

THE VIEW FROM THE TRENCHES: A REPORT ON THE  
BREAKOUT SESSIONS AT THE 2005 NATIONAL  
CONFERENCE ON APPELLATE JUSTICE

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“The past is a foreign country; they do things differently there.”<sup>1</sup> Certainly judges and lawyers did many things differently in 1975, the year of the first National Conference on Appellate Justice. They carried out legal research by poring over digests and reporters, not by scrolling down a screen and following a hyperlink. They dictated briefs and opinions for their secretaries to type rather than drafting their work on personal computers. They communicated by letter and telephone, not email. They waited days or even weeks before they could read a new Supreme Court decision. And when attending a conference, they had to stand in line at a pay phone to call their offices.

The political and societal setting was also different. Richard Nixon had recently resigned as President in the wake of the Watergate scandals. With the signing of the Helsinki accords, Communist regimes in the Soviet Union and Eastern Europe seemed more firmly entrenched than ever. Only fifteen percent of the newly graduated law students were women. CNN and Fox News did not exist, and talk radio was in its infancy.

One thing that has not changed since 1975 is the function of appellate courts. Today, as in the past, that function is twofold: to correct error or unfairness in the work of subordinate

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1. L.P. Hartley, *The Go-Between* 3 (Stein and Day 1967) (originally published 1953).

tribunals and to publish opinions that will serve as precedents for the decision of future cases.

How have the changes in technology, society, and politics affected the way in which appellate courts carry out the tasks of review for error and lawmaking? That is one of the questions that led four prominent legal organizations to sponsor the 2005 National Conference on Appellate Justice.<sup>2</sup> An important part of the Conference was the breakout sessions in which small groups of judges and lawyers discussed specific issues about the operation of the appellate system. Each group had a discussion leader—a distinguished judge or an experienced appellate lawyer—who was primed to pose questions to the participants to elicit their own perceptions. Each group also had a Reporter—a prominent academic—who was prepared to report the responses.<sup>3</sup> The reports were submitted (some with remarkable promptness!), and they fill a very large three-ring binder. In this Conference Report, I present a summary and synthesis of the main points that emerged from the discussions.<sup>4</sup> To set the stage, I will say a few words about the planning and organization of the 2005 Conference, with emphasis on what might be called (in Hollywood fashion) the 1975 prequel.

### I. A TALE OF TWO CONFERENCES

The first National Conference on Appellate Justice was organized by a group called the Advisory Council for Appellate Justice. The Advisory Council was an ad hoc group composed of some of the most eminent figures on the appellate scene. Most of its members were lawyers and judges (state and federal), not academics. What prompted the 1975 Conference was a widely held belief that the nation's appellate courts—and

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2. For a more detailed account of the planning and organization of the 2005 Conference, see Arthur J. England, Jr., *Planning and Conduct of the National Conference*, 8 J. App. Prac. & Process 65 (2006).

3. I take this opportunity to express my deep thanks to the discussion leaders and the Reporters for their dedicated efforts that made this Conference Report possible. The thorough and thoughtful work of the Reporters is reflected on every page of the Report. A complete list of the discussion leaders and the Reporters will be found in the Appendix.

4. The depth and breadth of the discussions in the thirteen groups were truly impressive. To keep this Report within reasonable length, many interesting topics and insightful comments had to be left on the cutting-room floor.

particularly the federal appellate courts—had reached a state of crisis.

There is ample evidence of this perception. The leading academic study at that time, published in 1974 and distributed to participants in the 1975 Conference for background reading, had the title *Appellate Courts: Staff and Process in the Crisis of Volume*. The author was Professor Daniel J. Meador, already one of the foremost scholars of appellate systems. The foreword was written by Justice Louis Burke, a member of the California Supreme Court and president of the National Center for State Courts. Justice Burke referred to “the present serious crisis in this country’s appellate courts.”<sup>5</sup>

As other Conference materials make clear, this assessment actually rested on two complementary concerns. One is captured by the title of Professor Meador’s book: the crisis was a crisis of *volume*, and the concern centered on the effect of volume on the *process* of deciding appeals. The Conference preview summarized this theme in its opening pages:

The situation which calls for a National Conference on Appellate Justice is the staggering inflation in caseload which besets the appellate courts in the United States. . . . Spreading the efforts of a limited number of judges over a growing number of cases will threaten the quality of the process by making the work of the judges less open and visible, and hence less subject to account, or by increasing a tendency toward delegation of more aspects of judicial work and toward an appellate process that is less humane and more bureaucratic in character.<sup>6</sup>

But there was a second theme as well: The surge in the volume of appeals posed a threat not only to the quality of the process, but also to the value of uniformity—the “harmonious and uniform administration of the law.”<sup>7</sup> The concern embraced state as well as federal courts. As early as 1965, Professor Geoffrey Hazard expressed the fear that further expansion of the California appellate system would convert “once authoritative

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5. Louis Burke, *Foreword*, in Daniel J. Meador, *Appellate Courts: Staff and Process in the Crisis of Volume* vii (West Pub. Co. 1974).

6. Advisory Council for Appellate Justice, *Appellate Justice 1975: Materials for a National Conference* vol. I (*Summary and Background*) at 1, 3 (Nat. Ctr. for St. Cts. & Fed. Jud. Ctr. 1975) [hereinafter *Appellate Justice 1975*].

