APPELLATE COURT PERFORMANCE STANDARDS AND MEASURES

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Appellate Court Performance Standards Commission and the National Center for State Courts

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National Center for State Courts

and the

Appellate Court Performance
Standards Commission

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Foreword

My colleagues and I were invited by the National Center for State Courts (NCSC) to serve on the Appellate Court Performance Standards Commission, which was charged with the task of articulating, organizing, and disseminating performance standards for the nation's state appellate courts. The NCSC essentially was asking us to help define what is a good appellate court by means of criteria that litigants, attorneys, the public, policy makers, and the courts themselves can use in setting goals, identifying problems, and taking steps toward remedying shortcomings.

Let me tell you what we have tried to do and what I believe is our unique contribution. We have tried to put the position of state appellate courts into the structure of state government as a whole and to suggest the special role of state appellate courts in that context. Hence, the mission of appellate state court systems is described neither in the abstract, nor in isolation, but instead it is defined in terms of the realities of the state governmental process.

From that perspective, we suggest that the central goals of state appellate court systems can be divided into four performance areas: (1) protecting the rule of law, (2) promoting the rule of law, (3) preserving the public trust, and (4) using public resources efficiently. In our opinion, all state appellate courts should strive to do well in these four areas. As a way of illustrating what good performance means, we have gone further and have formulated 15 standards of performance pertaining to the four performance areas. Certainly, a textbook could be written on the meaning of each area, if not on each standard. Our contribution is that we have tried to highlight the essential aspects of these areas and standards to facilitate their application in real-world, decision-making situations.

There is a common focus to the substance of the standards. We have attempted to emphasize standards for what appellate

courts do. What does a well-functioning court accomplish in terms of activities and results? We were not interested in defining what a good court looks like in terms of structure or organization, in part, because of the significant differences between our state appellate courts. Instead, we seek to formulate a consensus on what an appellate court should be doing to render just, timely, and consistent decisions . . . function not form.

Let me suggest that our work complements the efforts begun by the American Bar Association (ABA) over twenty years ago to set standards for appellate courts. The ABA's *Standards Relating to Appellate Courts* focus primarily on the internal administration of appellate courts (e.g., decision-making procedures, caseflow management, administrative services and facilities, technology). However, the *Appellate Court Performance Standards* focus primarily on basic functions of appellate courts that are linked to overarching goals of what appellate courts should be doing to serve the rights and interests of litigants, the public, the bar, and policy makers. Our audience certainly includes appellate courts, but we have tried to formulate standards that ask courts to look outward rather than inward and to consider how their operations can best contribute to just decisions. In addition, we consulted the literature on court administration, although we found it to be less substantial on appellate courts than we would have liked. Hence, in a real sense, we relied primarily on our own experience and understanding in producing the following product for consideration.

Finally, we have tried to offer our audience some concrete ways of measuring efficiency, timeliness, quality, clarity and other important components of appellate justice. Systematic information is needed to determine how closely an appellate court system surpasses, approximates, or falls short of standards of performance. We call our suggestions "Guideposts" because they are intended to be flexible enough that every appellate court can tailor them to meet their own particular circumstances. Hence, we hope that appellate courts view the 27 proposed Guideposts as useful tools and use them to begin to develop

valid measures of performance that are clear and comprehensible to a court and to its many audiences.

Wallace P. Carson, Jr., Chair
Appellate Court Performance Standards Commission

Introduction

The Role of Government in Protecting Constitutional Principles

Government promotes an orderly society by enforcing the mandates, prohibitions, and rights prescribed in state and federal constitutions. State and federal constitutions that were adopted to guide the discharge of these governmental obligations establish the criteria for all statutory enactments and are the source of the rights, responsibilities, and freedoms available to all individuals. This responsibility is shared by the executive, legislative, and judicial branches acting within the basic framework of separate and equal branches of government.

The legislature formulates public policy through the enactment of laws consistent with the constitution. The executive branch implements and enforces the laws by proclamation and administrative action. The judiciary applies and interprets constitutional provisions, legislative enactments, and executive activities. Working together within a constitutional system of checks and balances, the three branches govern.

Changing social, economic, and political conditions in which governments operate make the task of governing complex and demanding. Moreover, governments must protect and promote the rule of law within the limits of available public resources.

The Role of the Judicial Branch of Government

The primary role of the judiciary within this framework of shared governmental responsibilities is to provide an accessible forum for the just resolution of disputes in accordance with applicable civil and criminal laws. In contrast to private dispute resolution processes, courts are responsible for protecting both the interests of the immediate parties to the dispute and the interests of society in the fair, timely, and consistent rendering of

decisions. Both trial and appellate courts encourage negotiations between the parties, but their essential purpose is to provide an authoritative and unbiased resolution of a dispute. To fulfill this important role in resolving disputes, the judiciary must remain independent. Independence requires freedom from interference or usurpation by the legislative and executive branches when judicial power is being exercised. Judicial independence is a critical ingredient in producing decisions that are fair, timely, consistent, and meet the needs of society.[1]

The Role of Appellate Court Systems

The judicial branch is divided into the trial and appellate court systems within the constitution. Trial courts have initial responsibility for adjudicating the nearly 100 million civil and criminal cases filed annually.[2] To carry out its functions while handling this substantial volume of litigation, trial courts have established standards for assessing their performance.[3]

The role of appellate court systems is to provide review of decisions of lower tribunals and, as the final arbiter of disputes, to shape and define the law. Both intermediate appellate courts and courts of last resort are responsible for ensuring that divergent decisions of trial courts are reconciled.

State appellate court systems vary considerably in structure, jurisdiction, and method of judicial selection. Forty states have a court of last resort and an intermediate appellate court. The District of Columbia, Puerto Rico, and ten states have only a court of last resort (Delaware, Maine, Montana, Nevada, New

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[1] Stephen L. Carter, "Is Democracy a Threat to Judicial Independence?" *1993 Forum for State Court Judges*, sponsored by The Roscoe Pound Foundation, 1993.
[2] Brian J. Ostrom and Neal B. Kauder, *Examining the Work of State Courts, 1993*. Williamsburg: National Center for State Courts, 1995.
[3] *Trial Court Performance Standards*. Williamsburg: National Center for State Courts, 1990.

Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, Wyoming). Some states have separate courts of last resort (Oklahoma, Texas) or intermediate appellate courts for criminal and civil appeals (Alabama, Tennessee).

In most states, appeals of trial court and administrative agency decisions are reviewed by the intermediate appellate court, whose mandatory jurisdiction requires it to accept the appeal for review. Litigants may appeal their cases further to the court of last resort, although most courts of last resort have discretionary jurisdiction to accept or to reject cases for full review. However, there are important exceptions to this general flow. In some states, the court of last resort receives the cases and retains some, while transferring others to the intermediate appellate court (Hawaii, Idaho, Iowa, Mississippi, Oklahoma, South Carolina).[4]

Each state's substantive law also has an impact on the route cases take. For example, appeals in death-penalty cases are taken directly from the trial courts to courts of last resort in almost all states, although in Alabama, Ohio, and Tennessee, death-penalty cases are appealed directly to their respective intermediate appellate courts. Additionally, state legislatures and executives often designate appellate courts as the forum for the determination of some original proceedings, including the validation of election ballots. Administrative responsibilities relating to attorney conduct also are assigned usually to the

[4] The geographic jurisdiction of intermediate appellate courts is also an important element of the landscape. Some state intermediate appellate courts have statewide jurisdiction (Alabama, Alaska, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee Court of Criminal Appeals, Utah, Virginia), while others have formal regional district jurisdictions (Arizona, California, Florida, Illinois, Louisiana, Missouri, New York, Ohio, Texas, Washington) and some have statewide jurisdiction, but multiple sites (Oklahoma, Tennessee Court of Appeals, Wisconsin).

appellate courts. Finally, appellate court systems also vary in their methods of judicial selection, such as the use of popular elections, gubernatorial appointments, and legislative appointments.

Despite these differences among state appellate court systems, they each seek to render just decisions clearly and efficiently. For this reason, the appellate court performance standards, which follow, embody these and other universal values and are applicable to every state appellate court system.

Trust and confidence in appellate court systems are furthered when they fulfill these responsibilities in a manner that is consistent, fair, and timely to litigants, attorneys, judges, and the public. Standards of performance that clarify the role of appellate court systems and the ways that they should perform their responsibilities help promote confidence in these courts. Appellate court systems can foster the trust and confidence of their constituents by striving to meet the following suggested standards.

Appellate Court Performance Areas and Standards

I. Protecting the Rule of Law

Standard 1.1 Opportunity for Multi-Judge Review

Appellate court systems, exercising mandatory or discretionary jurisdiction, should provide a reasonable opportunity for a multi-judge review of decisions made by lower tribunals.

Commentary

Our judicial system recognizes that decisions made by lower tribunals may require modification. American jurisprudence generally requires the litigants to be afforded a reasonable opportunity to have such decisions reviewed by an appellate court. Appellate court systems, through the process of multi-judge review, achieves justice by: (1) correcting prejudicial errors, (2) developing, clarifying, and unifying the law in a sound and coherent manner, and (3) furnishing guidance to judges, attorneys, and the public in the application of constitutional and statutory provisions and common law, thus reducing errors and litigation costs.

Multi-judge review has been adopted as the most effective means for accomplishing these functions. Studies suggest that multi-judge review allows a "degree of detachment, perspective, and opportunity for reflection by a group of judges, beyond that which a single trial judge can provide, thereby enhancing the likelihood of a sound resolution."[1]

Multi-judge review is essential to the appellate process and is not dependent on a particular court organization or set of procedures. The fundamental imperative is the opportunity for multi-judge review, not the structure of the court system through

[1] Daniel J. Meador, *Appellate Courts: Staff and Process in the Crisis of Volume*. St. Paul: West Publishing Co., 1974.

which this review is achieved. An appellate court system that provides for multi-judge review of decisions is positioned to preserve fairness and impartiality in the application of the law on which the public relies and on which our government is based.

Standard 1.2 Develop, Clarify, and Unify the Law

Appellate court systems should develop, clarify, and unify the law.

Commentary

Appellate court systems should contribute to the development and unification of the law by resolving conflicts between various bodies of law and addressing apparent ambiguities in the law.

Our complex society turns, however, with increasing frequency to the law to resolve disputes left unaddressed by the authors of our previously established legal precepts. Interpretation of legal principles contained in state and federal constitutions, statutory enactments and common law is at the heart of the appellate adjudicative process. Appellate courts clarify the law by reconciling conflicting principles of law and by interpreting constitutional and statutory provisions. That clarifying process is best served by careful attention to precedent.

Nationwide increases in the number of trial and intermediate appellate courts have increased the potential for conflicting interpretations of procedural rules and substantive law. This development of our judicial infrastructure at both the trial and appellate levels underscores the importance of appellate court systems as unifiers of the law. Ideally, the same results should be obtained, regardless of forum (federal or state) or the composition of the appellate panel. With uniform interpretation and application of the law, the public is certain as to the controlling legal standards

and can order its conduct to avoid litigation; the law will then give clear direction to litigants and courts in resolving litigation.

Every effort should be made to avoid decisions that do not command a majority on every issue decided. Development of a cohesive, unified body of law is advanced by the sparing use of concurring and dissenting opinions. The value of a concurrence is often countered by the confusion caused by publishing multiple opinions, none of which represents a majority of the court, to the parties and others who might seek to rely on the appellate ruling in the future. However, a concurrence in some instances contributes to the development of the law by explicating the bases for the legal principle adopted in support of the majority holding. Dissents also can serve as a beneficial tool for the development of law. For example, some jurisdictions rely on dissents in the intermediate appellate court to refer an appeal automatically to the court of last resort. However, concurring and dissenting opinions suggest that the law on the point in question is unresolved or subject to change. Although at the time they may provide an important cautionary signal, these opinions tend to undercut confidence in the law and fail to promote resolution of disputes. The limited use of concurring and dissenting opinions should be the general practice for appellate court systems.

Standard 1.3 Error Correction

Appellate court systems should provide review sufficient to correct prejudicial errors made by lower tribunals.

Commentary

A key function of appellate courts is the correction of prejudicial errors in fact or law made by lower tribunals. Appellate court systems should have sufficient capacity to provide review to correct these errors.

The error-correcting function for a court of last resort is fundamentally different from the error-correcting function for an intermediate appellate court. A court of last resort is a court of

precedent whose primary function is to interpret and to develop case law, rather than to correct errors in individual cases.

On the other hand, an intermediate appellate court serves primarily as a court of error correction, following precedent created by the courts of last resort. Of course, in the absence of binding precedent, an intermediate appellate court must also interpret and develop law. Because review is normally discretionary in courts of last resort, these intermediate appellate court decisions may serve an important function in the development of law.

The ability of appellate court systems to correct errors protects the rule of law and improves the manner in which lower tribunals decide cases and dispense justice. In turn, intermediate appellate and trial courts more ably apply the law. The result is increased confidence in the entire judicial process.

Standard 1.4 Extraordinary Functions of Appellate Court Systems

Appellate court systems should determine expeditiously those petitions for which no other adequate or speedy remedy exists, and should determine original proceedings as directed by law.

Commentary

Appellate court systems, pursuant to state constitutional provision or legislative enactment, are often the designated forum for the determination of petitions and original proceedings, such as habeas corpus, mandamus, quo warranto, tax review, and examination of election disputes.

These proceedings often pertain to constitutional rights, affect large segments of the population within the court's jurisdiction, or require prompt and authoritative judicial action to avoid irreparable harm. This constitutional or legislative assign-

ment reflects the confidence the public places in the appellate review process. Usually, the right to appeal the appellate court's determination of such a matter is limited, if not foreclosed. Multi-judge review, the trademark of appellate courts, further ensures careful examination of these proceedings.

II. Promoting the Rule of Law

Standard 2.1 Quality of the Judicial Process

Appellate court systems should ensure adequate consideration of each case and decisions based on legally relevant factors, thereby affording every litigant the full benefit of the judicial process.

Commentary

Appellate court systems should provide the ultimate assurance that the judicial branch fulfills its role in our constitutional scheme of government by ensuring that due process and equal protection of the law, as guaranteed by the federal and state constitutions, have been fully and fairly applied throughout the judicial process. The rendering of justice demands that these fundamental principles be observed, protected, and applied by giving every case sufficient attention and deciding cases solely on legally relevant factors. Quality of the judicial process depends on these principles and the perception that the reviewing court has considered the issues on appeal fairly.

The integrity of appellate court systems rests on their ability to fashion procedures and make decisions that afford each litigant access to justice. Constitutional principles of equal protection and due process should be guideposts for an appellate court system's procedures and decisions. Toward this end, court procedures that are designed with these principles in mind should be fairly and consistently applied in all cases.

It is expected that an appellate court system's rules and procedures will be available and open to the public. In contrast,

the decision-making process is, for the most part, a cloistered, deliberative undertaking that by its very nature is not conducive to being open to public view. Nonetheless, decision making should be conducted in accordance with constitutionally guaranteed principles of fairness and justice. Appellate court decisions should be based solely on legally relevant factors fairly applied and devoid of extraneous considerations or influences.

Finally, each case should be given the necessary time based on its particular facts and legal complexities to render just decisions, although each case need not be allotted a standard amount of time for review. Quality of the appellate judicial process is not measured by the amount of time devoted to each case, but rather that each case is managed—from beginning to end—in a manner consistent with the principles of fairness and justice.

Standard 2.2 Clarity of Decisions

All appellate court decisions should be clear, and written opinions should address the dispositive issues, state the holding, and articulate the reasons for the decision in each case.

Commentary

Clarity is essential in rendering all appellate court decisions. An appellate court should issue a written opinion when it completely adjudicates the controversy before it. Ending the controversy necessarily requires that the dispositive issues be addressed and resolved. A fuller understanding of the resolution of the dispositive issues occurs when an appellate court explains the reasoning that supports its decision.

Written opinions should set forth the dispositive issues, the holding, and the reasoning that supports the holding. At a minimum, the parties to the case and others interested in the area of law in question expect, and are due, an explicit rationale for an appellate court's decision. In some instances, however, a limited

explanation of the court's rationale for its disposition may satisfy the need for clarity.

Clear judicial reasoning facilitates the resolution of unsettled issues, the reconciliation of conflicting determinations by lower tribunals, and the interpretation of new laws. Clarity is not necessarily determined by the length of exposition, but rather by whether the court has conveyed its decision in an understandable and useful fashion. Not only should the appellate court's decision be clear, but also the court's directions to the lower tribunal should be clear when it remands a case for further proceedings.

Standard 2.3 Designation of Precedential Authority

Appellate court systems should designate as authority, which may be cited, those written decisions that develop, clarify, or unify the law.

Commentary

The designation of judicial opinions as precedential authority is essential to achieving clarity and uniformity in the development of the law. The publication of these opinions as binding authority provides an easily accessible means for interested persons to ascertain the holdings of the court and the rationale for those findings, thereby promoting understanding of the law and reducing confusion regarding that law. Therefore, appellate court systems should ensure that their rules for designating judicial opinions as precedential authority are clear and consistently applied.

