possible to deploy reporters where they are most needed, thus avoiding having one reporter working too hard while another may be underused.

2. Appellate Court Breakdown

The Kansas appellate system is facing the potential for a crisis regarding the relationship between its Supreme Court and its Court of Appeals. This crisis has not yet begun to appear except in very minor ways, but the indications are clear.

The crisis could occur as follows. First, the combination of low salary and "decisional" status of the Court of Appeals judges could result in the present extremely high caliber of judges being downgraded by replacement, with attrition, by judges of lesser reputation. The reputation of the Court of Appeals as a competent court would suffer, both in the eyes of the public and the practicing bar, and in the eyes of the Supreme Court.

With a mechanism already in place by which the Supreme Court can summon up cases prior to hearing by the Court of Appeals, the Supreme Court would then, in accordance with its lowered opinion of the ability of the Court of Appeals, call up more and more cases of ever decreasing complexity, thereby injuring the morale of the intermediate court, contributing to a vicious circle.

The end result would be a Court of Appeals which has trouble recruiting new members of sufficient quality,

deciding appeals of only elementary difficulty, perceived by the Supreme Court as incompetent, and grasping at every opportunity to write a long, detailed opinion on the occasional case which passes through Supreme Court preliminary scrutiny, thereby reinforcing the perception of the intermediate court as slow.

This has happened in other states. Kansas should begin now to make plans to avoid it. The intermediate court can be a very effective "cop on the beat", quick and respected.

D. Support Staff

The appellate courts presently share their support staff in varying degrees, which is proper. Support staff positions are much more easily filled, replaced and eliminated than are judge positions, and they are cheaper.

Our preliminary survey of the support staff, hampered as it was by the vacancies and by the short time we were able to spend so examining, resulted in the conclusion that the central positions, those of Administrative Assistant, Acting Judicial Administrator, and Fiscal Officer, are at present filled by supremely able persons. These persons can, if the courts choose, form the core of an appropriately high quality support staff for both courts.

III. Recommendations

There are several directions the appellate courts, in cooperation with the legislature, should pursue at this time. Briefly stated, they are as follows.

A. Increased Salaries to Attract Necessary Personnel

Kansas must increase the salary level of its appellate judges in order to preserve the present high level. A reduction in the level of ability would immediately contribute to a slide into the situation outlined above, of decreasing confidence in the intermediate court, increased anxiety on the part of the Supreme Court, an accordant increase in the proportion of cases taken by the Supreme Court, and a corresponding further drop in the confidence in the intermediate court. This vicious circle must be avoided at all costs. At present, the salary of a Court of Appeals judge is only $1,000 above that of an administrative judge of the trial court. This is hardly sufficient to persuade such a senior trial judge to relocate in Topeka to assume appellate duties. The salary of a Court of Appeals judge is held back by the salary of a Supreme Court justice, which as mentioned above is 47th in the nation. In view of the present fiscal situation of the Kansas state government, this is an abnormality which the legislature should be quick to correct, purely to preserve the present fortunately high caliber of judges on both courts. The alternative is the vicious circle which will hurt the citizens.

B. Moderately Increased Support Staff

We are not in a position on the basis of the length of our review to comment informatively on the size and strength of the central administrative staff, otner than the comments given above. However, we are confident that our comments on the use and size of central support staff are adequately researched and supported.

The present central staff attorneys are very highly qualified. They face two problems: first, they are few--three--and second, they are at present paid more than the law clerks for the Court of Appeals and all concerned are very much aware of this discrepancy. We recommend that the size of the central research staff be increased to four, plus one administrator; that they be hired on two year terms; that during their second year they be paid precisely the same as judges' law clerks (by raising the salaries of the law clerks); and that they be placed explicitly under the management of one central staff attorney administrator who should be hired for as long as possible. These recommendations are made on the basis of observations of the use of central staff attorneys in other states, and the use of such attorneys has been discussed at length with the present central staff attorneys, central support staff, and judges and justices of both courts.

As far as we can discern at present, the optimum use of central staff is to use them for their first year as screening personnel only: they review cases for jurisdictional accuracy, they check to see that the cases described in the briefs are the cases that

in fact exist in the transcripts (and not the products of attorneys' imaginations), and they provide brief summaries of such cases for the use of the judges in their preliminary evaluation of the cases. The second year, central staff attorneys are also used for a wide range of tasks including the "break-down" of complex or short-fuse cases and serving as extra resource persons for judges whose regular allotment of cases may have proved to be particularly difficult. The first year, a central staff attorney works on simple cases, reviewing as many as possible; the second year, he works on such cases only when more interesting work is not available; when directed by his immediate superior, he performs the other functions. With the exception of the research staff director, none of the central staff are retained past approximately two years, thus avoiding the problem of a "shadow judiciary".

C. Alternative Methods of Disposistion

So far, the Kansas judiciary and the legislature have looked only to the increase of the number of judges as sources of expediting decisions. By so doing they have limited the options open to them. In other states, courts have been experimenting with other methods of dealing with rising caseloads, including such measures as expedited dockets (the current summary calendar is a step towards an expedited docket), appellate settlement conferences, oral decision dockets, and the like. These methods of accelerating the disposition of appeals should be actively explored. We recommend that they be implemented, at least in the first instance, in the Court of Appeals. Since that

court is charged with the responsibility for disposing of the greater number of appeals, it should be the proving ground for new methods of doing so.

D. Ordering the Transcript at the Beginning

At present, it is possible for the following scenario to occur. First, the attorney files the appeals as a matter of reflex. He also orders the transcript. Months later, the transcript is completed, and the attorney is presented with the bill, which he forwards to his client, who, having paid it, is locked into the appeal. It is suggested that the appellate courts define "ordering a transcript" as, "paying in full estimated amount in advance". With this requirement, litigants will be afforded the opportunity to make informal decisions at the very beginning of appeals whether or not they wish to pursue them.

The time of ordering a transcript should be reduced so that the ordering of the transcript will precede the filing of the appeal. This way, the litigant will be apprised of the major source of expense of his appeal prior to filing it. The ordering of a transcript should be a necessary prerequisite to filing an appeal, and a copy of the receipt of the order should be required to be attached to the notice of appeal. Without the attached receipt the appeal would be vulnerable to a motion to dismiss--voidable, though not void.

Finally, the deposit of the full estimated cost of the transcript should be tendered, not to the court reporter, but to a third party, an official authorized to hold the deposit and to give it to the court reporter upon completion of the transcript. This official would be the central manager if the position is created, the trial judge or clerk otherwise. In this way, the reporter is provided with an additional incentive to complete the transcript; the reporter is spared the task of collecting the money from the attorneys; and the state can collect the interest on the deposits while the transcripts are being prepared.

E. Making the Court of Appeals a Stepping Stone

At present, for no good reason, the Court of Appeals is coming to be regarded as somewhat of a dead end in terms of career advancement. Although the occasion has not yet arisen, it is generally accepted that a judge from the Court of Appeals would not be seriously considered for a position on the Supreme Court. This is wrong. Both courts and the legislature should begin to concentrate their attention on making the Court of Appeals a stepping stone, as it is in many other states, to the Supreme Court. By so doing, they will help to preserve the high caliber of the judges on the Court of Appeals.

END