7. *Id.* at 3.

appellate tribunals . . . into a judicial Tower of Babel.”<sup>8</sup> And a few months after the 1975 Conference, the Commission on Revision of the Federal Court Appellate System (Hruska Commission) issued its final report recommending creation of “a new national court of appeals, designed to increase the capacity of the federal judicial system for definitive adjudication of issues of national law.”<sup>9</sup>

At the same time, what stands out in the materials for the 1975 Conference is something that is not there. There is no discussion of the interaction between appellate courts and other institutions of government, nor is there any reference to the effect on appellate courts of the political and societal conflicts of the era. Rather, the 1975 Conference treated the appellate court system as a self-contained universe that existed largely independent of political and social controversies.

Viewing the appellate scene of today against the background of the 1975 Conference, the Steering Committee for the 2005 Conference identified three broad topics for discussion in the breakout sessions.<sup>10</sup> First, there was the overarching issue raised by the apparent assumption of the 1975 planners that appellate courts carry out their work in isolation from the political and social conflicts of their time. No one today would accept that picture, but has immersion in controversy changed the way appellate courts carry out their business? That is a different, and more difficult, question.

The second topic centered on precedent and appellate structure. In sharp contrast to 1975, concern about disuniformity in appellate decisions barely registers on the seismometer of legal discourse today. This is particularly remarkable at the federal level, in view of the fact that the only tribunal with

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8. Geoffrey C. Hazard, Jr., *After the Trial Court—The Realities of Appellate Review*, in *The Courts, The Public, and the Law Explosion* 60, 81 (Harry W. Jones ed., Prentice-Hall 1965). He added: “The proliferation of utterances could divest any one of these [intermediate appellate] courts of significant authority.” *Id.*

9. *Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 208 (1975) [hereinafter *Hruska Commission Report*].

10. The planning of the Conference was a truly collaborative effort. I cannot improve on Arthur England’s description of the Steering Committee: “a collection of very bright, able, dedicated, and convivial appellate specialists with whom it was a delight to work intimately.” England, *supra* n. 2, at 69.

authority to resolve conflicts with nationally binding effect—the Supreme Court of the United States—has actually reduced its decisional output to half of what it was in 1975.<sup>11</sup> Is this a problem? And what about uniformity in state systems? Those were among the questions we asked the participants to address.

Finally, there were the issues of volume, process, and delegation of responsibility that Professor Meador and others were writing about in the 1970s. Since then, although the volume of appeals has continued to increase, the sense of crisis has almost entirely disappeared. There is little outcry over the appellate shortcuts that aroused so much dismay in 1975. We see occasional vigorous debates about particular aspects of the appellate process—in particular, about rules prohibiting the citation of unpublished opinions—but except for one or two academics, no one is arguing that the system needs fundamental change.

In the pages that follow, I summarize the discussions in the breakout groups on each of these three topics. As one would expect, the focus was on today's practices and problems; comparisons with the past were only secondary. Nevertheless, the contrast between the preoccupations of 1975 and those of 2005 provides a useful framework for the Report.

Throughout this Report I use quotation marks for comments by participants. These comments should not be taken as verbatim transcriptions of what was said. The words have been filtered through the reports of the individual Reporters, and, in addition, have been edited for clarity and to avoid identifying the speaker.<sup>12</sup> Nevertheless, use of the quotations preserves some of the immediacy and the informality of the small-group setting. Moreover, I use “quotations” only when the Reporter's account appears to reflect a direct quote or close paraphrase.<sup>13</sup>

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11. See Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 Sup. Ct. Rev. 403 [hereinafter Hellman, *Shrunken Docket*].

12. As Reporter for the Conference, I made a commitment to the participants that I would not attribute any comments to particular individuals. Out of caution, I have generally eliminated references that would identify the state or court of the speaker.

13. It is possible that in editing for clarification, I have inadvertently changed or distorted what the speaker intended to say. I apologize to any participant whose comments have been mangled in any way.

## II. APPELLATE COURTS AS FLASHPOINTS OF CONTROVERSY

When Justice William O. Douglas retired late in 1975, his successor, John Paul Stevens, took his oath only three weeks after President Ford announced the nomination. It is hard to imagine such a quick succession happening today. Appellate courts, including the Supreme Court of the United States, have become flashpoints of controversy. In the legislatures, in the media, and on the campaign trail, appellate decisions receive attention and, often, harsh criticism. The public position of appellate courts played no part in the 1975 Conference, but in 2005 the subject generated extensive discussion.

### *A. Tensions between Courts and Legislatures*

One prominent manifestation of the controversial position of appellate courts today is the tensions that have developed between courts and legislatures. To be sure, the phenomenon is by no means universal. In some states, as Conference participants reported, “the relationship between legislative and judicial branches is relatively harmonious.” But harmony appears to be the exception rather than the rule.

In jurisdictions across the country, legislators have threatened—or have actually undertaken—to retaliate against appellate courts for their decisions on controversial issues. The issues and the forms of retaliation span the spectrum. Here are some examples reported by participants:

- State A: The state supreme court, controlled by members of one political party, issued a decision in a redistricting case declaring unconstitutional a statute passed by the legislature, which was controlled by the opposite party. The legislature retaliated by denying the courts the resources they need.
- State B: The relationship between the legislature and the courts is very tense, in large part because of school-funding decisions that have forced the legislature to appropriate more money for schools than it wants to. The relationship was further

aggravated by abortion decisions that were more liberal than those of the U.S. Supreme Court and by death-penalty decisions that favored defendants. As a result, there is growing legislative opposition to the “yes-no” method of electing judges, and proposals for more partisan judicial elections may gain strength.