Decisions should be published or otherwise designated as authority when they (1) establish a new rule of law, alter or modify an existing rule, or apply an established rule to a novel fact situation, (2) decide a legal issue of public interest, (3) criticize existing laws, or (4) resolve an apparent conflict of authority. Decisions not designated as authority should not be cited in any judicial proceeding.

The appellate court assigned to issuing an opinion should initially determine whether an opinion will satisfy one or more of the factors enumerated above. Once a court decides that an opinion should be designated as authority, the court should issue an opinion in a form that clearly states the issues, necessary facts, holding, and rationale, including providing a legal analysis of relevant authorities and principles. The manner in which the final decision to publish an opinion as precedential authority is made should be established by court rule.

Appellate court systems should have exclusive control over determining which opinions are considered precedential authority. According precedential value to an opinion is different from dissemination of that opinion. Historically, "publication" of an opinion determined whether it could be cited as authority; however, modern communication techniques such as electronic transmission and unofficial publications have blurred this line. Regardless of how an opinion is disseminated, appellate courts should specifically determine and indicate whether the opinion has precedential authority.

Standard 2.4 Timeliness

Appellate court systems should resolve cases expeditiously.

Commentary

Once an appellate court acquires jurisdiction of a matter, the validity of a lower tribunal's decision remains in doubt until the appellate court rules. Delay adversely affects litigants. Therefore, an appellate court should assume responsibility for a petition, motion, writ, application, or appeal from the moment it is filed. The appellate court should adopt a comprehensive delay reduction program. This program should be designed to eliminate delay in each of the three stages of the appellate process: record preparation, briefing, and decision making.[2]

[2] Rita M. Novak and Douglas K. Somerlot, *Delay on Appeal*. Chicago: American Bar Association, 1990, is an excellent blueprint for assisting

A necessary component of any comprehensive delay reduction program is the adoption of time standards to monitor and promote the progress of an appeal or writ through each of the three stages. Time standards applicable to appellate court cases should be responsive, when appropriate, to the special needs of individual cases when doing so does not sacrifice the quality of appellate justice.

Time standards cannot function without the joint cooperation of lawyers, court staff, and judges. Courts must recognize that a number of factors, including the appellate court's lack of direct supervision over lower tribunals, local legal culture, case complexity, and adequacy of resources for those responsible for processing appeals, have an effect on the time that it takes to resolve cases. These factors must be considered in developing realistic delay-reduction goals for any particular court. Each court should reach consensus concerning guidelines establishing the appropriate number of days that a given percentage of the caseload should take to complete each stage of the appellate process.[3]

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appellate courts in developing and implementing an effective delay reduction program.

[3] For example, in the American Bar Association's *Standards Relating to Appellate Courts*, Standard 3.52 suggests a Reference Model for courts of last resort whereby they should resolve 90% of all appeals within one year from the filing of a petition for review or the notice of appeal. Intermediate appellate courts should resolve 95% of all appeals within one year of the filing of the notice of appeal.

III. Preserving the Public Trust

Standard 3.1 Accessibility

Appellate court systems should be procedurally, economically, and physically accessible to the public and to attorneys.

Commentary

Making appellate court systems accessible to the public and to attorneys protects and promotes the rule of law. Confidence in the review of the decisions of lower tribunals occurs when the appellate process is open to those who seek or are affected by this review or wish to observe it. Appellate court systems should identify and remedy court procedures, costs, courthouse characteristics, and other barriers that may limit participation in the appellate process.

An appellate court's procedural rules should ensure that the integrity of the judicial process is maintained, that all litigants are treated fairly and equally, and that the court maintains control of its operations. To facilitate these goals, the rules should be straightforward and clear, and should be developed with the advice of those affected by the rules. Courteous court staff and multi-lingual capabilities are important elements in the effort to educate litigants, attorneys, and the public regarding court practices to facilitate their access to the court. Service should be offered regardless of race, cultural, ethnic, or religious background, age, gender, disability, or national origin. Asserting frivolous or spurious claims should be penalized because they prolong litigation inappropriately, cause unnecessary expense, may be used to harass or intimidate, and waste valuable court resources.

The ever-escalating cost of litigation, particularly at the appellate level, can limit access to the judicial process. When a party lacks sufficient financial resources to pursue a good-faith

claim, provision should be made to minimize or defray the costs associated with the presentation of a case to an appellate court.

Physical features of the courthouse can constitute formidable barriers to persons with a disability who want to observe or avail themselves of the appellate process. Accommodations should be made so that individuals with speech, hearing, vision, or cognitive impairments can participate in the appellate process.

Standard 3.2 Public Access to Decisions

Appellate court systems should facilitate access to their decisions.

Commentary

Decisions of appellate courts should be a matter of public record. Making appellate court decisions available to all is a logical extension of the courts' responsibilities to review, develop, clarify, and unify the law. Appellate courts should develop internal procedures that ensure decisions are made available promptly to litigants, judges, attorneys, and the public, whether in printed or electronic form. Access to appellate court decisions reduces errors in other courts due to misconceptions regarding the position of the appellate court.

Standard 3.3 Public Education and Information

Appellate court systems should inform the public of their operations and activities.

Commentary

Affirmative disclosure of court activities increases the appellate court system's influence on the development of the law, which, in turn, affects public policy and the activities of other governmental institutions. Appellate court systems should strive to increase public awareness of and confidence in court operations by engaging in a variety of outreach efforts to describe

what they do and the procedures they follow in reaching decisions.

Appellate courts can provide information about and insight into appellate court procedures to the public, litigants, attorneys, and the bar by holding court sessions in public forums, and publishing handbooks addressing internal operating procedures that contain information about the appellate process. Outreach programs that appellate judges might support or in which they might participate include continuing legal education courses on appellate court administration and procedures, participation in moot court trials at law schools, and seminars in schools and universities. Televised proceedings may enhance public understanding of appellate courts and the appellate process. Surveys among users of the court and suggestion boxes can provide appellate courts with important insights into how they are perceived and how they might perform these functions better.

Litigants, attorneys, and the public should be able to determine what cases are before the court and their stage in the legal process. Automated docketing systems operated by the courts should be available through computer terminals at the courthouse or through electronic bulletin boards. Finally, appellate court systems can enhance knowledge by tailoring reports on caseload trends and analyses to suit specific audiences, such as attorneys, community organizations, and the public.

Standard 3.4 Regulation of the Bench and Bar

Appellate court systems should ensure the highest professional conduct of both the bench and the bar.

Commentary

By virtue of the public trust placed in the bench and bar, those engaged in the practice of law must adhere to the highest standards of ethical conduct. Ethical conduct by attorneys and judges heightens confidence in the legal and judicial systems.

Standards of conduct for attorneys and judges serve the dual purpose of protecting the public and enhancing professionalism. Appellate court systems should contribute to the public development and enforcement of these standards.[4]

Principles pertaining to the relationships between attorneys and clients, fees, conflicts of interest, and civility are important elements of an ethics code for attorneys. A judicial code of conduct should include, at a minimum, provisions pertaining to fundraising, political activity, conflicts of interest, and courtroom demeanor. Appellate court systems should contribute to the formulation and revision of these codes whenever possible.

Regulation of the bench and bar fosters public confidence, particularly when it is open to public scrutiny. A disciplinary process which evaluates expeditiously, diligently, and fairly the merits of each complaint to determine whether standards of conduct have been breached is an essential component of the regulation infrastructure. Appellate court systems can and should play an important role in this disciplinary process.

IV. Using Public Resources Efficiently

Standard 4.1 Resources

Appellate court systems should seek and must obtain sufficient resources from the legislative and executive branches to fulfill their responsibilities.

Commentary

As an equal and essential branch of our constitutional government, the judiciary requires sufficient financial resources to fulfill its responsibilities. Just as appellate court systems should be held accountable for their performance, it is the obligation of the legislative and executive branches of our constitutional

[4] Establishing the initial competency for being a lawyer or judge is beyond the scope of this standard.

government to provide sufficient financial resources to the judiciary for it to meet its responsibility as a third and equal branch of government. Despite the soundest of management, appellate court systems will not be able either to promote or protect the rule of law or to preserve the public trust without adequate resources.

In seeking to obtain sufficient resources, appellate court systems should estimate their budgetary needs accurately and prepare their budgets in sufficient detail to establish those needs. In estimating their needs, the court's special functions, responsibilities, and long-term needs—including anticipated capital expenditures and year-to-year variations in its needs—should be represented. Such requests may necessitate a long-term budgetary strategy. At the same time, because unanticipated events may invalidate forecasts, sufficient flexibility should be built into the court's budget to allow the court to respond to unanticipated events.

Appellate court systems should apply the public funds they receive to employ a sufficient number of judges and court staff to process and resolve the increasing number of cases that are filed in appellate courts each year. Appellate court systems also should use public resources to maintain and improve court facilities and automated management information systems. Appellate court systems should invest their public funds in automated docketing and case-tracking systems to help handle the growth in volume and complexity of cases. Finally, funding for automated legal research systems will help provide better access to the appellate court systems.

Sufficient resources are also required and should be obtained to meet the increasing demands of pro se litigants on appellate court systems. To make the legal process available and understandable to pro se litigants, appellate court systems should have resources and personnel to consider and implement creative procedures to facilitate pro se litigants' access to the appellate court system.

Appellate court systems should encourage and support the efforts of other participants in the system to meet their own funding needs. Even though the appellate court system might be fully funded, there might still be delay if other participants, such as transcript providers and institutional advocates, are not adequately funded.

Standard 4.2 Case Management, Efficiency, and Productivity

Appellate court systems should manage their caseload effectively and use available resources efficiently and productively.

Commentary

Appellate court systems should manage their caseload in a cost-effective, efficient, and productive manner that does not sacrifice the rights or interests of litigants. As institutions consuming public resources, appellate court systems have the responsibility to ensure that their resources are used prudently and that cases are processed and resolved in an efficient and productive manner.

Appellate court systems that manage themselves efficiently and cost-effectively can better process and resolve the large number of petitions, motions, writs, and appeals that are filed in appellate courts each year and justify their budgetary requests for resources. Resources should be distributed according to case complexity with more complex cases receiving greater resources. Cases should be monitored throughout their processing to ensure the efficient use of resources assigned to them. Screening procedures should be developed to identify routine cases that can be processed and resolved expeditiously so that court staff and judges can spend more time on complex appeals. Efficient and cost-effective case-management procedures allow judges to consider and to resolve a greater number of cases and allow court clerks to process more filings within a specified period of time.

Under certain conditions, alternative dispute resolution programs and settlement conferences have expedited the settlement of cases and reduced the number of issues in nonsettled cases. Consequently, each appellate court system should consider whether its circumstances and needs warrant the development of such programs and whether a structured approach, using the modern techniques of alternative dispute resolution such as a settlement conference, will enhance the quality of justice, reduce the cost of litigation to the parties, speed the pace of settlement, and reduce the number of issues in nonsettled cases.

Standard 4.3 Assistance to Trial Courts

Appellate court systems should develop methods for improving aspects of trial court performance that affect the appellate judicial process.

Commentary

The efficiency and workload of appellate court systems are, to some extent, contingent upon trial court performance. If appellate courts do not properly advise the trial courts of the decisional and administrative errors they are making, appellate court systems waste valuable resources in repeatedly correcting or modifying the same or similar trial court errors.

Appellate courts can contribute to a reduction in trial court error by identifying patterns of error and by collecting information concerning the nature of errors and the conditions under which they occur. This information can help appellate courts ascertain the reasons for error and thereby better advise trial courts regarding avoidance of future error. In contrast, trial court judges become aware of mistakes only when their individual decisions are modified and usually lack access to system-wide analysis of all cases. Accordingly, given appropriate resources, appellate court systems should collect and disseminate these data, which will enhance trial court performance, and ultimately

preserve resources. Appellate courts, working in conjunction with state judicial educators, might further this work by periodically conducting a variety of education programs, seminars, and workshops for both trial and appellate judges.

Summary

The articulation of factors to guide appellate court performance should assist not only the judiciary, but also the public and the bar in assessing the appellate courts' success in protecting the rule of law, which is the cornerstone of our society. These standards should also assist the legislature and executive branch in determining the fiscal resources necessary for the judiciary to fulfill its obligations.

APPLYING PERFORMANCE STANDARDS:

Guideposts to Measurement

The National Commission on Appellate Court Performance Standards published *Appellate Court Performance Standards* after two years of deliberation and discussion.[5] The Commission, which was supported by the State Justice Institute, proposed 15 Standards to orient the nation's state appellate court systems, including both courts of last resort and intermediate appellate courts, toward important goals. The Standards were organized into four basic categories called Performance Areas: (1) Protecting the Rule of Law, (2) Promoting the Rule of Law, (3) Preserving the Public Trust, and (4) Using Public Resources Efficiently.

The Standards are broad statements of what objectives appellate courts should pursue to render just decisions clearly and efficiently. These Standards are important reminders to appellate courts that they are responsible for both the development of society's fundamental values and the correct resolution of disputes in individual cases. Appellate courts are charged with more than the processing of cases. They are expected to contribute to the fulfillment and refinement of the concept of justice. Yet, the Standards by themselves do not inform judges, litigants, attorneys, court staff, policymakers, or the public on how well the courts are doing in discharging their obligations.

[5] Appellate Court Performance Standards Commission and the National Center for State Courts, *Appellate Court Performance Standards*. (Williamsburg: National Center for State Courts, 1995).

Basically, there are two limitations to the Standards that inhibit an understanding of the actual performance of state appellate court systems. First, the Standards articulate goals that are general in nature. Each Standard is accompanied by a commentary that elaborates on it; however the Standards do not provide measures by which appellate courts can determine whether they meet those goals. As a result, the Standards by themselves do not suggest measurable activities that are within the realm of positive performance, activities that are indicators of negative performance, and the gradations that fall within those ends of the spectrum.

A second limitation of the Standards is that they do not provide a common set of guidelines for the collection of evidence to measure positive performance. Judges and others in a state appellate court system are free to select data that they perceive demonstrates solid performance and eschew data that might indicate inadequate performance. Those who analyze appellate court system performance can make subjective judgments that may lead to the conclusion, however erroneous, that a system is operating in accordance with the Standards' tenets. Because the Standards neither interpret the data that analysts cite in support of their conclusions nor address these subjective judgments in a uniform way, judges and others need more assistance to assess whether appellate court systems are fulfilling their mandate.

In response, the Commission has developed 27 Guideposts to assist state appellate court systems in measuring performance in an objective manner. The Guideposts are intended to translate the goals articulated by the Standards into observable aspects of appellate court structure, process, and case decisions that can be measured and examined by the collection of pertinent data. The Guideposts also suggest how data can be analyzed and what interpretations can be made concerning how closely a particular Standard is approximated. In some instances, the Guideposts provide numerical measures and corresponding concrete benchmarks. However, some of the evidence is measurable in a more qualitative manner and only

broad distinctions can be drawn between optimal, adequate, and limited performance. Nevertheless, both types of measures should help connect the Standards' aspirations to actual experience by means of a manageable set of steps that appellate court judges and others can follow without allocating excessive administrative time or cost.

These Guideposts are intended to address three central questions. What data concerning appellate courts are relevant in light of each Standard's particular goals? How can the data be gathered and analyzed? What sorts of possible patterns among the data suggest high or low performance?

The Guideposts are neither definitive nor perfect because scholars and practitioners do not agree on how to measure timeliness, clarity, quality, efficiency, or other important goals. Because the field of court administration is still in the early stages of development, there has been limited experience in the use of data to conclude whether courts are fulfilling their functions satisfactorily. However, the Guideposts have the benefit of being developed, critiqued, and refined by the Appellate Court Performance Standards Commission, the leadership of the Oregon Court of Appeals and the Oregon State Court Administrator's Office, and the Performance and Accountability Committee of Florida District Courts of Appeal.

In Oregon, the Chief Judge of the Court of Appeals and the State Court Administrator's Office reviewed an initial draft of the Guideposts for their feasibility and desirability. Could the Oregon Court of Appeals put its hands on the sort of data called for by the Guideposts? What sorts of adjustments did the Court think were needed to improve their utility?

In Florida, the Guideposts were subjected to an even more stringent test because that state's five district courts of appeal have formed a special committee to produce a regular, ongoing method of performance review to be useful to the Courts and one that they could share in periodic reports to the bar, policymakers, and the public. Whereas the Oregon Court of

Appeals generously provided the Commission with a thorough reading of the Standards and Guideposts, the Florida Performance and Accountability Committee provided a rigorous pretest. Because of the variability among the five Districts, the Florida Committee, which was assisted by the Florida Administrative Office of the States Courts, the Guideposts were well tested.

Finally, there are some key organizing ideas that shape the nature of the proposed Guideposts. They affect the number of Guideposts, the nature of the data associated with the Guideposts, and the audience that the Guideposts are intended to reach. They are as follows:

1. A few good measures are needed to maintain focus and to facilitate the application of the Standards. Concentrating the measures on the essential aspects of appellate court performance should encourage many courts to apply the Standards. Multiple applications will provide a rich foundation on which future refinements of the Standards and Guideposts can be based.
2. Several of the Guideposts rely on a common set of 24 data elements, although different standards are based on different combinations of these data. A list of these elements is found at Appendix 1. The data concern individual appellate case characteristics and generally are stored within a court's docketing and information management system. This feature of the Guideposts should ease their application. *Additionally, because the National Center for State Courts' Court Statistics Project encourages the gathering of these same core data, a comparative database should be available to assist a court in the development of benchmarks*. However, other data, including surveys and focus groups, are necessary for some of the Guideposts. Finally, the complexity of the data collection and the data analysis associated with the three Guideposts to Standard 4.1

likely will require a court to seek the assistance of the National Center for State Courts or another organization. However, courts should be able to implement all of the other Guideposts with their own resources and staff.