- State C: There is a real crisis between the judiciary and the legislature. Judges do not get a salary increase unless the legislature approves, and it has been seven years since the last increase. Last year, a controversial supreme court justice was up for retention, and the speaker of the state house, who is at the other end of the ideological spectrum, ran an unsuccessful campaign to unseat him. The speaker is now proposing changes to undermine the nonpartisan court plan.
- State D: A legislative committee recently recommended a \$9000.00 pay raise for trial court judges, but no raise for appellate court judges. The recommendation was made at a time when there were many letters published in the state’s newspapers denouncing judicial activism.
- State E: A ruling allowing a lesbian to adopt a child prompted a huge political controversy. There were efforts to impeach the judge who had written the decision. The situation ended with a strong reaffirmation of the need for an independent judiciary, but it was still a very contentious situation.

Apart from specific hot-button issues, participants pointed to a number of developments that contribute to tensions between courts and legislatures. Here are the Reporters’ summaries from two of the groups:

- All participants in the group agreed that appellate courts have become the focal point of political

controversy. As courts have weighed in on matters of social policy, there has often been a backlash in the media and, not infrequently, legislative bodies. There was a general sense among participants that judicial decisions will remain controversial, and judges targets for politically motivated attacks, as long as judges are required to decide controversial issues of public policy.

- Several state court judges noted that in the appropriations context, the judiciary “is just another agency, not the third branch of government.” There was general agreement with this “another agency” legislative vision of the judiciary. State court judges stated that there was much tension between legislatures and the courts, and it causes judgeships to go unfilled and the courts to be underfunded.

Other participants called attention to the effect of “the national information grid” on legislative concerns. A state judge described the phenomenon and its consequences:

One of the differences in the criticism and distrust that judges experience today is that the national information grid, from talk radio to evening cable shows to electronic access to journal articles and so on, causes the things that any appellate court does to bounce around the country in a way that’s exponentially greater than what it was ten years ago. If the Massachusetts court writes an opinion on gay marriage, people huddle in party caucuses in my statehouse to discuss whether our judges are the sorts that would do this, and should we try to pass a constitutional amendment now. That just didn’t happen in an earlier age because the country moved more slowly.

So among the political branches it isn’t just worries about any individual appellate court; they worry about all of them. When the Ninth Circuit says “under God” has to come out of the Pledge, it’s instant news everywhere. And the public is even less likely than the elected officials to differentiate between the Ninth Circuit and their state supreme court.



One particular development was emphasized by participants from at least half a dozen states: the decline in the number of legislators who are lawyers. As one state judge commented, “The natural constituency of the judicial branch has been shrinking.” This has had unfortunate consequences for the judiciary, including the appellate courts. “The legislators lack professional understanding of the role of the courts.” “The change becomes very significant when the courts approach the legislature with needs.” “At least in theory, lawyers should understand the need for a strong, independent judiciary and should be able to look at a ruling in a case as the product of more than simply the policy preferences of the judges.”

One judge perceived a more subtle consequence. “In my experience, the non-lawyer members of the legislature need help dealing with the arguments of the lawyer legislators who have agendas that they want to advance.” This comment was unique; it would be interesting to know whether others have had that experience.

Participants also cited the effect of legislative term limits. In one state, “term limits have removed many legislators who had built a strong relationship with the courts.” As a result, “the legislature is increasingly made up of “high-turnover 30-somethings who have no feel for what the judicial system is about.”

How can appellate courts combat misunderstanding or hostility on the part of legislators? Judges from several states offered a variety of suggestions and described a number of successful initiatives:

- State A: “There are a few glimmers of hope. Judges have worked with the state bar to encourage lawyers to run for office, and judges have had some success in enlisting business leaders to come to the defense of a nonpartisan court plan.”
- State B: “The supreme court’s rulemaking power provides an opportunity to build a stronger relationship with the legislature. The court asked the legislature to set the policy and indicated that the courts would provide the procedure. The legislature

was so pleased with the process that it gave the courts money to carry out the plan.”

- State C: In response to retaliatory action by the legislature, “the chief justice has enlisted business leaders, lawyers, and others to come to the aid of the judicial system.”
- State D: “I suggest that we look at the situation as an opportunity for the judges to educate themselves about the legislature and for the judges to educate the legislators about the courts. We have found that the legislators are delighted to get a ‘back-stage’ tour of the court. And our court has met in open meetings with the legislators to discuss issues such as legislative interpretation.”

Others spoke in more general terms: “We need to do more to educate legislators, put them through a little bit of ‘law school.’” “The relationship with the political branches is really driven by the personality of the Chief Justice, who has an important role to play in maintaining good political relations.”

### *B. Election of Judges*

Election of judges has been part of American life since the early nineteenth century. However, Conference participants pointed to several recent developments that have exacerbated concerns about politicization of the appellate judiciary.

First, as one lawyer observed, “special interest groups” focus public attention on “single issues.” Many of these groups send questionnaires to judicial candidates, and, as a judge reported, “if one doesn’t answer, one gets a bullet on the website indicating refusal to answer.”

Second, as participants in several groups noted, in 2002 the Supreme Court handed down its decision in *Republican Party of Minnesota v. White*,<sup>14</sup> holding that the First Amendment limits the power of states to restrict speech by candidates for judicial

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14. 536 U.S. 765 (2002).

office. One judge said: “It is difficult to see how judges can avoid political attacks when they stand for election (or retention) just as legislators or other political candidates. If judges are to stand for election, they are going to have to take positions on issues, and their rulings will be fair game for campaign attacks.”

Third, judicial elections in many states have become very costly. In one state, as much as \$1,000,000 has been spent in the campaign for a supreme court position. What makes this troubling, of course, is that the candidates raise money from lawyers.

Does the prospect of having to run for reelection or retention affect the way appellate judges carry out their work? A few judges saw evidence that it does. Said one: “The deepening perception that judges decide cases in accord with their personal feelings compromises the way that judges do business.” But the majority of comments were to the contrary. As one judge observed, in a comment echoed by others, “Judges do what they think is right without worrying about reelection.”

But even if judicial elections do not affect courts’ decisions, they may have other unfortunate consequences. Over the long term, hotly fought campaigns can have a negative effect on the way citizens view courts. The prospect of having to run for election may deter good people from seeking or accepting judicial positions. For example, in one state, the judicial selection commission now asks candidates “whether they have the stomach to run a campaign after they have been on the bench or whether they will bail out on the governor who appointed them.” In another state, according to one participant, a person who is hostile to the death penalty could not be elected to the bench.

### *C. Media Coverage and Public Perceptions*

Public response to appellate decisions cannot be considered apart from coverage in the media, for the former is heavily influenced by the latter. But as one participant observed, “while the amount of *attention* [given by the media] has increased significantly, the amount of *insight* has not. The increased attention to the courts presents a great opportunity, but the opportunity is being wasted by coverage that is superficial.”

Several participants lamented the quality of media coverage. Judges and lawyers in one group agreed that the media frequently make mistakes in reporting about cases because of the need to “dumb it down.”

One phenomenon that generated discussion in several groups is the media’s practice of regularly identifying the political affiliation or appointing president of the judge who wrote a newly issued opinion. A state judge elaborated: “In the past, news reports of court decisions said that ‘the Fifth Circuit’ decided X. Now it is far more likely that a news story will say that ‘Judge A, appointed by President Bill Clinton (or by President George W. Bush)’ decided X.” The effect is “to push toward a cult of personality” and to reinforce the perception that judges decide cases in accordance with political affiliation.

The “national information grid” also came up in this context. Again the Massachusetts same-sex marriage case was the exemplar. As one state judge said, the decision “had a ripple effect on [his] state and others, not from anything that the judges did in [his] state, but from concerns about what they *might* do. Blogging and interest groups and a twenty-four-hour news cycle all combine to produce a transferability of issues.”

Does increased media scrutiny have any impact on judicial decisionmaking? None of the participants believed that media attention changes the *outcome* of appellate decisions, but some pointed to other possible effects. These include the contents of opinions, the timing of decisions, and the determination about which opinions get published. A state judge said that media attention might “change the way that opinions are drafted, especially in controversial cases.” In a similar vein, a federal judge voiced the suspicion that that, in some of his court’s opinions, “extra flourishes have been inserted in the hope of attracting media attention.”

#### *D. Self-Inflicted Wounds and the Role of Civility*

Many of the factors that contribute to the politicization of the judiciary are, obviously, beyond the control of the judges. But that does not mean that the judges are blameless or that there is nothing they can do to improve the situation. One participant summed up a widely held perception when he

commented that “some of the decline in public respect may be a self inflicted wound. Judges bring controversy upon themselves by the way they write their opinions.”

This observation was echoed, with a variety of emphases, by many judges (as well as by lawyers and academics). Here are some examples:

- “There is a lot of chest-thumping about judicial independence, but I think we bring some of [the challenges] upon ourselves by the way we write, particularly our dissents, where we accuse our colleagues in the majority of being political in their decisionmaking. And this provides the text for a lot of the criticism for those on the outside. We need to think about the consequences of the way we express our views.” (A state judge.)
- “There is a really bad public perception when you see dissents and dissents [from] dissents and concurring opinions—they look like the McLaughlin group . . . and there’s a perception by the public, it’s really horrendous.” (Another state judge.)
- “Judges need to monitor their own words carefully and tone down the harshness that has crept into so many opinions. The public perception of the courts is really harmed when, for example, a dissenting Supreme Court justice criticizes the competence or integrity of the majority.” (A federal judge.)
- “There has been a change in tone, and we need to think more about the fact that every opinion may be amplified through the media.” (Another federal judge.)

Participants also pointed to some of the circumstances that may account for the increased harshness of judicial rhetoric:

- “Law clerks can contribute to the lack of civility. If they perceive that their judge is under attack, their reaction is often to return fire.”
- “One thing that may be contributing to the problem is time pressures. The California appellate courts labor under a 90-day rule; the judges don’t have time to choose their words carefully and monitor each other’s work closely.”
- “I think it’s simply another symptom of the entire coarsening of the culture [that began with] the events of 1968. [In addition to] all the bad things that were swept away in that ferment, we swept away some good things, and [that includes] the sorts of internal restraints that people used to carry around, particularly people in positions of authority. . . . But [that is not limited to] the legal system; the standards are slipping everywhere.”