3. The Guideposts are designed to provide appellate courts with information that they can use in managing themselves and in communicating with litigants, attorneys, policymakers, and members of the public. They are general indicators of performance, which can be extended and refined to accommodate specific internal management purposes of individual courts. Because the Appellate Court Performance Standards have been designed to fit within the framework of state government as a whole, the Guideposts are likewise oriented to inform a broad audience of judges, litigants, attorneys, policymakers, and members of the public on how well a court is operating.

Hence, the Guideposts are designed to be workable in the time and effort required to apply them. Moreover, it is hoped that the Guideposts' dual uses as an internal management tool and as a vehicle for educating others outside a court will make them desirable to apply.

I. Protecting The Rule Of Law

Standard 1.1 Opportunity for Multi-Judge Review

Appellate court systems, exercising mandatory or discretionary jurisdiction, should provide a reasonable opportunity for a multi-judge review of decisions made by lower tribunals.

Appellate courts by their very nature provide multi-judge review. Both courts of last resort and intermediate appellate courts resolve issues and cases either en banc or in panels. When panels are used, efforts are made to rotate judicial assignments. Appellate courts recognize the need for collegiality in achieving meaningful multi-judge review and give it high priority at educational and training sessions. Yet, apart from the structural design of appellate courts as multi-judge entities, two basic questions need to be addressed to understand more fully what is meant by this concept. What cases are, in fact, subject to the appellate process? What is the mandatory versus discretionary jurisdiction of a court? Guideposts 1.1.1 and 1.1.2 are proposed to address these questions.

Guidepost 1.1.1 Determining What Cases Are Subject to Appellate Review

A basic measure of appellate court performance is the ability of a court to describe the work that it handles. This description is relevant to clarifying what the job of multi-judge review is all about.[6] Additionally, information on the cases that come before a court is the foundation for other measures of court performance. The capacity of a court to describe its work based

[6] The connection between the work of appellate courts and the nature and significance of appellate review has been pointed out elsewhere. See Robert A. Kagan et al., "The Evolution of State Supreme Courts," 76 *Michigan Law Review* 1978; Bliss Cartwright et al., "The Business of State Supreme Courts" 30 *Stanford Law Review* 1977; and Joy A. Chapper and Roger A. Hanson, *Intermediate Appellate Courts*. (Williamsburg: National Center for State Courts, 1990).

on systematic data permits those same data to be reanalyzed in other ways to address different questions of performance. Conversely, the lack of information on caseload composition inhibits a court from substantiating virtually any claim that it makes about the work that it does. Hence, Guidepost 1.1.1 outlines a series of steps that a court can follow in examining how closely it meets an essential criterion of performance.

The Guidepost begins by the classification of cases, including appeals, petitions, applications for writs and other original proceedings, such as attorney disciplinary matters, certified questions, judicial ethical inquiries, and so forth. A scheme that might fit most courts and one that is sufficiently flexible to take into account particular features of individual courts is as follows:

1. Civil, including tort, contract/commercial, real property, family, and probate.
2. Criminal, including juvenile, non-death penalty, and death penalty.
3. Administrative agency, including workers' compensation/industrial commission, tax/revenue, and economic security.
4. Application for writs, including habeas corpus and all other writs, such as mandamus, prohibition, and quo warranto.
5. All other matters, including certified questions, advisory opinions, attorney and judicial discipline.

These five types of cases are consistent with the categories used by the NCSC's Court Statistics Project to gather comparable data each year from the nation's state appellate courts. Using this classification, a court has the ability to draw on a comparative database available through the Court Statistics Project if it wants to see how its caseload composition stands in relation to others. Intermediate appellate courts with regional districts that function independently of each other need to agree to a common case typology to measure performance statewide.

A court's next step is to document for each of the past two years the number of cases filed that fall into each of the five case categories. Additionally, it is important to describe the relative size of each of the five categories. Is the work of a court primarily civil or criminal? Or is there a balance between these two categories? Is the work awaiting multi-judge review actually weighted toward agency cases because of a large number of workers' compensation cases? Finally, in anticipation of Guidepost 1.1.2, the five categories are subdivided by jurisdiction into appeals (under mandatory jurisdiction) and petitions (under discretionary jurisdiction). If this subdivision is made here, it will enhance the value of the information gathered for this Guidepost and will facilitate the efficient application of the next one, Guidepost 1.1.2. A suggested format for presenting information on subject matter jurisdiction appears below.[7]

[7] This format follows a general approach to presenting a variety of case management data that has been recommended to appellate courts. See Roger A. Hanson, *Handbook for Appellate Judges: Management Information and Court Performance*. (Williamsburg: National Center for State Courts, 1995). The handbook should be a useful resource for several of the Guideposts.

Type of Case	Number Filed 1998	Number Filed 1999	Percentage Change 1998-1999	Percentage of Caseload in 1999
Civil				
Appeals				
Petitions				
Criminal				
Appeals				
Non-Death Penalty				
Death Penalty				
Petitions				
Administrative Agency				
Appeals				
Petitions				
Applications for Writs				
Habeas Corpus				
All Other Applications				
Other Matters				

The needed data are available in a court's docketing system either as entries in an automated database or as paper entries in hard-bound ledgers. The raison d'être of the Guidepost is to see how capable a court is in accessing the needed data and in presenting them, as suggested above. It is hoped that a court will see the virtue of making any necessary adjustments to its automated system or acquiring such a system so that it can gather and organize the needed data.

The answer to the basic question behind Guidepost 1.1.1 is whether a court can classify its caseload composition in the proposed scheme outlined above. There is no exact set of benchmarks that demarcates solid performance. However, some qualitative judgments can be made. Is a court capable of distinguishing appeals from petitions or applications for writs? Can a court separate civil from agency cases? In states with

regional intermediate appellate courts, are different courts consistent in how they classify and count cases? Affirmative answers are signs of positive performance. The inability of a court to distinguish among cases and the inability of different courts in the same state to follow the same classification arrangement indicate that there is room for improvement.

Guidepost 1.1.2 Looking at the Mandatory v. Discretionary Nature of Review

Mandatory review gives litigants a greater opportunity for appellate court review than discretionary review, all other things being equal. As a result, a reasonable test of performance is whether the work of a court, as revealed in Guidepost 1.1.1, is almost exclusively or primarily subject to mandatory review. Do litigants have the right to have their appeals decided? Or can a court first decide whether it believes the appeal warrants full review, and, in some instances, decide not to grant further review? Guidepost 1.1.2 suggests a series of steps to address these questions.

One of the considerations in examining the jurisdiction of a court is the structure of other appellate systems. The most common institutional framework is a two-tiered appellate system in which virtually all appeals are filed first, as a matter of right, with an intermediate appellate court. A court of last resort is available to hear appeals primarily on a discretionary basis from the intermediate appellate court, but the court of last resort also exercises mandatory jurisdiction over some civil and criminal cases. Hence, most appellate court systems use a combination of the two methods of review. (A helpful article that describes the organization of each state's appellate court system is found in Appendix 2.

A court can see itself in perspective by comparing its structure to the most common institutional arrangement found in other state appellate systems, as described in Pattern IV in Appendix 2. If a court is an intermediate appellate court, is its jurisdiction primarily mandatory? If a court is a court of last

resort in a two-tiered system, is its jurisdiction primarily discretionary? For a court of last resort without an intermediate appellate court, does its jurisdiction tend to be mandatory? Answering these questions provides relatively unambiguous information about whether a court operates within the kind of structure that facilitates the opportunity for multi-judge review. The structure of an intermediate appellate court with primarily mandatory jurisdiction supports the opportunity for multi-judge review, and the discretionary review of a corresponding court of last resort does not undermine that support. However, there are other issues for courts that do not follow the common framework.

For courts of last resort, the number of discretionary petitions granted full review relates to the opportunity for multi-judge review. If a court of last resort lacks an intermediate appellate court or if an intermediate appellate court itself exercises discretionary jurisdiction, the percentage of petitions granted full review should be quite high. Certainly, the rate should be higher than it is for courts of last resort with an intermediate appellate court with mandatory jurisdiction.

The number of discretionary petitions granted by a court of last resort in a two-tiered system is more difficult to evaluate. As the number of petitions filed in a court of last resort increases each year and the number of judges remains constant pressures are placed on a court to grant a smaller percentage of petitions each year because of the simultaneous desire to achieve timely resolution. Moreover, even if the caseload does not increase in number, there may be an unusual number of extremely difficult and time consuming cases that pressure a court of last resort to grant a smaller percentage than it did the previous year. Nevertheless, the percentage of discretionary petitions granted full review should be measured and monitored each year. What are past and current trends? Is the observed pattern consistent with what a court believes to be the pattern and with what it considers to be desirable? A well-performing court will know what it is doing and will be able to account for change or

continuity in the percentage of discretionary petitions granted full review.

Standard 1.2 Develop, Clarify, and Unify the Law

Appellate court systems should develop, clarify, and unify the law.

The commentary to Standard 1.2 provides a clear rationale for the limited use of concurrences and dissents. These types of opinions "undercut confidence in the law and fail to promote resolution of disputes." As a result, the degree to which an appellate court meets this Standard is measured by the agreement patterns among the judges. How frequently are concurring opinions and dissenting opinions written? Guidepost 1.2.1 suggests an approach to addressing this question.[8]

Guidepost 1.2.1 Agreement Patterns

The needed data on agreement patterns should be available in a court's automated docketing system or its closed case files. For intermediate appellate courts, either a random sample of at least 500 cases decided on the merits or an entire year's worth of resolutions should be chosen, depending on which set is most convenient for the court to access. For courts of last resort, the database should include all decided mandatory appeals and discretionary petitions for a given year. Data elements pertinent to both types of courts include the following:

[8] The importance of consensus and the negative aspects of dissensus is discussed elsewhere in the context of a state court of last resort. The discussion also provides ideas on how to measure dissensus and how to interpret it. See Charles H. Sheldon, "The Incidences and Structure of Dissensus on a State Supreme Court," eds., Cornwell W. Clayton and Howard Gillman, *Supreme Court Decision Making*. (Chicago: University of Chicago Press, 1999).

1. Docket number.
2. Type of jurisdiction (mandatory appeal v. discretionary petition).
3. Type of case (civil v. criminal v. administrative agency).
4. Date the notice of appeal or petition for review is filed (month, day, year).
5. Date the petition for review is granted, denied, or dismissed (month, day, year).
6. Date of resolution (month, day, year).
7. Degree of agreement (unanimous v. non-unanimous decision).
8. Number of judges concurring.
9. Number of judges dissenting.
10. Identity of concurring justices by designated numbers.
11. Identity of dissenting judges by designated numbers.

The analysis can focus on several questions. What is the expected percentage of non-unanimous decisions? Is the observed percentage of non-unanimous decisions more, less, or about the same as expected? Do non-unanimous decisions tend to be concentrated among particular types of cases? Do some judges tend to write concurring or dissenting opinions more frequently than other judges?

One possible performance benchmark is the comparison between a court's expectations and the actual rate of non-unanimous decisions. If the actual rate is less than the expected rate, this is a positive sign. If the actual rate is greater, a court should consider a review of its writing and circulation practices to determine whether some practices inadvertently are contributing to non-unanimous decisions.[9]

[9] The incidence of non-unanimous decisions has implications for other Standards. Specifically, non-unanimous decisions take longer to resolve than unanimous decisions. See Roger A. Hanson, *Time on Appeal*. (Williamsburg; National Center for State Courts, 1996). As a

A second benchmark is to compare a court's non-unanimous decision rate with the rates among other similarly situated courts. Cases with separate concurrences and dissents will be among the published opinions in most states. As a result, the non-unanimous decision rates among other courts can be calculated from an examination of cases in the reports for other states. In making these comparisons, a court should inquire into states that have reasonably similar publication rates.

One indication of positive performance is the extent to which a court has a rate of non-unanimous decisions that is less than the average rate for a group of other comparable state appellate courts. Another indication of positive performance is the rank-ordered position of a court's rate compared to the rates of other courts (e.g., a court's non-unanimous decision rate of five percent ranks lower than respective rates of seven, nine, and eleven percent for three other comparable states).

Standard 1.3 Error Correction

Appellate court systems should provide review sufficient to correct prejudicial errors made by lower tribunals.

Error correcting is a central function of appellate court systems. There is some literature on this topic, although most studies have focused on criminal appeals and the work of state intermediate appellate courts.[10] The few studies of courts of last

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result, poor performance on Standard 1.2 is likely to inhibit positive performance on Standard 2.4 Timeliness.

[10] For exceptions, see single court studies by Thomas W. Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeals," 82 *American Bar Foundation Research Journal* 1982; Thomas W. Davies, "Gresham's Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources," 6 *Justice System Journal* 1981; David Wasserman, *A Sword of the Accused: Representing Indigent Defendants on Appeal*. (New York: NYU Center for Research in Crime and Justice, 1988); and David Neubauer, "A Polychotomous Measure of Appellate Court Outcomes: The Case of Criminal Appeals," 16

resort also focus on criminal cases.[11] There is no practical reason to continue to follow this narrow focus on criminal cases because much of the needed data are common to an analysis of both criminal and civil of cases. Furthermore, error correction in civil cases is essential to the development of the law, although the exact pattern of modifications to trial court decisions may not be identical in civil and criminal appeals. In civil cases, there are likely to be more instances in which some modification, short of a complete reversal are made.[12] Yet, despite this situation, three interrelated Guideposts are proposed to measure error correction in both civil and criminal cases.

Guidepost 1.3.1 Measuring Error Correction

The information needed to address basic questions concerning the nature and extent of modifications includes particular data elements listed below on each individual case, including appeals and petitions, decided on the merits during the past year. For both civil and criminal cases, elements 1-3 and element 9 are essential. For criminal appeals, the value of the Guidepost will be enhanced to the extent that data on elements 4-8 are gathered, although an intensive case examination of the cases that are modified is a possible substitute. For civil appeals, the value of the Guidepost will be enhanced by information on elements 4, 5, 7, and 8.

Justice System Journal 1992. The only comparative study is by Joy A. Chapper, and Roger A. Hanson, *Understanding Reversible Error in Criminal Appeals*. (Williamsburg: National Center for State Courts, 1989).

[11] Note, "Courting Reversal: The Supervisory Role of State Supreme Courts," 87 *Yale Law Journal* 1978; and James W. Meeker, "Criminal Appeals Over the Last 100 Years," 22 *Criminology* 1984.

[12] The only study of error correction in civil appeals is an examination of three U.S. Courts of Appeal. See J. Woodford Howard, Jr., *Courts of Appeal in the Federal Judicial System: A Study of the Second, Fifth, and the District of Columbia Circuits*. Princeton: Princeton University Press, 1981.

1. Docket number.
2. Date of the filing of the notice of appeal (or the date that the petition for review is filed).
3. Date of resolution.
4. Type of the most serious criminal offense at conviction on appeal in criminal cases (e.g., homicide, other crimes against the person, burglary/theft, drug sale/possession/weapons, other types of felonies). Area of law on appeal in civil cases (e.g., tort, contract, property, family and probate, administrative agency).
5. Type of the underlying trial court proceeding (e.g., jury trial, bench trial, guilty plea in criminal cases'; jury trial, bench trial, motion in civil cases).
6. Type of legal representation for the criminal offender (e.g., public defender, assigned counsel, privately retained counsel, pro se).
7. Number of issues on appeal.
8. Types of issues on appeal in criminal cases (admission/exclusion of evidence; instructions; procedural or discretionary ruling; sufficiency of the evidence; merger of offenses, suppression of evidence, statements, or identification; ineffective assistance/waiver of counsel; other constitutional claims, jury selection; statutory interpretation or application; plea voluntariness; prosecutorial misconduct; excessive sentence; other type of sentencing issues). Types of issues on appeal in civil cases (admission/exclusion of evidence; instructions; procedural or discretionary ruling; sufficiency of the evidence; constitutional or statutory interpretation; jury selection).

9. Outcome of a court's decision
   Criminal cases:
   a. Trial court judgment is completely affirmed, although there may be harmless error.
   b. The defendant obtains some modification, although the conviction for the most serious offense is not necessarily disturbed. This category includes remands for resentencing and vacating convictions of lesser included offenses.
   c. A conviction is reversed and either the case is remanded for a new trial or all of the charges are dismissed.

   Civil cases:
   a. Trial court judgment is completely affirmed, although there may be harmless error.
   b. Some modification is made.
   c. The judgment is reversed and the case is remanded for a new trial.

What is the modification rate? What is the reversal rate? Do the outcomes vary by the type of the underlying trial court proceeding, type of criminal offense (or area of civil law), or type of issue? How frequently is each type of issue raised? Are some issues more likely than are other issues to be associated with some type of error?