Judges also suggested that there are ways of avoiding self-inflicted wounds. Here are some of their comments:

- “Sometimes it takes the intervention of a judge who is not on a panel to get the judges who are writing the majority and dissenting opinions to ratchet down their rhetoric. “ (A federal judge.)
- “Civility used to be a problem on [our court], until the judges decided to police themselves carefully. If a judge writes anything that is even the least bit unkind, the other judges will pressure the judge to change it.” (A state judge.)
- “It’s fairly ordinary, when somebody sends out [a draft opinion], and it’s too aggressive, for somebody else on the court to either reply in writing or go to the other person’s office and say, ‘I suggest you reconsider how you said this. The legal point you make is good, but [there’s a less aggressive way of

writing it].’ And I’d have to say that in our little part of the world, people usually react favorably to that.” (A state judge.)

- “[There is also] the issue of being respectful towards the district courts. . . [Sometimes] I wince when I get a draft from another chambers, where I feel that the opinion of the district court has not been treated with the respect that it deserves. But I’ve never had a situation where I’ve said, ‘Don’t you think we might say this in a different way?’ and the change hasn’t been made.” (A federal judge.)
- “We work very hard institutionally at collegiality among ourselves, and I think we’ve kept the sniping at each other in opinions to a minimum. When we have a problem, we bring it up at a court meeting and talk about it.” (A federal judge.)
- “When an opinion strikes a statute down as unconstitutional, it should be done with humility and respect.” (A federal judge.)

The participants were not unanimous, however. One federal judge said: “The idea that judges should craft their opinions to make them more palatable to the public is a horrendous suggestion. Where do you stop? It’s a slippery slope.” But the dominant view was that judges can and should think about public perceptions—and the possibility of media amplification—when they write their opinions.

#### *E. Improving Public Understanding of the Courts*

Underlying many of the specific points about tensions with legislatures, the national information grid, and politicization of the judiciary is a concern about public understanding of the courts—or rather the lack of understanding. Some participants commented specifically about this phenomenon and its causes. For example:

- “The public raises legitimate questions about whether judges are doing their jobs. Those questions arise because anyone outside the process does not know the answer to the questions. The courts need find some way to communicate with the public that will minimize the ability of cynical public opinion leaders to foment misunderstanding.” (A state judge.)
- “The public is buying the claim about judges being activist. For the losing side, they want to attribute loss to something other than the merits. So you need to explain how you got to your decision.” (Another state judge.)
- “Everyone around the table would agree that the public is woefully uninformed about how courts operate. Why haven’t we done more to educate journalists?” (A lawyer.)

The groups also considered various methods of remedying the situation. Two generated extensive discussion: televising oral arguments and finding better ways of explaining court decisions.

### *1. Televising Oral Arguments*

Justice Stephen Breyer, in response to a question at the plenary session, discussed one frequently heard suggestion for enhancing public understanding: televising appellate proceedings. But Justice Breyer did not support the idea; on the contrary, he emphasized the “things that [he was] frightened of” if television cameras were allowed in the appellate courtroom.<sup>15</sup>

Some participants agreed, at least in part, with the reservations voiced by Justice Breyer. A federal judge said that he was worried about “grandstanding—i.e., lawyers making jury arguments before appellate judges.” One lawyer reported that several of his arguments had been televised; in one, his opposing counsel used the opportunity to give a political speech and did

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15. Stephen G. Breyer, Speech, *The Future of Appellate Courts* (2005 Natl. Conf. on App. Just., D.C., Nov. 5, 2005) (copy on file with author).



not answer the panel's questions. A state judge said that the press could cause distortions by broadcasting only selected excerpts from arguments as news stories. And one of the academic participants voiced the fear that, in states where judges are elected, candidates might use films from oral arguments in election advertisements. As a result, broadcasting arguments might influence judicial decisionmaking. (Note, though, that a state judge, in response, expressed disagreement on this point, based on experience with televised arguments in that judge's state.)

These negative comments represented a distinctly minority view at the Conference. As one Reporter summarized his group's discussion, "There was a very strong consensus in favor of televising appellate court proceedings, and numerous examples of favorable experience doing so." In a similar vein, another Reporter said: "Broadcasting appellate arguments seemed to be generally acceptable to the group. There has been experience with it in several jurisdictions of group members without any major adverse consequences."<sup>16</sup>

Several participants specifically supported televising oral arguments in the United States Supreme Court. One lawyer said:

What goes on in the United States Supreme Court is inspiring, and the American public should be able to see it. *Kelo* is a great example of an oral argument that should have been televised. There would have been much better understanding of the outcome if people had seen that argument.<sup>17</sup>

Another lawyer added:

I've got a lot of lay friends who watched some of the John Roberts confirmation, and aside from the uniform comment, including my wife, on how handsome he is, a lot of laypeople said he's so bright that they felt better about the Supreme Court knowing that somebody so bright would be on the Supreme Court. And I think if they saw some of the arguments there, they'd come away with the same

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16. Many of the participants who supported televising oral arguments in appellate courts emphasized that allowing cameras in trial courts—particularly in criminal proceedings—presents very different issues. That aspect of the discussion will not be further treated in this Report, but it is important to note that the distinction was widely drawn.

17. The reference is to *Kelo v. City of New London*, 545 U.S. 469 (2005), the eminent domain case.

feeling—the Justices are serious people trying to do a serious job.

Overall, what stands out is that with a handful of exceptions, the participants who spoke on the basis of experience said that the much-feared problems had not materialized. In one state where supreme court arguments have been webcast for five years, a judge said, “It doesn’t seem to affect the behavior of Justices. And we haven’t heard from lawyers about any adverse reactions.” A judge from another state said that his court “provides a gavel-to-gavel feed of all proceedings to public television. The reaction has generally been very favorable.” Another state “has had a good experience with cameras in the Supreme Court.”

Some judges, on the basis of their experience, explicitly took issue with Justice Breyer. Said one:

We’ve had tremendous, tremendous, success in [our state] with absolute transparency. Every appellate argument in every court is streamed live over the internet, Supreme Court arguments are live on television, and everything is archived. If there’s a question about [what was said], all you’ve got to do is click the button, go back and look at it. I was disappointed because Justice Breyer immediately went to the question of criminal trials. Well, that’s not what the question was.

Another judge emphasized the benefits of making videorecorded oral arguments widely available:

When you do streaming video or reruns on the community access channel, what you get is a relatively small but very high quality of audience of lawyers, school children, college classes, and journalists from the local press, who wouldn’t have covered this case because they wouldn’t come to the state capitol to do it. . . . I’ve come to look at this very differently because we get so much feedback from opinion leaders who watch that stuff. Legislators watch it, political people watch it, and that’s a place where we need all the help we can get. . . . If you create your own point of access, whether written or video, you do get a pretty good bang for a very little buck.

The participants who spoke on the basis of experience generally remained supportive even as they acknowledged occasional problems. For example, one judge observed that the

media “choose the most salacious cases,” and that the filming does not always serve an educational purpose. But the judge also emphasized that “filming is done very responsibly because the media does not want the filming rights revoked. After approximately thirty seconds, one forgets that the cameras are rolling.” Another judge said that televising court hearings did affect how some judges behaved: “One judge was afraid to ask questions, and another was a camera hog. And some of the advocates appeared more nervous.” But, overall, the court’s experience was described as “good.” And a judge from another state added: “Once it becomes routine, those problems disappear. The camera can be concealed, and soon everyone forgets it’s there.”

## 2. *Explaining Court Decisions*

The traditional view is that courts speak only through their opinions. Moreover, those opinions generally are written for readers trained in the law—primarily lawyers and other judges. The task of translating legal prose into everyday language has been left to outsiders, particularly the media. This raises the question: In an era in which many court decisions are of great interest to a broader public, should the courts themselves take steps to explain their rulings in a more accessible way? There was extensive discussion of this point in the breakout sessions, but no consensus.

Some participants argued that courts should hire public information officers or issue press releases. One state judge elaborated on this view by comparing the handling of the *Bush v. Gore* litigation in the Florida Supreme Court and in the United States Supreme Court:

Florida had this very able fellow who held regular press conferences. He gave the press information, something to cover, not in secret, but straightforward explanations of what was happening in the Florida Supreme Court today and how it related to other cases that were then pending in other courts in Florida. Then he came out with the Court-issued opinions. I know that many judges say, “just read the opinion.” Well, nonsense. It’s not a bad thing for somebody to be able to point to this or that page and say “what the court said about this is such and such.”

Contrast that with that incredible scene on the steps of the Supreme Court when they handed down the decision. They did it late at night when everybody was tired. I was watching C-SPAN or CNN or somebody. They had two reporters: “You read the first half, and I’ll read the second.” It was obliviousness that really passes all understanding.

At a crucial moment it seemed to me that the level of public understanding and acceptance of those decisions had a lot to do with—not the only thing, but it had a fair amount to do with—the ham-fisted way the Supreme Court handled it, and how the Florida court did just the opposite.

Other state judges described how their courts have taken steps to help the public understand their decisions. Said one:

Our court has a public information officer who is a former reporter herself and who has worked well with the media. Reporters are now assigned to the court, and they develop expertise in covering the court’s work. The reporters really try to get it right, and they are getting it right more and more. The public seems to be understanding more about what judges do.

Another court has gone even further:

Our court [now issues] press releases for our highest profile cases. They are written with the author of the opinion, a member of the court, and they’re approved by the whole court before they go out. [The reason we do this is that] the opinion is sometimes too complicated and doesn’t really say [what the court has decided]. And so this is the shorthand way of saying here’s what the court thinks the issues are. [These press releases] are greatly appreciated by the press and the public, and sometimes get into stories almost verbatim because they cut to the chase.

A federal judge said that his court had obtained some funds to hire a public information officer, and it worked well. “The person we had was very helpful, but then with budgetary cutbacks, we didn’t have the funds.” However, this judge did not specify what the public information officer’s responsibilities were, and there is reason to doubt that these included issuing press releases explaining court decisions.

Other judges were more skeptical about hiring public information officers to explain appellate decisions to the media. A federal judge said that press releases inevitably interpret

opinions and thereby provide a “spin” on the cases. A state judge said that it might be useful for courts to post unofficial synopses of cases on the Internet and that his court was considering moving in that direction. He acknowledged, however, that limiting a case summary to a few sentences could pose a risk of distorting the thrust of the opinion. One Reporter summarized what appears to be a widely held view: There are advantages to providing information, but there are also risks in “trying to capture difficult issues in a few words.”