Is the pattern of affirmances and modifications consistent with a court's expectations? Past research on criminal appeals suggests that modification rates in first-level appellate courts are approximately 20 percent, although the rates for courts of last resort may be somewhat higher than those of intermediate appellate courts.[13] How does a court compare to this pattern? Reversal rates in criminal appeals are generally two percent or less in first-level appellate courts.[14] How does a court compare

[13] Chapper and Hanson, "Understanding Reversible Error in Criminal Appeals," op. cit.
[14] Ibid.

to the pattern? Answers to these questions will suggest how closely a court adheres to patterns found elsewhere. Because there has been very little examination of error correction in civil cases, there are no established figures that parallel those in the criminal area. However, the modification and reversal rates among civil cases are likely to be higher than they are in criminal cases because issues in civil law tend to be somewhat less settled and more subject to technological and other changes in society. More importantly, a well-performing court will try to use this information to reduce error in both criminal and civil cases. To that end, Guideposts 1.3.2 and 1.3.3 are offered.

Guidepost 1.3.2 Assisting Trial Courts

The importance of the outcome of appeals to litigants, attorneys, policymakers, and the public calls for individual appellate courts to monitor their own performance for feedback purposes and to enhance their role in supervising the trial process. If one in every five criminal appeals is modified, there is room for improving trial court performance. Perhaps not every error can be averted, but there is evidence that an appreciable portion of the error is reducible.[15] An appellate court with the help of the state administrative office of the courts can begin an educational process by identifying where errors occur by type of issue, the surrounding case characteristics, and the jurisdiction where they occur. When a new statute is enacted, do all, some, or only a few trial courts experience appellate court reversals? Answers to these questions can be gained from the data assembled for Guidepost 1.3.1. However, the data need to be packaged for use by the appellate courts, the state administrative office of the courts, and the state's judicial educators in training programs.

[15] Observers also have contended that appellate courts should not only engage in error correction but link information on errors to efforts to reduce future errors. See J. Clark Kelso, "A Report on the California Appellate System," 45 *Hastings Law Journal* 1994.

Appellate courts and judicial educators need to place error correction/reduction on the annual state training agenda for trial courts. The exact substantive content of these programs is impossible to predict, but there are four general themes for appellate courts and judicial educators to consider.

1. Error is just as likely to be found in nontrial and posttrial proceedings. Educational programs should not limit their focus to trial proceedings, but should address nontrial matters, including probation violation hearings, plea bargains, and sentencing in criminal cases and posttrial motions in civil cases.
2. The relative frequency of error may not be strongly related to the underlying offense in criminal cases or the area of law in civil cases. As a result, there is no obvious scenario to target. Education should focus on the circumstances of the error itself rather than exclusively high-profile cases.
3. Error occurs in new areas of litigation; problems arise until a new law or procedure becomes settled. Because new areas of law are problematical, educational programs need to introduce trial court judges to new laws, discuss how other states have interpreted similar laws, and encourage the prompt preparation of pattern instructions when changes are made to the civil or criminal code.
4. Some error may appear to be the result of a lack of deliberation on the part of a judge. For example, the incidence of instructional error might be reduced by more careful assessment of the sufficiency of the evidence to justify an instruction on the defense theory. Similarly, sentencing errors might be reduced if a judge were to follow a more careful methodology in adhering to sentencing guidelines and law. Educational efforts, thus, should not overlook routine proceedings and the need to reinforce a trial judge's bench skills.

Appellate courts can benefit trial courts by conducting systematic inquiry along the lines of Guidepost 1.3.1. They also are in a position to engage in dialogue with trial courts on how errors can be averted. However, the participation of appellate court judges at state training programs for trial court judges should be one of cooperation and partnership. Certainly some issues will always cause problems because of the context in which they are raised. A classic example is when evidentiary questions are raised during the examination of witnesses. When the parties anticipate a difficult evidentiary ruling, they will ask for a ruling in limine; here a judge can deliberate before trial begins. Most of the time, however, evidentiary or testimonial problems emerge from the moment, the product of the flow of questioning. The judge cannot recess and research an issue. Hence, the appellate courts need to work with trial courts to reduce error while recognizing that not all error is preventable.

Guidepost 1.3.3 Assessing Educational Efforts

Are educational efforts successful in reducing error? Guidepost 1.3.3 is an approach to answering that question.

Basically, the same procedures suggested for Guideposts 1.3.1 and 1.3.2 should be replicated annually. The patterns likely will never be identical over time because new laws are enacted and interpreted every year at the state and federal levels. Nevertheless, many of the same circumstances that give rise to error will occur year after year unless there is some planned approach to alter them. Hence, an appellate court should work with the state administrative office of the courts to conduct consistent and systematic inquiry into the nature of reversible error on an annual basis.

While the overall modification rate may not change every year because of new laws, do areas targeted in the previous year's educational effort indicate reductions in error? Is there more statewide consistency in error patterns, especially in aspects of the trial process such as jury instructions and sentencing? Or do some counties continue to have higher error

rates? Each year educational programs will need to give emphasis to new laws and to areas of persistent error that do not seem to have been reduced to an acceptable level.

Standard 1.4 Extraordinary Functions of Appellate Court Systems

Appellate court systems should determine expeditiously those petitions for which no other adequate or speedy remedy exists, and should determine original proceedings as directed by law.

What types of applications for writs or other original proceedings are filed with a court? How expeditiously are they resolved? Does the timeliness of resolution vary by the nature of a court's review? Guidepost 1.4.1 offers an approach to answering these questions.

Guidepost 1.4.1 Timely Resolution of Applications for Writs and Other Original Proceedings

Applications and other original proceedings should be classified in a meaningful way. The following trichotomy should be applicable for many courts: (1) applications for writs of habeas corpus, (2) applications for all other types of writs, and (3) all other original proceedings. A court should collect the following data elements on each case.

1. Docket number.
2. Type of application (petition) or other original proceeding.
3. Date the application for a writ of habeas corpus, the application for any other writ, or any other original proceeding is filed.
4. Date resolved.
5. Nature of court's review.
   Granted full review or per curiam
   Overruled or dismissed

6. Outcome of full or per curiam review.
   Application granted
   Application denied

The analysis of the data on the applications consists of calculating the elapsed time between the date that the application was filed and the date it was resolved. This calculation should be performed for both categories of court review and the categories of case outcomes for each type of application or original proceeding. The calculations may be expressed in median and mean case processing times as well as by percentiles (e.g., 10th, 25th, 50th, 75th, 90th, and 95th).

Do applications and other original proceedings take a shorter time to resolve than mandatory appeals or discretionary petitions?[16] Do applications that are granted full review take a shorter time to resolve than mandatory appeals or discretionary petitions decided on a per curiam basis? Do applications that are overruled or dismissed take a shorter time to resolve than discretionary petitions that are denied or dismissed? Standard 1.4 suggests that the answers to these questions should be affirmative. If the time taken to resolve the applications is not substantially less, a court should examine the application or original proceedings that are taking the longest amount of time. What factors appear to be inhibiting expeditious resolution? Finally, a court can set its own time standards for the resolution of applications and original proceedings. Based on the data gathered from this Guidepost, a court may want to aim for resolving all applications and original proceedings within 60 or 90 days after they are filed. However, the exact numerical goal depends on what a court considers to be both realistic and desirable.

[16] Information on the timeliness of mandatory appeals and discretionary petitions is available to a court by following the Guideposts associated with Standard 2.4. Timeliness.

II. Promoting The Rule Of Law

Standard 2.1 Quality of the Judicial Process

Appellate court systems should ensure adequate consideration of each case and decisions based on legally relevant factors, thereby affording every litigant the full benefit of the judicial process.

An essential aspect of achieving and maintaining the quality of the judicial process is that all cases receive individual attention, as part of a multi-judge review.[17] However, neither due process nor equal protection requires that all cases receive the *same* time and the *same* attention. Under the real-world condition of limited resources, courts allocate time and attention in proportion to the amount that each case warrants. More complex cases warrant more time and attention than more routine cases.[18]

In response, virtually every appellate court has modified the traditional appellate process—of a complete record, fully written briefs, oral argument, and a detailed, signed, and published opinion—in some way for some of its cases. Some courts modify a particular step in the process (e.g., court decisions in routine cases might be a very brief opinion of only a paragraph or less). Many courts have taken the approach of either seeking waiver of or denying oral argument in routine cases.

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[17] The central importance that all cases receive individual attention in appellate courts has its parallel in trial courts. The Trial Court Performance Standards, for example, state that "Trial courts give individual attention to cases, deciding them without undue disparity among like cases and upon legally relevant factors. See Standard 3.3 Court Decisions and Actions, *Trial Court Performance Standards*.(Williamsburg: National Center for State Courts, 1992).

[18] Joy A. Chapper and Roger A. Hanson, "The Attorney Time Savings/Litigant Cost Savings Hypothesis: Does Time Equal Money?" 8 *Justice System Journal* 1983.

Finally, some courts have set up tracks for particular kinds of cases. Cases are screened, and if they meet particular criteria, they are placed on a special track or calendar for expedited handling.[19] The modifications are intended to balance quality and the need for efficiency. The question is, do the modifications achieve that goal? Or do judges and attorneys believe that modification results in a sacrifice in quality? The range of modifications (e.g., summary calendars, limited briefs, per curiam affirmances, orders without opinions) is extensive and well documented.[20] The question is, does a court's particular modification result in greater efficiency without a loss in quality? Guidepost 2.1.1 offers a two-step approach to addressing that question.

Guidepost 2.1.1 Rendering Quality in All Cases

A first step in assessing the quality of the judicial process is for a court to address four basic questions concerning its work.

[19] For examples of special expedited calendars, see Joy A. Chapper and Roger A. Hanson, "Expedited Procedures for Appellate Courts*:* Evidence from California's Third District Court of Appeal," 42 *Maryland Law Review* 1983; Charles Douglas, "Innovative Appellate Court Processing: New Hampshire's Experience with Summary Affirmance," 69 *Judicature* 1985; Thomas B. Marvell, "Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar," 75 *Judicature* 1991; Joy A. Chapper and Roger A. Hanson, "Managing the Criminal Appeals Process," 12 *State Court Journal* 1998; Roger A. Hanson, *Procedural Innovations for Appellate Courts.* (Williamsburg: National Center for State Courts, 1995).

[20] Stephen Wasby, "The Study of Appellate Court Administration: The State of Enterprise," 12 *Justice System Journal* 1987.

1. Are judges ultimately responsible for final decisions in every case?
2. Does a court have internal operating procedures consistent with this responsibility?
3. Are the procedures published?
4. Does a court follow these procedures?

Positive performance lies in affirmatives responses to each of the questions. Finally, the judges need to agree that they are following those procedures and need to review instances in which some judges believe that the prescribed procedures are not being followed.

A second step is a more research-oriented approach to addressing the issue of quality. It supplements the first approach, although it has its own limitations because the quality of the judicial process is a complex phenomenon that defies universal definition and common measurement. Virtually all measures of quality have focused on the nature of the process rather than the quality of the outcome. Moreover, most studies have measured quality of the process from an attitudinal perspective rather than objective indicators.[21] This Guidepost is in this tradition, but relies specifically on previous research on the quality of the process in criminal appeals.[22] When that approach is used in a study of modifications to the criminal appeals process, quality is measured by asking all current members of a court, all available senior judges, and a full range of attorneys who practice before a court the following question:

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[21] The only other measure of the quality of court processing is a study of nine state criminal trial courts. That study relies on the views of prosecutors and defense attorneys to measure quality. See Brian Ostrom and Roger Hanson, *Efficiency, Timeliness, and Quality*. (Williamsburg: National Center for State Courts, 1999). Other court-related research on quality, such as evaluations of alternative dispute resolution and the literature known as procedural fairness, also relies on subjective measures of quality.

[22] Roger A. Hanson and Joy A. Chapper, "Organizing the Criminal Appeals Process: The Views of Judges, Government Attorneys, and Defense Counsel," 72 *Judicature* 1989.

Based on your experience, how satisfied are you that cases handled under your court's modified process (or a special expedited calendar) receive the same quality of justice as cases on the regular calendar? Please indicate your degree of satisfaction on a scale of 1 to 5, where 1 equals very satisfied and 5 equals very dissatisfied. [Note: A court would insert the name that it gives to its modified procedure or the name it gives to its special expedited calendar.]

Not all participants will be satisfied on the quality issue. However, what is it about the modified procedure that shapes the participant's views on the degree of quality? Again, borrowing from past research, the following questions are suggested as possible standards of quality.[23]

1. To what extent do you agree or disagree that a modification or a special expedited calendar allows you to spend more time on complex cases? Please indicate your level of agreement on a scale of 1 to 5, where 1 equals agree strongly and 5 equals disagree strongly.

[23] Obviously, there are other possible standards of quality, but in previous research these four items proved to be more valid predictors of where participants stand on the issue of quality than other possible items. That is, if a respondent agrees that the modification or special calendar allows him or her to spend more time on complex cases, he or she is more likely to be satisfied that cases handled under the modification received the same quality of justice as cases that were not handled under the modification. If a respondent disagrees, then he or she is more likely to be dissatisfied with the quality of justice rendered to cases handled under the modification. For a more extensive set of possible standards of quality, see Joy A. Chapper and Roger A. Hanson, "Managing the Criminal Appeals Process," 12 *State Court Journal* 1988.

2. To what extent do you agree or disagree that a modification or a special expedited calendar creates the appearance of second-class justice?
3. To what extent do you agree or disagree that a modification or a special expedited calendar makes the outcome in your court a foregone conclusion once the case is placed on it?
4. To what extent do you agree or disagree that oral argument is often the only way in which judges are effectively informed of the facts and issues in the case?

The average scores for the measure of quality should be computed. Are all of the participants satisfied that quality is maintained under the special expedited calendar? That is, is the average score 2.5 or smaller? Do some individuals express greater satisfaction than others?

The scores of each of the potential standards then should be correlated with the scores on the question of quality for each of the subgroups. Do the correlations indicate that the four potential standards are strongly, moderately or weakly related?

If the correlations between quality and each standard are strong, this information indicates that the greater degree to which an individual in a subgroup considers this standard to be met, the greater is his or her satisfaction that all cases receive the same quality of justice. A court can look at the results and see if the following patterns emerge.

1. The greater the extent to which the participants agree that a modification or a special expedited calendar allows a court to spend more time on complex cases, the greater the extent to which they are satisfied that the quality of justice is the same for all cases. If this is the case, there should be a strong, positive correlation between item 1 and the quality measure.

2. The greater the extent to which the participants disagree with the idea that a modification or a special expedited calendar creates second-class justice, the greater the extent to which they are satisfied that all cases receive the same quality of justice. If this is the case, there should be a strong, negative correlation between item 2 and the quality measure.
3. The more the participants disagree that the special expedited calendar makes the outcome of a case placed on it a foregone conclusion, the greater the extent to which they are satisfied that all cases receive the same quality of justice. If this is the case, there should be a strong negative correlation between item 3 and the quality measure.
4. The greater the extent to which the participants *disagree* that oral argument is the only way for judges to be informed about a case, the greater the extent to which they are satisfied that all cases received the same quality of justice. If this is the case, there should be a strong, negative correlation between item 4 and the quality measure.

Unanimity among all of the participants is not likely. Some participants will be more satisfied with the quality of justice than others. Some participants will share different standards of quality than other participants. Yet, a well-performing court will know where differences lie and will have a more informed sense of what problems it needs to address to raise the level of quality and to form a greater consensus on how best to organize the appellate process.

Standard 2.2 Clarity of Decisions

All appellate court decisions should be clear, and written opinions should address the dispositive issues, state the holding, and articulate the reasons for the decision in each case.

As indicated in discussion to Guidepost 2.1.1, appellate courts have modified the appellate process because of the need for greater efficiency. One of the common ways is at the decision stage. Many courts do not provide a detailed, signed, and published opinion in every case. The question then becomes, what is the nature of a court's opinions? How closely does a court come to the goal prescribed in Standard 2.2 that there should be a written opinion in every case? Guidepost 2.2.1 offers an approach to addressing that question.

Guidepost 2.2.1 Written Decisions

Based on all cases resolved in a given year, how many cases did a court decide by some type of written opinion? The following is a suggested set of categories to classify the form of court decisions made on the merits.

1. Published Opinions—Detailed (i.e., more than one page or one word), signed, and published.
2. Per Curiam Opinions—The decisions might be published, but they are per curiam.
3. Memoranda Decisions—They provide a discussion of the issues, but are not as detailed as published opinions.
4. Summary Dispositions—Approximately one word, paragraph, or one page.[24]

[24] A rationale for summary dispositions is that they are an efficient way to resolve a case. They avoid the work that even a short written opinion to resolve a routine case might entail. However, there is an alternative type of opinion that might be just as efficient and provide a more complete explanation for a court's decision than what is available in a summary disposition. For example, the U.S. Court of Appeals for

To estimate how many decisions result in written opinions, a court would need to gather information on particular case characteristics on appeals and petitions. Specific data elements include:

1. Docket number.
2. Type of case.
3. Type of jurisdiction.
4. Method of resolution (decision on the merits, denied, dismissed).
5. Form of the decision.

What percentage of the decisions are either published, per curiam, or memoranda? Is this figure consistent for different types of cases?