Several participants suggested that courts could communicate better without issuing press releases if judges wrote opinions with more of an eye to a general audience. One participant said courts should “take great care, particularly in politically controversial cases, to write their opinions in ways that will help the public understand why the law required the disposition the court reached.” A federal judge made the point even more emphatically: “There are some cases where you can write the opinion [in such a way] that the justification [is] put in terms comprehensible to anyone who goes to the trouble of finding the opinion. The idea in writing the opinion in that way is that it helps to sell the court’s result to the public.”

### *3. Other Measures*

Participants also offered other suggestions for improving public understanding of the courts. Some focused on the media, because, as one judge said, “that is where the public gets most of their education about courts.” A recurring theme is that courts should “educate journalists, so that they can carry the message.” One judge described a “sort of one-day law school for journalists.” The court worked with a local university and brought in television reporters as well as print journalists. The judge elaborated on the benefits of the program:

In talking about the basic issues, we each learn a lot about each other. And one of the things we learned [is that] the media, because of budget cuts and otherwise, don’t have as many regular people that cover the courts [as they used to, so] they have to do that in addition to other assignments. And they don’t get special training about the courts, and I think [we ought to do] more of that exchange of ideas.

But outreach need not be limited to journalists. There was wide agreement, as summarized by one Reporter, that “public education projects, as well as bench/bar committees, are worthwhile in counteracting ignorance or misunderstandings about judges and the judicial process.” In another group, a state judge described a program that “took the Supreme Court on the road.” The judge explained:

We go into communities and into local court houses. Lawyers and teachers teach students in advance on the cases. The students hear the cases and [they have a chance to talk with] the lawyers that just argued the cases. The cases are on a fast track to be decided, so they’re decided before the school year is over, and the kids then get to talk about the case after it’s decided.

### III. PRECEDENT, UNIFORMITY, AND APPELLATE STRUCTURE

The 1975 conference took place at a time of ferment over issues involving precedent and appellate structure. The Commission on Revision of the Federal Court Appellate System (Hruska Commission) was engaged in a wide-ranging study to determine whether the existing structure provided “adequate capacity for the declaration of national law.”<sup>18</sup> The American Bar Association had begun work on standards relating to appellate courts, including various approaches to maintaining decisional consistency in state judicial systems.<sup>19</sup> Institutional endeavors such as these provided a focus for discussion that was lacking at the 2005 Conference. Rather, the participants talked about uniformity, predictability, and the non-structural arrangements that might promote or retard those goals.

#### *A. National Uniformity and the Role of the Supreme Court*

Simultaneously with the planning of the 1975 Conference, the Hruska Commission was carrying out its investigation of “national appellate capacity.” A few months after the

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18. *Hruska Commission Report*, *supra* n. 9, at 217.

19. See ABA Commission on Standards of Judicial Administration, *Standards Relating to Appellate Courts* § 3.01 (ABA 1977).

Conference, the Commission issued its final report. The Commission recommended creation of a National Court of Appeals to decide questions of national law that were important enough to require national resolution, but not necessarily important enough to demand the time of the Supreme Court.<sup>20</sup>

The debate over national appellate capacity continued for roughly the next two decades, particularly in the early 1980s, when Chief Justice Burger urged Congress to create an “Intercircuit Tribunal” similar in purpose to the National Court of Appeals.<sup>21</sup> By 1998, however, the issue had disappeared almost entirely from the realm of legal discourse.<sup>22</sup> Not surprisingly, at the 2005 Conference, there was almost no discussion of the topic, and there was no support at all for creating new structures of the kind proposed by the Hruska Commission and Chief Justice Burger.

One group did address the “national law” issue. The Reporter summarized the discussion:

On the question of conflicts, the group generally agreed that long-lasting conflicts do create problems for district courts and practitioners. Those conflicts may come from intra-circuit decisions, splits between circuits, or from splits between state courts interpreting federal law and federal district and circuit courts interpreting the same federal law. The degree to which a conflict creates a serious problem depends in part upon the degree to which the issue necessarily crosses jurisdictional boundaries. Some issues are clearly national in scope, such as interpretation of class action certification requirements; others are not.

One participant elaborated on this last point:

I agree that this is a problem in types of cases that are national practice cases. For example, in class action

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20. Disclosure note: I served as Deputy Director of the Hruska Commission and helped to write its report.

21. See e.g. Warren E. Burger, *Annual Report on the State of the Judiciary*, 69 ABA J. 442 (Apr. 1983).

22. The final blow was administered by the Commission on Structural Alternatives for the Federal Courts of Appeals, whose Final Report, issued in late 1998, did not even mention the subject. This was particularly telling because the Chairman of the Commission was retired Justice Byron White, who had been a strong supporter of the various national court proposals. See generally Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* (Dec. 18, 1998), <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf>.

practice, we stumbled along with a four-to-four circuit split on aggregation for jurisdictional purposes, and it got resolved [by the Supreme Court] only this last year, just when the issue became less relevant because of legislation. There remain significant splits on certification issue, and the choice of which circuit to send cases to from the Multidistrict Litigation Panel can be outcome determinative. This makes forum selection and shopping decisive.<sup>23</sup>

Yet even in that group, the participants were in general agreement that “there aren’t that many conflicts, and there is a valid reason for letting conflicts persist while the law ‘percolates’ before taking the issue to the Supreme Court.” In other groups, although there were scattered references to conflicts that go unresolved, the “national law” issue received even less attention.