What is a court's rationale for deciding cases with summary dispositions? Are these decisions reached only in routine cases? Are they only error-correcting cases? How does a court ensure that quality decisions are rendered in these cases? Basically, positive performance lies in a court's ability to answer these sorts of questions clearly and convincingly.

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the Sixth Circuit renders decisions orally in some routine cases where the correct decision is clear and well understood by the judges. In these cases, the judges have read the briefs and heard oral argument, but they inform the attorneys at oral argument of their decisions and read their opinion into the record. The attorneys benefit by receiving a prompt decision and are given specific reasons for the decision. This type of decision is recommended for consideration in lieu of a summary disposition.

Standard 2.3 Designation of Precedential Authority

Appellate court systems should designate as authority, which may be cited, those written decisions that develop, clarify, or unify the law.

Discussions concerning what decisions warrant publication and citation as precedential authority require some understanding of past and current trends in the percentage of cases that actually have resulted in publication. For appellate courts to say that their policies are appropriate, basic data on opinion-writing practices are needed. Guidepost 2.3.1 offers an approach to gathering the needed data.

Guidepost 2.3.1 Publication Rates

How many decisions result in a published opinion? Is the rate changing over time? Are there observable features associated with the publication rate?

The data needed to estimate the publication rate is information on individual appeals and petitions decided during the preceding year. How many decisions resulted in a detailed, signed, and published opinion versus one of the other forms of decisions? Specific data elements include:

1. Docket number.
2. Type of case.
3. Type of jurisdiction.
4. Date of resolution.
5. Group deciding case (en banc v. panel).
6. Author identity can be a designated number.
7. Form of decision:
   Detailed, signed, and published opinion
   Per curiam opinion
   Memoranda decision
   Summary disposition

The test of performance is whether the actual publication rate is consistent with a court's expectations and sense of what is desirable. Is the rate less than either what is expected or what is deemed desirable? Is the rate dependent on the author of the opinion (or the composition of the panel)? A measure of positive performance is that the publication rates do not vary substantially by author or by panel make-up.

Guidepost 2.3.2 Focus Group Examination of Precedential Authority

What are the essential characteristics of published opinions? Or are a court's criteria too general to permit widespread agreement on what should and should not be published? This Guidepost offers a four-step approach to answering these questions.

The approach is the use of a focus group. The focus group should consist of approximately ten experienced appellate practitioners, including a law school professor who might be the focus group leader. A court should randomly select 100 published opinions from cases decided in the past year. The authors of the published opinions should be asked to indicate which of the following criteria warranted publication.

1. The decision established a new rule of law, altered or modified an existing rule, or applied an established rule to a novel fact situation.
2. The case decided a legal issue of public interest.
3. The decision criticized existing laws.
4. The decision resolved an apparent conflict of authority.

Prior to the focus group session, the participants should be asked to complete the same exercise that the authors of the published opinions did. The focus group leader should begin the session by summarizing the level of agreement between the results of the two sets of exercises.

Positive performance would be determined by the extent to which the focus group agreed with the court's decisions to publish. Ninety percent agreement by two-thirds of the group would be very positive performance. The lower the percentage, the greater the cause for concern that a court is not following standard criteria.

The focus group leader should then pose other possible questions or discussion. Even if almost all of the authors and the focus group participants agreed that all of the opinions should be published, did they employ the same criteria? Do some criteria appear to be too easy to meet? Do some of the criteria appear to be too obscure or irrelevant to most cases?

The focus group leader should synthesize the themes raised during the focus group and communicate them to a court. What did the group see as the strengths and weaknesses of the criteria? What did they suggest as a future agenda for a court?

A court should be able to take the information flowing from the focus group, as well as the results from Guidepost 2.3.1. What reactions does a court have to the focus group's observations? Do a court's procedures and practices in the circulation of draft opinions appear to warrant review? Is there a need to redefine any of the criteria or to communicate the criteria in a better manner?

Standard 2.4 Timeliness

Appellate courts systems should resolve cases expeditiously.

The pace of appellate review is important because until and unless the process is completed, there is uncertainty concerning the validity of trial court decisions. Additionally, appellate court delay compounds problems that may have arisen as a result of trial court delay. Finally, until the appellate review process is finished, the development, clarity, and unity of the law remain uncertain. Hence, there are four Guideposts that address various facets of Standard 2.4. How timely is a court? How

closely are a court's time requirements fulfilled? What is the size and the age of a court's backlog? Are there reasons that account for a court's degree of timeliness?

Guidepost 2.4.1 Time to Resolution

How long does it take a court to make its decisions? Is the elapsed time longer for particular kinds of appeals and petitions? Guidepost 2.4.1 offers a four-step approach to addressing these and related questions.

The essential requirement in assessing timeliness is to know the relevant starting point, subsequent procedural events, and the point of final resolution for a random sample of 500 cases or a year's worth of resolutions, depending on whichever alternative is most convenient. Additionally, case characteristics that likely affect the pace of litigation are also important to know in advance. A suggested list appears below.

1. Docket number.
2. Type of case.
3. Type of jurisdiction.
4. Date the notice of appeal or the petition for review is filed.
5. Date the petition for review is granted, denied, or dismissed.
6. Date the record is submitted.
7. Date the last brief is submitted.
8. Date of oral argument/submission.
9. Date of resolution.
10. Method of resolution:
    Decided on the merits
    Denied
    Dismissed

11. Form of a court's opinion:
    Published opinions
    All other written opinions
    Summary dispositions

Every mandatory appeal decided in the previous year and every discretionary petition accepted for review in the previous year is a suitable database. All of these cases should be available and accessible in a court's record-keeping system. However, not every one of the 11 suggested data elements may be accessible. As a result, some courts will be able to perform more complex analyses than other courts.

The aim of the analysis is to examine how long it takes a court to resolve appeals from the date of their filing until resolution, by type of case. Possible comparisons based on the suggested data elements are as follows:

Case Processing Time from Filing to Resolution (in days)					
Mandatory Appeals					
Percentiles					
	25th	50th	75th	90th	95th
Civil					
Criminal					
Discretionary Petitions					
Civil					
Criminal					

There are at least four criteria that a court can use to assess case processing time. They include (1) The American Bar Association's Reference Models for State Intermediate Appellate Courts and for State Courts of Last Resort,[25] (2) the pace of 35 intermediate appellate courts and 23 courts of last resort for

[25] American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts*. (Chicago: American Bar Association, 1994).

cases resolved in 1993,[26] (3) a court's own time standards, and (4) a court's past performance.

Does a court meet any of the guidelines offered by the ABA? Is a court at least as expeditious as the average processing time for all of the intermediate appellate courts or all of the courts of last resort in *Time on Appeal*? Does a court meet its own expectations? Is a court making progress over time? Should delay reduction be a priority? Does a court have a delay reduction plan, program, or committee in place? In light of the data, what should be the focus of that plan, program or committee?

Guidepost 2.4.2 Time Required for Steps in the Process

How long does it take to complete the basic steps in the appellate process? Answers to this question may uncover if there is a bottleneck in the process. A four-step approach is offered as a way of gaining these answers.

The same data elements and set of cases used in Guidepost 2.4.1 can be used for Guidepost 2.4.2. Possible analyses based on the available data are as follows:

[26] Roger A. Hanson, *Time on Appeal*. Williamsburg: National Center for State Courts, 1996.

	Median Processing Time			
	Mandatory Appeals		Discretionary Petitions	
	Civil	Criminal	Civil	Criminal
NOA to Submission of Record				
Date Record Submitted to Close of Briefing				
Date Last Brief Filed to Argument/ Submission				
Date of Oral Argument/ Submission to Resolution				
NOA to Resolution				
Date Petition Filed to Petition Granted				
Date Petition Granted to Oral Argument/ Submission				
Date of Oral Argument/ Submission to Resolution				
Date Petition Filed to Resolution				

A court can compare itself to at least four criteria (1) the American Bar Association's suggested time frames for stages in the appellate process,[27] (2) median processing times of steps in the process for the state intermediate courts studied in *Time on Appeal*,[28] (3) a court's own time requirements and expectations, and (4) a court's past performance.

Two areas are of potential concern. One involves the question of what stage is taking the longest time to complete. If the decision stage is taking the longest, a court has a responsibility to correct the situation. Improvements in the pace of litigation rest in its own hands. A second concern is whether the record preparation and briefing times exceed a court's time standards because of the granting of extensions of time. If this situation exists, a court is confronted with the challenge of

[27] American Bar Association, op. cit.
[28] Hanson, *Time on Appeal,* op. cit.

working with the other participants. If the data suggest either potential concern is real, this information should be discussed by a court and put on the agenda of its delay reduction efforts.[29]

Guidepost 2.4.3 Size and Age of the Court Backlog

Every court has pending cases (i.e., cases awaiting completion of a step in the process). The question is, is the pending caseload simply a court's inventory or has a backlog been created? This Guidepost offers an approach to answering that question.

A court can select any month at random and ask the clerk of court to produce a list of pending appeals and petitions. Regardless of the volume of the caseload, a court should take three separate monthly samples over an 18 month period.

The essential data are the filing date, the current date, and the type of case for each case in the monthly sample. The objective of the analysis is to see how long the cases have been pending. A display of the results might look as follows:

Civil Cases

Age of Pending Cases	Number of Cases	Percentage of Pending Cases
0-3 months		
3-6 months		
6-9 months		
9-12 months		
12-18 months		
18-24 months		
over 24 months		
		100%

[29] A helpful guide to delay reduction is found in Rita N. Novak and Douglas K. Somerlot, *Delay on Appeal*: *A Process for Identifying Causes and Cures*. (Chicago: American Bar Association, 1990*).*

A court has a backlog if any of its cases have been pending beyond a particular time standard (e.g., one year). The percentage of cases in that age category indicates the size of the backlog. The average number of days those cases have been pending is the age of the backlog.

Does a court have a backlog? Is the backlog growing over time? Is the age of the pending caseload becoming older? Affirmative answers to these sorts of questions should alert a court to take corrective action.

Guidepost 2.4.4 Caseload Composition and Timeliness

Guidepost 2.4.4 uses the same data gathered for the three preceding Guideposts. However, in addition, more specific information is needed on the underlying trial court proceeding and the nature of the most serious offense at conviction on appeal in criminal cases. Are there some types of cases that take a longer time to resolve? Guidepost 2.4.4 is a framework to use in addressing that question.

A first step is to draw finer distinctions between cases that are finer than the traditional criminal versus civil appeal dichotomy. Past research suggests what factors explain why some cases take longer to resolve than others. However, for a court to replicate comparative research studies conducted by the National Center for State Courts or other organizations would require a complicated methodology and a very extensive database that are not likely to be within the capacity of most appellate courts. Nevertheless, a second-best strategy is for a court to focus on the leading "causes" of delay that will require the least amount of additional administrative time and cost to gather and that will produce interpretable and understandable results.[30] These determinants are the underlying trial court

[30] The full list of statistically significant determinants of why some cases take longer to resolve than others depends on the type of case (e.g., civil v. criminal) and on the type of court (e.g., intermediate appellate court v. court of last resort). However, the following list

proceedings in both civil and criminal cases and the severity of the most serious offense at conviction in criminal cases.

The aim of the analysis should be to determine if cases with particular characteristics not only take longer to resolve, but also slow down the process for other cases as well. These are the "tough cases." Based on past research,[31] courts are advised to see if the following sets of relationships emerge because if the percentage of tough cases increases, overall work time and appeal time will increase disportionately.

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includes leading data elements found in previous research to be of causal influence in explaining *why some cases take longer than others to resolve:* (1) length of the court's opinion (the longer the opinion, the longer the resolution time), (2) whether the opinion is published (cases with published opinions take longer), (3) method of resolution (cases decided on the merits take longer than those that are dismissed), (4) degree of agreement (unanimous decisions take a shorter time on appeal than non-unanimous decisions), (5) brief length (the longer the briefs, the longer the resolution time), and (6) number of substantive motions, (the greater number of motions, the longer the resolution time). See, for example, Joy A. Chapper and Roger A. Hanson, *Intermediate Appellate Courts*, op. cit., Roger A. Hanson, *Time on Appeal*, op. cit. The reasons *why some courts take longer to resolve cases* than others involves two basic factors: (1) the amount of judicial and legal staff resources (courts with more judges per case filings and more legal staff per judge tend to be more expeditious than others) and (2) caseload composition. See, for example, Roger A. Hanson, *Time on Appeal*, op. cit., Roger A. Hanson, "Resources: The Key to Appellate Court Timeliness," *Court Review*, 1999.

[31] Chapper and Hanson, *Intermediate Appellate Courts*, op. cit; Roger A. Hanson, Steven Hairston, and Brian J. Ostrom, "Time on Appeal: Beyond Conjecture," paper presented at the American Society of Criminology, Phoenix, Arizona, 1993.

Median Case Processing Time
(in days)
Criminal Cases

Homicide		Other Crimes Against the Person		All Other Offenses	
Trials	Nontrials	Trials	Nontrials	Trials	Nontrials
500	250	300	200	275	150

Civil Cases

Jury Trials	Bench Trials	Motions
400	350	250

In the hypothetical situation concerning criminal cases, trials take longer to resolve for all types of offenses, but the type of offense also is related to timeliness. Moreover, cases arising from jury trials and cases that involve homicide convictions take appreciably more time than any other category of cases. In fact, these cases consume a disproportionate amount of court resources and disproportionately influence a court's overall appeal time.

If the hypothetical results above actually occur, a court can focus attention on a particular set of cases and provide the legislative and executive branches with a specific rationale for why more judicial resources are needed. The toughness of a court's caseload, as represented by the percentage of cases arising from homicide convictions and jury trials, is an index of the need for court resources. Every increase in this index calls for more resources. This information should be of assistance to a court because it informs what cases demand judicial attention and why more resources may be needed. Without this information, a court is in the position of having to treat all cases equally and to base its rationale for resources on the overall caseload.

In a parallel manner, the type of underlying proceeding in civil cases is important to monitor. As the percentage of civil cases arising from jury trials increases, there is a need for more resources. Interestingly, the impact of the jury trial holds true across the different areas of civil law (e.g., tort, contract, real

property). Hence, a court need only measure and monitor the type of underlying trial court proceeding in civil cases.

III. Preserving The Public Trust

Standard 3.1 Accessibility

Appellate court systems should be procedurally, economically, and physically accessible to the public and to attorneys.

Do individuals with language, vision, hearing, and physical needs find it difficult to use the appellate process? This Guidepost offers a six-step approach to addressing that question.

Guidepost 3.1.1 Responsiveness to Individuals with Special Needs

The objective of this Guidepost is to determine if individuals with special needs are able to obtain case-related information and to attend court hearings as easily as individuals who have no disabilities. This Guidepost proposes a field test comparing the experiences of an experimental group (i.e., persons with disabilities) and the experiences of a comparison group (i.e., persons with no disabilities). This Guidepost suggests three possible types of disabilities with corresponding experiential and comparison groups. They are:

1. Hearing impairments.
2. Visual impairments.
3. Physical impairments (e.g., confinement to wheelchairs, use of walking aids).

A court, with the help of the state bar association, public service organizations, and community groups, should contact individuals to determine their willingness to participate in a field experiment. Five individuals with each type of disability should be paired with five individuals with no disabilities. Additionally, groups should be matched as closely as possible on basic demographic features (e.g., age, gender, and race).

Members of each group should be instructed to perform three basic tasks:

1. Telephone the clerk of court's office and indicate in advance that they will be coming to a court and that they have a particular disability.
2. Within two days of the telephone call, they should go to the clerk of court's office and request specific information on one closed case and one pending case.
3. Attend an oral argument hearing.

The volunteers should be asked to complete a questionnaire concerning their experiences. The items on the questionnaire may include the following:

1. From the time that you were in your automobile in front of the courthouse, how long did it take you to find a parking place?
2. Did you notice any designated places for persons with handicaps?
3. Were they available?
4. How long did it take you to reach the courthouse entrance?
5. Did you have any difficulty entering the courthouse?
6. Did anyone assist you?
7. If yes, please identify that person. _____
   _____
   _____
8. How long did it take you to reach the entrance to the clerk's office?
9. Did you have any difficulty entering the clerk's office?
10. Did anyone assist you?
11. If yes, please identify that person. _____
    _____
    _____
12. Did you have any difficulty approaching the counter?

13. How long was it before a deputy clerk approached you at the counter?
14. How long did it take you to obtain the information on the closed case?
15. How long did it take you to obtain the information on the pending case?
16. After you informed the clerk's office that you wished to attend the hearing, were you given instructions on where the courtroom was located?
17. Did anyone assist you in locating the courtroom?
18. How long did it take you to reach the courtroom?
19. Did you have difficulty entering the room?
20. Did anyone assist you?
21. If yes, please identify that person._____
22. Did you have any difficulty in finding a place to sit in the room?
23. Did anyone assist you?
24. If yes, please identify that person._____
25. Did anyone assist you in leaving the courthouse when the hearing was completed?

The responses to these questions should reveal if individuals with all, some, or none of the designated impairments spent more time locating desired information or courtrooms than individuals with no disabilities. Was the difference, if any, only a matter of a few minutes? Or did persons with disabilities spend two, three, or four times as much time in gaining access to information or court proceedings? Were the persons with handicaps more likely to experience difficulties in entering the courthouse, the clerk's office, and courtrooms? Finally, the time and effort spent by the nondisabled individuals should be of interest to the court. Does everyone appear to spend too much time obtaining desired information or locating courtrooms?

A well-performing court will seek to minimize the extra time and the inconveniences that persons with handicaps may

encounter. Does a court believe that it is in compliance with the American with Disabilities Act (ADA)? Has a court every conducted a self-evaluation as part of its obligation under the ADA? Does it have a plan to implement the ADA requirements? What areas uncovered by Guidepost 3.1.1 should be given priority by a court?

Guidepost 3.1.2 Minimizing Court Costs

Is a court imposing unnecessary costs on litigants? This Guidepost offers an approach to addressing that question.

A first step is to develop a catalogue of court requirements that the litigant must meet at each step in the appellate process. A suggested list is as follows:

Event	Amount of Fee	Number of Copies Required
Filing the notice of appeal		
Record preparation		
Transcript preparation		
Docketing		
Briefing		
Motions		

A second step is to view the information above in light of several key questions.

1. Does a court impose separate fees for filing the notice of appeal or the petition for review, making photocopies of the designated record, and docketing? If so, does this encourage litigants to file an appeal because the fee for filing notice of appeal is low, only to abandon the case when they find out that their photocopying bill may be $500-$1,000? And if they abandon the case, is the trial court stuck with $500 to $1,000 worth of fees for photocopying?

Should litigants be told up front what the total court cost of a case will be?

2. Does a court impose a fee for filing motions? Is the fee easy to collect? Or is collection a problem? If the movant's motion is rejected, is the respondent able to recover his or her fee?
3. How many copies of the briefs are required? If the case is to be decided by a panel, why are there more copies provided than judges on the panel? In the event that the case is heard en banc, could not extra copies be made at that time?
4. How many copies of the record are required? Why are multiple copies required? Is it not feasible for the judges assigned to the case to share a copy? Is it necessary to provide copies for a court library or archives?
5. How do the practices in a court compare with those in adjoining states?[32] Are their fees higher, lower, or about the same? Are their requirements concerning the number of copies of briefs and records similar or different?
6. Does a court provide levels of relief for litigants who have different levels of resources? Are all fees waived for the most acutely indigent, while some fees are waived for those litigants who have some resources?

By addressing questions like these, a court should have a clearer sense of whether its fee structure and other requirements are inhibiting access.

[32] Some information on court fees is available in Carol R. Flango, *Appellate Court Procedures*. (Williamsburg: National Center for State Courts, 1998).

Guidepost 3.1.3 Comprehension of the Legal Process and Dismissals

Are some litigants failing to comprehend court procedures and, as a result, having their cases dismissed? Guidepost 3.1.3 offers an approach to answering that question.

One possible way to determine whether the appellate process is accessible, but not abused, is to examine cases dismissed during the past year. The following data elements are needed on all cases resolved during the previous year.

1. Docket number.
2. Type of case.
3. Type of jurisdiction.
4. Date case filed.
5. Date case resolved.
6. Method of resolution.
7. Type of representation (attorney v. pro se).

Are some areas of law (e.g., administrative agency cases) experiencing a higher rate of dismissal? If so, how long after filing? Is the rate of dismissal higher or lower among pro se litigants in all or only in some areas of law? If the rate of dismissal is higher for pro se litigants than those with attorney representation, a court might want to look at the pro se cases more intensively.

What exactly are the causes of the dismissals? Have the pro se litigants failed to submit affidavits of indigence? Or are their briefs improperly formatted? The answers to those questions might help a court ascertain whether the dismissals are occurring because of lack of comprehension or because of frivolousness. If there appears to be a problem of comprehension, a court can make a good-faith effort to make some procedural requirements less complicated and to communicate the requirements more clearly.

On the other hand, a court might consider the imposition of costs on those litigants who are repeatedly filing frivolous or spurious claims. A well-performing court will know the underlying causes of dismissals and will take action to make the process more comprehensible, when appropriate, and to deter frivolousness, when appropriate.

Standard 3.2 Public Access to Decisions

Appellate court systems should facilitate access to their decisions.

How difficult is it for a litigant or an attorney to obtain a copy of a court decision? The following Guidepost offers a strategy to address that question.

Guidepost 3.2.1 Retrieval of Decisions

A first step is to ask individuals to participate in a field test to determine the methods used, the time involved, and the ease of obtaining copies of published and unpublished court decisions. A random selection of litigants and attorneys in civil cases resolved during the past year should be contacted and asked to participate in a field test. The random selection will ensure a representative mixture of participants by status, area of law, and type of legal practice.

Each participant should be given a list of three cases decided in the past year that identifies the docket number and the caption in each case. The participants should also be told if the cases are published or unpublished. They should be instructed to retrieve these cases and record the holding in each case. Finally, the participants should be told to obtain the information on a designated day (e.g., five individuals are assigned January 19, five individuals are assigned on February 1, and so on).

After the participant's designated day has passed, he or she should be sent a short questionnaire to complete. The items on the questionnaire will apply to each case. They are as follows:

1. Did you locate the case?
2. What was the holding?
3. Where did you retrieve the case?
   At the courthouse
   At an office library
   At a public library
4. How much time did you spend locating the case?
5. By what method?
   Published report
   Electronically
   Case file
6. Did anyone else assist you in the retrieval process?
   If so, please identify that person.

Are attorneys more successful than litigants in accessing decisions? Does their greater degree of success hold true for both published and nonpublished decisions? Does success depend on the method of retrieval used? Is the amount of time required to locate decisions, by type of opinion, attorneys versus litigants, or method of retrieval significant?

Is the time and cost of accessing decisions acceptable to a court? Are the disparities among litigants and attorneys acceptable? What does a court need to do to correct any disparity or unacceptable amount of time and cost? For example, should it provide access to all decisions by placing them on the bar association's web site?

Standard 3.3 Public Education and Information

Appellate court systems should inform the public of their operations and activities.

How effective is a court in learning what the public excepts about the appellate court system? So that it can best inform of what the court is doing. Without knowledge of the public's expectations the court might communicate information that is meaningless and irrelevant to the public. Guidepost 3.3.1 offers a three-step approach to answering that question.

Guidepost 3.3.1 Survey of the Public's Beliefs about the Court

The purpose of this survey is to determine what different sectors of the public expect of a court. Do some sectors have different expectations than others? Hence, the first step is to identify pools of potential respondents. The following five groups are suggested:

1. A random sample of 50 attorneys who handled an appeal in the past year.
2. A random sample of 50 attorneys who are members of the state bar association.
3. A random sample of 50 litigants who had an appeal resolved in the past year.
4. A random sample of 50 litigants who had a case resolved in the largest trial court in the appellate court's jurisdiction in the past year.
5. A random sample of the membership of a public service organization (e.g., League of Women Voters).

All of these groups have some reason to know about the appellate court system. They are users or potential users and are likely to have some expectations about a court's performance.

The questionnaire should be concise and related to potential expectations about a court's functions and its performance. The following items are suggested.

1. How much should it cost to file an appeal?
   a. $400 b. $700c. $5,000 d. don't know
2. How long should it take, on average, for a court to reach a decision in a civil case?
   a. 6 months b. 12 months c. 18 months d. don't know
3. How long should it take, on average, for a court to reach decision in a criminal case?
   a. 6 months b. 12 months c. 18 months d. don't know
4. How long should it take, on average, for a court to reach a decision in a family-related case (e.g., martial dissolution, child custody, child support)?
   a. 6 months b. 12 months c. 18 months d. don't know
5. Appeals fulfill a number of functions in the criminal justice process. Here is a list of potential functions. Please indicate the importance of each function on a scale of 1 to 5, where 1 means very important and 5 means very unimportant.
   a. ensure uniformity in how cases are handled at the trial level
   b. correct lower-court errors
   c. protect constitutional rights
   d. clarify the laws
6. Would you like appellate courts to communicate more information about their activities to you?
7. How would you like to receive that information?
8. Where do you currently get most of your information concerning appellate courts?
9. Would you like more assistance from a lawyer in deciding whether to appeal case?
10. Would you like more information on which lawyers are experienced in handling appeals?

11. Would you like more information on the decisions that the courts makes each year?

From answers to these questions, there should be a wealth of implications for what sort of information does a court need to communicate to enhance public understanding. Caseload information? Information on procedures? Membership on a court? What is the best way to fill the information needs? Media coverage? Court publications? A law-related education program? Finally, does any sector of the public understand the role of a court? Do any members of the public that share the same view that members of a court do?

Standard 3.4 Regulation of the Bench and Bar

Appellate court systems should ensure the highest professional conduct of both the bench and the bar.

How does the bench and bar expect from an appellate court system to curb misconduct? There is one Guidepost that addresses this question.

Guidepost 3.4.1 Survey of the Bench and Bar

The purpose of the survey is to gain a sense of what judges and attorneys believe the court is doing to maintain ethical conduct and what they think a court should do to improve performance.

A brief questionnaire may be sent to a random sample of the state's bench and bar. Questions include the following:

1. How many cases of misconduct are filed each year against attorneys?
2. How many cases of misconduct are filed each year against judges?
3. What percentage of the attorney disciplinary cases are appealed?
4. What do you believe is the most important reason why the misconduct occurs?

a. Too many inexperienced counsel
b. Too many attorneys with a hired-gun mentality
c. Profession is too competitive
d. Ethical training is perfunctory
e. Failure to impose sufficiently severe sanctions when needed.

5. Do you believe that the problem with attorneys is more a matter of a lack of civility than a breach of ethical conduct?
6. Do you believe that the appellate court system is adequately promoting civility?
7. Do you believe that the appellate court system is adequately upholding the highest standards of ethical conduct?

A court, in cooperation with the board of professional responsibility, should obtain information on bench and lawyer misconduct cases for each of the previous three years. The desired data are:

1. The number of misconduct cases.
2. The number of cases closed with no sanctions.
3. The relative frequency of different type of sanctions (e.g., admonition, reprimand, censure, temporary disbarment, permanent disbarment).
4. The number of exceptions to the board's decisions.
5. The number of appeals filed in an appellate court.
6. The relative frequency of disciplinary appeals decided in favor of the attorney.

How accurate are the perceptions of the bench and bar on the volume of misconduct charges, appeal rates, and the number of individuals severely sanctioned? Is the total number of misconduct cases decreasing or staying the same, relative to the size of the bar? Is the severity of the sanctions increasing over time? Are the outcomes of disciplinary appeals changing over time?

Is there a problem of increasing misconduct, either real or perceived? Or is there a perceived problem of lack of civility? Responses by an appellate court system depend on the nature of the problem. If there is a lack of civility, a court may wish to consider increasing its supervisory role at bar and judicial conferences. If misconduct is the problem, then a court may wish to reexamine the work of the board of professional responsibility and its own decisions.

IV. Using Public Resources Efficiently

Standard 4.1 Resources

Appellate court systems should seek and must obtain sufficient resources from the legislative and executive branches to fulfill their responsibilities.

How can an appellate court determine the level of resources required to process its caseload? Three interrelated Guideposts are suggested to address that question.

The Guideposts lay out a method of measuring the resource needs associated with the variety of cases being handled by a court. Resource sufficiency is determined by taking differences in the *complexity* of appeals and petitions into account. Complexity is the basis for building a set of "appeal weights" that are derived from the amount of judicial and staff time needed to handle a particular type of case from filing to resolution. The weights can then be applied to all major types of cases handled by a court.

Guideline 5 of *Assessing the Need for Judges and Court Support Staff* states that the "best direct measure" of the demand for court services is the number of weighted case filings.[33] Weighted caseload measures have several advantages over other methods for assessing workload. First, the weighted caseload approach takes into account the composition of cases rather than simply the total number of cases. Merely summing the total number of cases filed will not indicate the amount of judicial and court staff work *time* it will take to resolve that caseload. In the absence of explicit case weights, *all* cases, whether civil or criminal, are counted equally. Or in other words, they are all given a weight of 1.

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[33] Victor Flango and Brian Ostrom, *Assessing the Need for Judges and Court Support Staff*. Williamsburg: The National Center for State Courts, 1996.

If the differences in work are not assessed, 100 single-issue, criminal appeals are deemed equivalent to 100 three-issue, utility rate appeals. Yet, a multiple issue utility rate appeal likely will require more time. The unanswered question is, how much more? And how will that time compare to 100 workers' compensation appeals, 100 driving under influence appeals, or 100 domestic relations appeals? Because unweighted appeals are not tied to workload, they offer only minimal guidance for estimating resource needs.

A second advantage of the weighted caseload approach is that it recognizes that each case consists of multiple procedural events and may be decided in a variety of ways . For example, different cases may require taking different steps in the appellate process:

Filing of the notice of appeal
Filing a docketing statement (or a prebriefing settlement conference statement, prebriefing memoranda, and so forth)
Submission of the record
Docketing
Submission of briefs
Oral argument
Conferencing
Decision
Rehearing
Filing of a petition for review and a subsequent respondent's brief
Initial review of the petition
Oral argument
Conferencing
Decision

A weighted caseload study for appellate courts begins by establishing the *possible or potential* steps for each type of appeal. Once that is accomplished, the nature of the decision also must be categorized to allow for the varying degree of effort

typically associated with different ways in which cases are resolved:

Detailed, signed, and published opinion
Other type of written opinion
Summary disposition
Denial (discretionary petitions)
Dismissal

The third advantage of the weighted caseload approach offers more help in knowing how to apportion workload requirements among judges, staff attorneys, and law clerks for various types of cases. A civil case requiring a detailed, signed, and published opinion typically will require more judge time than a criminal case resolved by a per curiam affirmance. Yet, how much more? How much staff attorney time is needed for different types of cases?

The process of weighting appeals is a method for measuring the amount of court time spent on each major type of case. The basic procedure is outlined below:[34]

1. Determine the current extent of appellate court resources.
2. Calculate time available to judges, staff attorneys, and law clerks.
3. Select the types of cases to be weighted and analysis of caseload composition.
4. Analyze the volume and trend of the appellate caseload.
5. Move from caseload to workload—create the "appeal weight."
6. Verify the appeal weights.
7. Examine the efficiency of the appellate process.
8. Initiate a procedure to keep the weights up to date.

[34] For a complete discussion of the case weighting procedure in the trial courts, please see Flango and Ostrom, op. cit.

The Guideposts discussed below are designed to make extensive use of existing data sources and to produce a set of appeal weights that are feasible to update.

Guidepost 4.1.1 The Quantitative Analysis

The number of judges, staff attorneys, and law clerks working in a court needs to be specified and the duties and responsibilities of the judges and the different groups of attorneys and clerk's office staff clarified. In some courts, for example, the primary responsibility of the staff attorney is to screen incoming cases, identify those cases considered to be routine, and draft memoranda opinions for routine cases. A law clerk may be used almost exclusively to conduct research on more complex cases under the guidance of a particular judge, who is assigned to write the opinion. At the outset, it also must be decided whether the full range of court support staff (e.g., clerk's office staff and secretarial support) will be included in the study.

The completion of a weighted caseload system requires calculating the total amount of *judicial time available* each year (including judges, central staff attorneys, and law clerks)—"the judge year"—and how time is typically spent (e.g. screening cases, conducting research, conferencing, writing opinions)—"the judge day." The total amount of time required to process the anticipated caseload is then compared to the amount of time available from the individuals who will do the work.

The calculation of available judge time also must include work not directly related to deciding specific cases, such as attending education and training programs, participating in task forces, and speaking at meetings and conferences. Such activities enable an individual to remain abreast of developments in the law. Work that is more administrative in nature also must be factored into the workday. Likewise time necessary to read correspondence, educate students and members of civic organizations, and so forth must be taken into account.

The next step in assessing appellate workload is to determine what specific types of cases are counted and tracked in a court and whether reliable filing and disposition data are available for each type. Information should be gathered on civil, criminal, and administrative agency cases as well as original proceedings. Frequently, the necessary set of case information is collected and reported in the annual report. The weighting will have greater credibility if the filing data includes only those cases resolved by a court decision on the merits, excluding cases that are settled, abandoned, or withdrawn. The data also will be strengthened if they are compiled as a trend over an eight to ten year time period. A database is then established that describes the composition of the appellate caseload.

This database will allow a careful analysis of caseload composition and how it is changing over time. For example, what has been the trend in civil petitions in a state's court of last resort? If an intermediate appellate court is structured into regional districts, how has the growth in criminal appeals varied among the individual districts?

The analysis also should examine:

1. Filings per judge and per legal staff
2. Clearance rates
3. The number of briefed appeals that are pending
4. Time to disposition

Two other general types of analyses also may be valuable. First, examing in the historical trend of case filings in an appellate court allows analysts to make some basic inferences about probable future change in case filings levels. Past filing levels can provide an important source of information for forecasting the future work of a court. The accuracy of estimates based on past filing trends likely will reflect the extent to which caseloads have changed fairly consistently over time and whether the factors that have influenced caseload growth in the past will continue to affect filings in the future. Ideally, requests for additional resources should be based on expected future

workload to allow for the delay between the timing of the request and the appropriation.

A second type of analysis involves linking the emergence of new areas of law, past changes in court rules, or procedural changes adopted by a court to the trend in appellate filings as a means to explain court performance. For example, in the California Courts of Appeal, parties are encouraged to seek review of orders terminating parental rights by extraordinary writ rather than appeal.[35] This procedure has accelerated the resolution of these matters, leading to an increasing inventory of pending appeals and additional stress on existing resources. As another example, a procedural innovation (e.g., settlement conference) may be adopted by some but not all intermediate appellate courts in a regional district state. This situation provides an opportunity to gauge the potential impact of the innovation on court performance if it is adopted throughout the state.

The caseload analysis suggested above illuminates some aspects of appellate court performance. However, the rationale for moving budgetary decisions from the traditional focus on court caseload to court workload is an acknowledgment of case complexity. The challenge facing appellate courts is to develop objective measures of judicial and staff work required to resolve the mix of cases entering the court and then to use that information to allocate limited judicial resources.

There are two options for determining the hours of work attached to appellate caseload: (a) an approach that draws on judicial or staff "expert opinion" to estimate workload and (b) a longer-term, more intensive time-study approach that directly *measures* judicial workload. Explicit knowledge of workload is important because it helps ensure that judges have the time necessary to handle their caseload reasonably and appropriately.

[35] California Rules of Court, Rule 39.1A.

Once available judge time has been determined and caseload composition has been established, the next step is to calculate the amount of time each type of case requires. That is, how much *work* does the *caseload* require? Time information is most difficult to obtain and must either be estimated or measured directly.

Option 1. Delphi. The first option uses appellate judges, attorneys, and legal staff to *estimate* the amount of time required to handle each type of appellate case. At a minimum, cases need to be separated into civil cases, criminal cases, administrative agency cases, and original proceedings. Additionally, criminal cases should be separated into those that involve sentencing issues and those that do not. The Delphi technique was developed to allow judges to estimate the amount of time various case activities take, without conducting an actual time study. Estimates are tabulated, and averages (and ranges) are calculated and returned to each judge with a request to adjust these original estimates in light of the new information. This technique bypasses the need to measure how much time judges actually spend on each type of case. A potential limitation, of course, is that the judges could reach consensus on the times required for court activity, but the times still might be inaccurate.

Option 2. Self Reports. Judges (or legal staff) are asked to report on judicial activity, and a direct measure of the time spent on cases is generated. Activities both on the bench and in chambers are included. Self-reports are expensive, however, and intrude on the time judges and staff have during the workday. Judges also may resist "accounting" for their time and may be concerned that the time data might be used improperly. In addition, self-reports require a substantial length of study time to compile the required data. This approach does provide actual measures of judge time and, consequently, will produce the most accurate case weights.

The end result of either technique is an estimate or measure of the judge time necessary to handle the different types of cases processed in a court—the "appeal weight." Estimating

the number of judges needed to process all cases is derived by multiplying case filings for each type of case by its weight.

The most straightforward way to verify the weights is to multiply them by the number of cases filed and compare the result to the amount of time available for case processing. The crucial question is, could all of the cases filed and resolved last year have been processed according to the weights assigned?

Guidepost 4.1.2 The Qualitative Analysis

No statistical approach can be expected to account fully for the work habits and styles of individual judges. Quantitative analysis produces estimates of resource need based on the *average* amount of time taken to complete specific activities by all judges on the court, their central staff attorneys, and law clerks. Some judges, for example, may rely on a law clerk or a central staff attorney to review the record, while other judges may review the record with little or no assistance. Because different judges on the same bench may use different practices, determining the typical amount of time needed to complete a particular activity will require considering the contribution of *all* participants. For example, assessing the work involved in determining whether a discretionary petition should be granted full review will require considering the contribution of judges, central staff attorneys, and law clerks.

The quantitative criteria suggested above will provide an estimate of how much time appellate courts need to process their caseload *using existing case processing practices and procedures*. This stage of the study is designed to assess the strengths and weaknesses of a court's current caseflow management activities, policies, and procedures. This information will help a court assess whether it is managing its business effectively. It also addresses the costs and benefits of alternative practices and procedures. How much judicial time is saved by limiting oral argument? What are the consequences of these limitations on the quality of judicial review?

A *qualitative* assessment should complement the analysis outlined above in the following areas:

1. Determine whether the judges, staff attorneys, law clerks, and the clerk of court believe that they need additional staff resources through a systematic procedure to solicit their views. Input also should be sought from members of the bar. A procedure should be established to obtain this input in writing.
2. Examine a court's organization to ensure that the court is structured and managed to make the most effective use of the additional resources. Review the possibility of experimenting with alternative procedures (e.g., special expedited calendars).
3. Explore options that will address concern over judicial workload without increasing the number of permanent, full-time judges, such as expanding the role of central staff attorneys and law clerks for certain types of procedures.
4. Keep in mind that judicial productivity and, hence, the need for new judges also depend on the effectiveness of court staff. Without the proper type and level of support, judges may be performing some activities that may be delegated to qualified staff.

Guidepost 4.1.3 Updating and Adjusting Case Weights

Weights must be adjusted and updated periodically. Otherwise, judges and legal staff might contend that the weights do not represent their workloads accurately. Frequent adjustment is expensive; therefore, it should be based upon readily available data to the extent possible. Moreover, the differences between weighted and unweighted case filings should be compared. If the differences are slight, perhaps specific weights are not required for some case types.

Standard 4.2 Case Management, Efficiency, and Productivity

Appellate court systems should manage their caseload effectively and use available resources efficiently and productively.

Are courts able to keep up with the incoming number of cases? Guidepost 4.2.1 offers an approach to answering that question. Guidepost 4.2.2 offers an approach to addressing the related question: Is a court able to differentiate cases efficiently?

Guidepost 4.2.1 Clearance Rates

The clearance rate is the number of cases resolved divided by the number of cases filed in the same year, multiplied by 100. For example, if a court receives 500 cases in a given year and resolves of 400 cases that same year, the clearance rate is 400/500 x 100 or 80 percent. The cases resolved were not necessarily filed that same year, but the clearance rate has a reasonable ease of calculation and is a useful measure of the responsiveness of a court to the demand for services. If a court is keeping up with the incoming caseload, the clearance rate should be close to 100 percent.

A court has three criteria to use in assessing its performance: (1) the average clearance rates for courts of last resort and intermediate appellate courts as reported in the annual publication of the NCSC's Court Statistic Project;[36] (2) a court's past performance, if available; and (3) a court's own standards, illustrated below.

How well is a court doing compared to the national average? Is a court's performance becoming better, worse, or remaining the same over time? Finally, a court might judge its

[36] See, for example, Brian Ostrom and Neal Kauder, eds., *Examining the Work of State Courts, 1997*. Williamsburg: National Center for State Courts, 1998.

performance by comparing itself to its own definition of excellent, good, fair, or weak performance. For example, excellent performance is a clearance rate of 100 percent or more. Good performance is 95 to 99 percent. Fair performance is 90 to 94 percent, and poor performance is 89 percent or less.

The clearance rate may be used in two ways. First, the rate can be used as a measure of productivity. How does a court's productivity compare to the productivity of other courts, to its past performance, or to its own standard? Second, the clearance rate is a springboard for asking other questions. If the rate is less than 100 percent, lower than the average rate of other courts, or lower than what it considers desirable, what factors contribute to this situation? Has a court experienced an increasing number of cases filed each year while remaining static in the amount of court resources? Do other courts with higher rates have fewer cases filed per judge (i.e., more resources)? If the rate is 100 percent or more, is this the result of a backlog-reduction effect? Has the number of cases filed each year either remained constant or actually decreased? Finally, a court can apply the clearance rate to both mandatory and discretionary appeals. The rate also is applicable to different areas of civil law and different criminal offenses. Is the clearance rate uniform across various types of cases? Or is productivity significantly greater for some types of cases than for others?

Guidepost 4.2.2 Screening and Case Differentiation

Virtually every appellate court engages in some form of tracking or case differentiation. Different kinds of cases are handled under different procedures. Cases are examined early in the process for their degree of complexity. Those cases that are deemed to be less complex might be directed to a special procedure to resolve the case quickly (e.g., civil case settlement conference). Less complex cases also may be handled under some modification of full appellate review (e.g., a non-argument calendar rather oral argument). In fact, some courts simultaneously modify the several steps in the process to create what is called a special expedited calendar. It is important to

examine both limited and major types of modifications in assessing performance.

Whether a court has made only a limited modification in the appellate process (e.g., use of per curiam affirmances) or established a special expedited calendar, the objectives of both types of modifications are to reduce the amount of time that a court spends on routine cases and to permit a court to spend more time on complex cases. If the screening and case differentiation work, the processing times associated with the two types of cases should be different and shorter for those handled under either type of modification.

The needed data are the same as those gathered in Guidepost 2.4.1, Time to Resolution. To use this Guidepost, a court would also have to measure the cases in terms of whether they have been handled under a modified procedure (or placed on the special expedited calendar) or handled in the traditional manner (or placed on the regular calendar).

A special expedited calendar combines several modified procedures (e.g., limited briefs, no argument, and a short, nonpublished opinion versus fully written briefs, oral argument, and a published opinion). For reference to illustrative special expedited calendars, see footnote 15 in the discussion of Guidepost 2.1.1.

The average lapsed time from the filing of the notice of appeal or petition for review to resolution should be calculated for each method of handling cases. Additionally, the average time consumed for each stage in the appeal process should be calculated for each method.

Positive performance is achieved if the time to resolve cases handled under a modified procedure (or a special expedited calendar) is shorter than the time to resolve cases handled in the traditional manner (or placed on the regular calendar). Is the difference as expected? It is neither obvious nor automatic that case differentiation will result in shorter processing times. If

cases are not screened correctly, some complex cases may be unintentionally handled under a modified procedure on a special expedited calendar. This situation may produce much longer processing times than expected. Some cases may be transferred from a special calendar back to the regular calendar. The processing times for such cases should be attributed to the time of the special calendar.

There are two additional ways of assessing performance that are appropriate for special expedited calendars. The first way is to focus on specific steps in the process that are intended to be affected directly by the use of the special calendar. For example, is the decision time shorter for cases that do not involve a published opinion? Presumably, such a result is expected. Does it, in fact, occur? On the other hand, while a no-argument calendar may reduce the overall time to resolve cases, does it affect the time from the close of briefing to argument/submission? It could be argued that whether cases are argued or submitted on the briefs alone should have no effect on this step. Is that the case? Answers to these questions will help a court assess its performance in terms of intended and unintended effects.

A second way of assessing performance is to examine the range of processing times associated with the two calendars. Positive performance is indicated by a much narrower range of processing times under the special expedited calendar than under the regular calendar. Not only is the average time shorter under the expedited calendar, but the difference between the slower (e.g., 25th percentile) and the faster case processing times (e.g., 75th percentile) should be much less than it is for the cases on the regular calendar. The reason is that the screening process should have placed on the special expedited calendar a group of cases that resemble one another more closely than cases than were placed on the regular calendar.

Standard 4.3 Assistance to Trial Courts

Appellate court systems should develop methods for improving aspects of trial court performance that affect the appellate judicial process.

Appellate courts should work and cooperate with trial courts whenever possible. A good example is described in Guidepost 1.3.2. However, there are other areas in which appellate courts can facilitate the work of trial courts. An example is provided below.

Guidepost 4.3.1 Facilitating the Work of Trial Courts

To enhance the ability of trial courts to produce transcripts in a timely manner, the California Court of Appeal in San Francisco, has designated trial court liaisons to maintain communication and supervision in the preparation of transcripts of appeals in criminal cases. The liaison can assist trial court personnel about the procedural requirements for preparing cases on appeal and alerting the appellate court to systemic problems (e.g., shortages of reporters) that receive major corrections. Appellate courts that require a large number of appeals from several trial courts might find this technique especially useful in smoothing out problems because it establishes a single contact person for matters concerning record and transcript preparation in each location. (For further information on this tool, see Novak and Somerlot, op. cit. pp. 100-01).

Appendix 1

Core Data Elements

Multiple Guideposts rely on a core set of 24 data elements. As a result, a court should examine the list below when applying the proposed measures. Most courts should find that the needed data are available and accessible from their docketing and management information systems. Hence, the task of data gathering should not be overly time-consuming or expensive.

1. Docket number: Guideposts 1.2.1, 1.3.1, 1.4.1, 2.2.1, 2.3.1, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.1.3, 3.2.1, 4.2.1, 4.2.2
2. Type of case: Guideposts 1.1.1, 1.1.2, 1.2.1, 1.4.1, 2.2.1, 2.3.1, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.1.3, 4.2.1, 4.2.2
3. Type of jurisdiction: Guideposts 1.1.1, 1.1.2, 1.2.1, 2.2.1, 2.3.1, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.1.3, 3.2.1, 4.2.1, 4.2.2
4. Date the notice of appeal, the petition for review, application for writ, or other original proceeding is filed: Guideposts 1.1.1, 1.1.2, 1.3.1, 1.4.1, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.1.3, 3.2.1, 4.2.1, 4.2.2
5. Date the petition for review, application is granted, denied, dismissed: Guideposts 1.1.2, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.1.3, 4.2.1, 4.2.2
6. Date the record is submitted: Guideposts 2.4.1, 2.4.2
7. Date the last brief is submitted: Guideposts 2.4.1, 2.4.2
8. Date of oral argument/submission: Guideposts 2.4.1, 2.4.2
9. Date of resolution: Guideposts 1.1.1, 1.1.2, 1.2.1, 1.3.1, 1.4.1, 2.3.1, 2.3.2, 2.4.1, 2.4.2, 2.4.4, 3.1.3, 4.2.1, 4.2.2
10. Method of resolution of appeals and petitions: Guideposts 1.3.1, 2.2.1, 2.4.1, 2.4.2, 3.1.3
11. Form of the decision in appeals and petitions: Guideposts 2.2.1, 2.3.1, 2.3.2, 2.4.1,2.4.2, 3.2.1

12. Outcome of the decision in criminal and civil cases: Guidepost 1.3.1
13. Nature of court's review in application for writs: Guidepost 1.4.1
14. Outcome of applications for writs: Guidepost 1.4.1
15. Types of legal representation: Guidepost 3.1.3
16. Group deciding case: Guidepost 2.3.1
17. Agreement among judges: Guidepost 1.2.1
18. Number of concurrences: Guidepost 1.2.1
19. Number of dissents: Guidepost 1.2.1
20. Identity of concurring judges: Guidepost 1.2.1
21. Identity of dissenting judges: Guidepost 1.2.1
22. Outcome of a court's decisions in criminal cases: Guidepost 1.3.1
23. Outcome of a court's decisions in civil cases: Guidepost 1.3.1
24. Author of a court's decision: Guidepost 2.3.1

In addition, there are a few supplemental data elements that will greatly enhance the value of other Guideposts. They are more specific in nature, but they are worth the effort of gathering and analyzing. Hence, they are recommended to a court for its consideration. They include:

25. Type of the underlying trial court proceeding in criminal and civil cases: Guidepost 1.3.1, 2.4.4
26. Number of issues on appeal: Guidepost 1.3.1
27. Types of issues raised on appeal: Guidepost 1.3.1
28. Types of most serious offenses at conviction in criminal cases: Guideposts 1.3.1, 2.4.4
29. Area of law on appeal in civil cases: Guidepost 1.3.1
30. Type of legal representation for the offender in criminal cases: Guidepost 1.3.1

Appendix 2

A TAXONOMY OF APPELLATE COURT ORGANIZATION*

by
Victor E. Flango and Carol R. Flango**

Much has been written about how trial court structures have adapted to demographic, economic, and political conditions in the states. For example, some states use a single trial court of general jurisdiction to decide all cases, whereas other states employ a multi-tiered system composed of general, limited, or special jurisdiction courts. Courts of special jurisdiction, such as specialized courts to handle drug offenses, are in vogue now, but follow in the tradition of the specialized courts designed to meet specific state needs, such as the Water Court in Colorado or the Land Court in Hawaii.

The variety of ways in which appellate courts have changed to accommodate increasing caseloads have not been as systematically studied.[1] An understanding of variations in organizational responses is necessary to assist those interested in appellate courts to communicate meaningfully with each other, and to ensure that cross jurisdictional comparisons are made fairly. States have used *all* of the approaches described below, but in various combinations, to meet their appellate

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* This Appendix consists of an article that originally appeared as part of NCSC Court Statistics Project's *Caseload Highlights* series. It has been reproduced as it originally appeared with the permission of the authors.

** The authors would like to express their gratitude to several chief justices who reviewed an earlier draft of this manuscript: Chief Justice David A. Brock, New Hampshire; Chief Justice Arthur A. McGiverin, Iowa; Chief Justice Thomas R. Phillips, Texas, and Chief Justice Gerald W. VandeWalle, North Dakota. We are also grateful for the critical reviews by members of the Court Statistics Project Advisory Committee and staff, as well as for comments from Roger Hanson and data runs by Pam Petrakis.

[1] This overview is intended to cover the *appellate* workload of courts of appeal. Many of these courts have jurisdiction over original proceedings, but these are a comparatively small part of their workloads and are not used to construct this taxonomy.

responsibilities. This report uses four common organizational changes to construct a taxonomy of appellate courts.

1. Increasing the Size of the Court of Last Resort

Perhaps taking a cue from the U.S. Supreme Court, no state court of last resort has more than nine judges.[2] Since 1950, increasing the size of the court of last resort has not been a typical response to increasing appeals. Standard 1.13 (4) of the *ABA Standards Relating to Court Organization* suggests that collegial decision making is best promoted by having seven members of the highest court, but no more than nine members under any circumstances. Although achieving some economies of scale, increasing the number of justices does not proportionately increase decision making capacity. Whether the highest court has five or nine members, all justices must do the basic work of appellate justices: read the briefs, hear oral arguments, prepare and critique draft opinions, and discuss issues in conference.[3]

2. *Creating Intermediate Appellate Courts or More Geographic Divisions*

The most common state response to increasing appeals is the creation of an intermediate court of appeals. Intermediate appellate courts permit many more petitioners at least one opportunity to appeal, but also create the possibility of a second appeal to the court of last resort. According to Professor Leflar "It is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multi-judge court."[4] The taxonomy presented below shows the variety of ways intermediate appellate courts are used in the states. In 11 states, the intermediate appellate court is essentially another appellate court, similar in size to the court of last resort. In 29 states, the intermediate appellate courts have more than 9 members and as many as 88 authorized members serving on panels in geographically-based

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2 Most state courts of last resort have seven members, 18 have five justices, and only 7 have nine-justice courts. A history of the number of state supreme court justices in 34 states can be found in E. Curran and E. Sunderland, *The Organization and Operation of Courts of Review*, **Third Report of the Judicial Council of Michigan** 52, 61-62 (1933). Only New Jersey and Virginia ever had more than nine judges. The Virginia Supreme Court had 11 judges from 1779 to 1788, when it also served as a trial court. The New Jersey Supreme Court had 15 or 16 justices from 1844 until 1948. See Harison, *New Jersey's New Court System, 2* **Rutgers L. Rev.** 60,65 (1948).

3 J. Dethmers, *Delay in State Appellate Courts of Last Resort*, 328 **Annals** 153,1158 (1960).

4 R. Leflar, **Internal Operating Procedures of Appellate Courts** (Chicago: American Bar Foundation, 1976).

districts. Geographically-based divisions provide more convenient access for counsel and court clients, but do create the possibility of "doctrinal divergence and caseload imbalance between divisions."[5]

3. Establishing Discretionary Jurisdiction

Creation of an intermediate appellate court permits the establishment of discretionary jurisdiction in the court of last resort.[6] Also, with the advent of discretionary jurisdiction, the courts of last resort are more likely to sit en banc. En banc decisions are made practical in the higher courts because intermediate appellate courts are available to decide the majority of the cases. Cases that are further appealed to the court of last resort are likely to be more complex, and to have broader policy implications beyond the interests of the parties. These second appeals are likely to require more time and attention than first appeals. Intermediate appellate courts typically hear appeals of right, but some also have discretionary jurisdiction for certain types of cases.

4. Using Panels

Justices on larger courts of last resort can increase their capacity to decide appeals by sitting in panels, rather than en banc. Indeed, for large intermediate appellate courts, panels are a practical necessity. This adaptation, however, creates the possibility of inconsistency in decision making among panels, and generates the need to reconcile differences among panels. Techniques, such as conferencing the opinion drafts en banc, can be used to minimize inconsistent decisions among panels.

Patterns of Response

These four structural responses can be combined to construct at least seven distinct patterns of appellate caseflow. The patterns themselves are arranged according to degree of flexibility, from least to most flexible. Theoretically, the pattern with the least flexibility is the single, five-justice appellate court with mandatory jurisdiction that decides all appeals en banc (Pattern I). At the other extreme is the nine-justice court of last resort with mostly discretionary jurisdiction that hears cases in panels of three. It sits in a structure over a large

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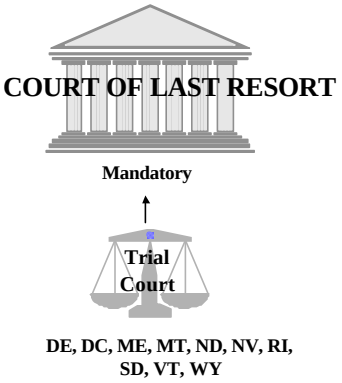
[5] S. Wasby, *Appellate Delay: An Examination of Possible Remedies*, 6 **JUST. SYS. J**. 329 (1981).

[6] See Pattern II, New Hampshire's and West Virginia's supreme courts have discretionary jurisdiction even though an intermediate appellate court has not been created in those states. Virginia, had the same structure for many years until the intermediate appellate court was established in 1985.

intermediate appellate court, also sitting in panels by geographic district, and that has some discretion over the cases it hears. This last combination does not occur in the United States, because states with very large intermediate appellate courts (e.g., California, Florida, Illinois, New York, and Ohio) usually have seven-member courts of last resort.

Pattern I

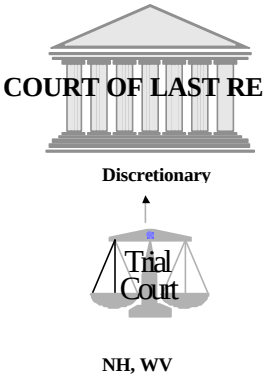
States with comparatively small volumes of appeals may be able to handle their caseloads without the need for either an intermediate appellate court or discretionary jurisdiction. Delaware, Nevada, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming are states in which a five-justice supreme court with mandatory jurisdiction handle the volume of appeals. Maine and Montana also fit this basic pattern, but have seven justices on their supreme courts. The District of Columbia, has a nine-justice Court of Appeals which often sits in panels of three.[7] The Delaware Supreme Court may also sit in panels of three; the Montana Supreme Court can sit in panels of five, and Maine's Supreme Court sits in panels, but only for sentence review hearings. Theoretically, the five-member, North Dakota Supreme Court can transfer cases to an intermediate appellate court, but they have not done so since February of 1994, and so are classified here. The North Dakota Court of Appeals is a "temporary court of appeals" composed of active or retired trial court judges, retired justices of the supreme court, and lawyers assigned to the court on a case-by-case basis.



[7] Information on panels is from **State Court Organization, 1993** (US Dept. of Justice, Bureau of Justice Statistics, 1995), Table 25.

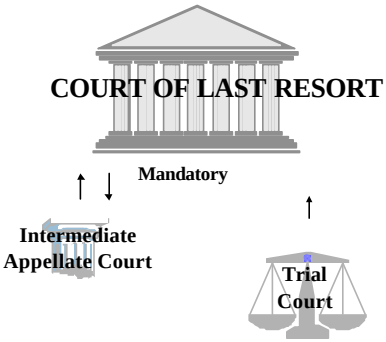
Pattern II

The second pattern is a single appellate court that has discretionary jurisdiction. New Hampshire and West Virginia are states that fit here. Both supreme courts are composed of five justices who sit en banc. New Hampshire uses a refereed appellate panel, composed of three retired judges, as an additional resource. At nearly 2,700 appeals, West Virginia has a high proportion of filings per judge; 48 percent of these appeals are from administrative agencies, particularly the Workers' Compensation Appeal Board.



Pattern III

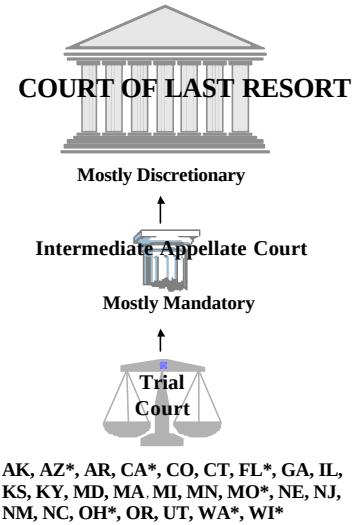
Five states use the pattern of having appeals filed in the court of last resort, which then retains some and transfers others to the intermediate appellate court. Of the courts following this pattern, three (Hawaii, Idaho, and South Carolina) have five members and two (Iowa and Mississippi) have nine members. None of the five member courts sit in panels, but both of the larger courts do. The Iowa Supreme Court decides cases using two panels with one justice, on a rotating basis, sitting on both panels each month. The courts of last resort in these five states have mostly mandatory jurisdiction.



HI, ID, IA, MS, SC

Pattern IV

This is the most common pattern, one court of last resort with discretionary jurisdiction over an intermediate appellate court with mostly mandatory jurisdiction. In 21 states, the court of last resort has seven members and in most of these, the high court sits en banc.[8] Three other states following this pattern have five-justice courts. Washington state is the only nine-justice court in this set, and its supreme court sometimes sits in panels. All of the intermediate appellate courts in Pattern IV, except for Alaska, sit in panels. Intermediate courts range in size from 3 to 88 members, with most (20 of 24) having more members than their respective courts of last resort.

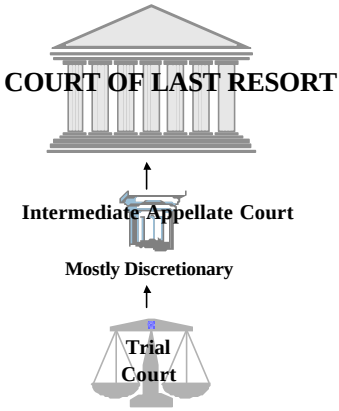


*** Denotes intermediate appellate court that sits in geographical divisions.**

[8] Exceptions are: Connecticut, Massachusetts, and Nebraska.

Pattern V

The distinguishing feature of this pattern is that both the court of last resort and the intermediate appellate courts have discretionary jurisdiction over the majority of their caseload. Virginia has seven justices on its supreme court and Louisiana has eight, seven elected and one assigned from the Louisiana Courts of Appeal. Discretionary appeals comprise 58 percent of the intermediate appellate court caseload in Louisiana and 75 percent of the caseload in Virginia. To be equivalent to intermediate appellate courts with mandatory jurisdiction one would expect a high proportion of the petitions would be granted. This is not the case. In 1995, the Louisiana Courts of Appeal granted 29 percent of the discretionary petitions and the Virginia Court of Appeals granted 16 percent of the petitions filed.

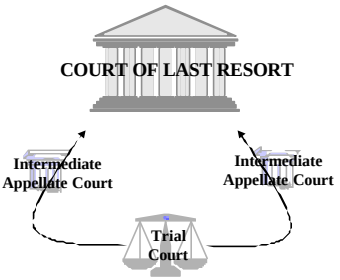


LA*, VA

*** Denotes intermediate appellate court that sits in geographical divisions.**

Pattern VI

This pattern of appellate caseflow is similar to the most common pattern explained in Pattern IV except that these states have two intermediate courts of appeal rather than one. Jurisdiction of the intermediate appellate courts are separated by subject matter jurisdiction. The supreme courts of Indiana and Tennessee are composed of five justices; the high courts of New York and Pennsylvania have seven. The Alabama Supreme Court has nine justices, but they can sit in panels. The intermediate appellate courts in Alabama and Tennessee are essentially divided into civil and criminal courts. Indiana uses a Court of Appeals for most appeals as well as a specialized Tax Court. In Pennsylvania the Commonwealth Court hears civil cases involving state government entities or agencies, and the Pennsylvania Superior Court reviews all other appeals, both civil and criminal. New York has intermediate appellate courts at two different levels. So appeals can go through three levels of courts: (1) the lower level, comprised of the Appellate Terms of the Supreme Court in the First and Second Judicial Departments and the County Courts in the Third and Fourth Departments; (2) the Appellate Division, the primary intermediate appellate court, and (3) the highest court, called the Court of Appeals.[9]



AL, IN, NY, PA, TN*

*** Denotes intermediate appellate court that sits in geographical divisions.**

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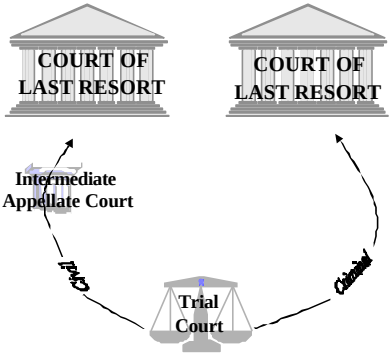
9 *See* R. MacCrate, J. D. Hopkins, and M. Rosenberg, **Appellate Justice in New York** (Chicago: American Judicature Society, 1982). Appellate Terms are classified as intermediate appellate courts. Appeals to County Courts, used in the Third and Fourth Departments, are the equivalent of appeals form a court of limited jurisdiction to a general jurisdiction court in other states.

Pattern VII

Texas and Oklahoma have one intermediate appellate court, but two courts of last resort with different subject matter jurisdiction. Each state has a supreme court with largely civil jurisdiction and a specialized court of last resort for criminal appeals. All of these courts sit en banc. The intermediate appellate court in Texas has both civil and criminal jurisdiction, the intermediate appellate court in Oklahoma has civil jurisdiction only.



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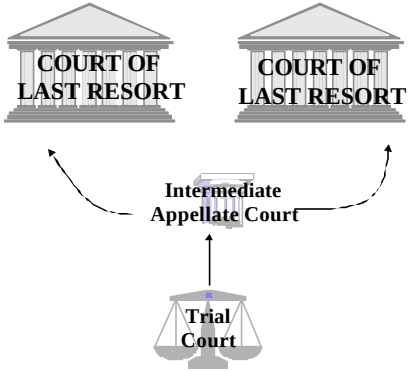

TX*

*** Denotes intermediate appellate court that sits in geographical divisions.**

Conclusions

This issue of the *Highlights* series is an attempt to catalog the various state responses to increases in appellate caseloads. Four common state responses to increasing appeals were used to construct a taxonomy of seven patterns. The usefulness of the taxonomy can be determined by comparing appellate outcomes by pattern, although a systematic comparison is beyond the scope of this article. Nevertheless, as a start it should be noted that the patterns are related to state populations. This is an important connection because population is directly related to number of trial court filings which in turn are related to number of appeals, and consequently to workload (dispositions).[10]

In states with the smallest populations, one appellate court with mandatory jurisdiction appears to be sufficient to handle the workload. As size of population, and number of appeals, increase some states adapt by using discretionary jurisdiction (Pattern II), experiment with intermediate appellate courts, or establish an intermediate appellate court to which cases are transferred from the court of last resort (Pattern III). The next stage are courts of last resort and a full-fledged intermediate appellate court, usually with mandatory jurisdiction (Pattern IV), but occasionally with discretionary jurisdiction (Pattern V). Finally, some states have adapted to caseload by creating multiple courts of last resort (Pattern VII) or multiple courts of appeal (Pattern VI).

[10] For a more complete discussion of appellate court caseloads and dispositions, **see Examining the Work of State Courts, 1995** (National Center for State Courts, 1997).

Acknowledgments

Many individuals contributed to the excellence of the Appellate Court Performance Standards. The Commissioners received the advice and input of their colleagues in the field. Draft versions of the standards were circulated at meetings of the Conference of Chief Justices, the Executive Committee of the Appellate Judges Conference, the Council of Chief Judges of Courts of Appeal, the National Conference of Appellate Court Clerks, and the Conference of State Court Administrators. At all of these meetings, one or more of the Commissioners had the opportunity to highlight the essential aspects of the standards and to ask for ideas in improving the work-in-progress.

The benefits of these interchanges were complemented by the constructive criticism of several individuals who reduced their thoughts to writing. Positive reactions and helpful suggestions were received from The Honorable Robert C. Murphy, The Honorable A.M. (Sandy) Keith, The Honorable Patrick M. Schott, Joe S. Cecil, Peter W. Davis, Thomas L. Hafemeister, Susan L. Keilitz, Jean M. Kennett, Thomas B. Marvell, Daniel J. Meador, Donna Stienstra, and Stephen L. Wasby. To all of these individuals, we say thank you.

In addition to the many helpful comments that we received on the Standards, the Guideposts underwent strict scrutiny appellate courts in Florida and Oregon. We point in the text of this report how these two groups served as complementary pretests of the Guidepost. We now wish to acknowledge the particular individuals in each state who devoted so much time and attention to refining our drafts.

In Florida, the persons who contributed to the revision of the Guideposts included members of the Judicial Management Council Committee on District Court of Appeal Performance and Accountability. They are The Honorable Peggy A. Quince (Chair of the Committee 4/98-11/98) and now a member of the Florida Supreme Court, The Honorable Martha C. Warner (chair 11/98

to the present), The Honorable James R. Wolf, The Honorable Jerry R. Parker, The Honorable David M. Gersten, The Honorable Jacqueline R. Griffin, The Honorable Susan F. Schaeffer, The Honorable Alice Blackwell White, John R. Beranek, Esq., Benedict P. Kuehne, Esq.. The Honorable Charles T. Wells served as the Florida Supreme Court's liaison to the committee. These judges and appellate practitioners were assisted in the presentation by key staff members of the Florida Office of the State Courts Administrator. These individuals included Peggy Horvath, Brian Lynch, Stephan P. Henley, Thomas D. Hall, and W. Clyde Conrad.

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Finally, this project could not have been undertaken or completed without the support of the State Justice Institute (SJI). The Commission and the National Center for State Courts wish to express their gratitude to the Board of Directors of SJI and to its Deputy Director, Richard Van Duizend, who served as the project monitor. With the assistance of SJI, the state appellate court community has established goals to foster greater public accountability in all areas of appellate review.

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