Related issues generated some discussion. For example, a few participants expressed dissatisfaction with the Supreme Court’s reliance on the cert pool in selecting cases for plenary consideration. Said one:

My biggest frustration is with the process used by the U.S. Supreme Court in deciding whether to grant cert. The cert pool in which eight of the nine justices participate essentially delegates that decision to a single 25-year-old law clerk. Clients have a hard time understanding how their lives and fortunes can be placed in the hands of a single 25-year-old.

A participant in another group echoed this concern and suggested that reliance on the cert pool has had deleterious effects on the kinds of cases selected for plenary review:

Clients seeking certiorari in the Supreme Court are dismayed to learn that, except in exceptional circumstances, the Justices decide which cases to take—or not take—based only on a “pool memo” from a recent law school graduate. . . . When these graduates, the product of a legal education that gives disproportionate emphasis to constitutional law, play such an important role in determining the cases that the Court accepts for review,

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23. The speaker was referring to the Supreme Court decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), and to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 12 (2005).



perhaps it shouldn't come as a surprise that the Court's docket is heavy on constitutional law and light on commercial law cases. In my view, the Court is making itself irrelevant, in part by taking so few cases every year and in part by the esoteric nature of much of the Court's docket. There are lots of important issues, in the area of commercial law and other disfavored fields, that the Court is choosing to ignore.

But most lawyers did not share this frustration, and no judge discussed the point.

A somewhat larger number of participants expressed dismay at the product of some of the cases the Court does take. In one group, several conferees said that the Supreme Court sometimes issues confusing opinions that actually create conflicts in the lower courts. In another, the discussion led to a gentle ribbing of Justice Stephen Breyer, who had spoken at the plenary session. A judge cited the example of the Establishment Clause, which has generated a very large body of decisions over the past several decades. The judge asked rhetorically: "Do we know anything more about the Establishment Clause now than we knew in 1962 or '63?" A lawyer responded, "I had a non-lawyer friend who told me a couple of days ago, if I had the chance, ask Justice Breyer about his two decisions on the Ten Commandments."<sup>24</sup> Laughter obscured the other responses.

### *B. Uniformity and Predictability within Circuits*

In contrast to the lack of interest in the problem of "national appellate capacity," most of the breakout groups engaged in extensive discussion of issues relating to uniformity of decisions within individual circuits. As several participants noted, all circuits follow the rule that decisions of three-judge panels are binding on subsequent panels unless overruled by the

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24. In June 2005, a few months before the Conference, the Supreme Court handed down two decisions involving Establishment Clause challenges to displays of the Ten Commandments. The Court held that one of the displays was constitutional and that the other was not. Only Justice Breyer voted in the majority in both cases. For edited versions of the two decisions and commentary (including Justice Breyer's own explanation), see Arthur D. Hellman, William D. Araiza & Thomas E. Baker, *First Amendment Law: Freedom of Expression and Freedom of Religion* 974-98 (LexisNexis 2006).

Supreme Court or by the court of appeals en banc. But this rule does not necessarily preclude the development of conflicts.

First, a later panel may purport to adhere to the law of the circuit, but other members of the court may view the decision as creating an inconsistency. As one judge said, “The problem that we most often experience is conflicting precedents. Like most circuits, we do not allow one panel to overrule a precedent set by another. So we often have panels straining to distinguish their cases from prior circuit decisions.”

Second, conflicts may develop because the lawyers have failed to provide the kind of help that the court needs. As one circuit judge said, “At times, lawyers do not bring to the court’s attention binding precedent, and thus problems can be created.” Advocacy can also fall short in more subtle ways. A lawyer commented:

Part of the reason why there is growth of the appellate specialist is that so often the lawyer who tried the case is still so angry about that evidentiary point or seventeen other [rulings by the trial court]. Hopefully the appellate specialist is able to push it down to that point of law that’s really likely to do something. But you don’t have to be an appellate specialist to be the one to call to the court’s attention to the fact that there are discrepancies in the case law. [My point is that] the lawyers can play a role through careful analysis and presentation of those intracircuit or intrastate conflicts, and then you get it worked out.

And I also think that lawyers can help [in other ways]. Generally there are not ten issues in a case; there are the one or two real issues on which the case is going to turn. A brief that hones down to what the case really is about is probably going to do a great deal to help the court [do its job]. When I was a law clerk, [there were some briefs that] you just looked at and said, “How do I even start in helping the judge analyze this?”

Third, problems can arise when the same issue is presented to two or more panels at the same time. Several groups discussed the various approaches to this situation. A colloquy in one group captured the thrust of the debate:

Judge 1: “In my circuit, the opinion that is considered binding is the opinion issued in the case that was *argued* first, even if it is not the opinion that is *published* first.”

Lawyer 1: “That is not the way the rule works in other circuits. It is the first opinion that is published that is considered binding. But under that system, there sometimes is a rush to be the first to publish.”

Judge 2: “That definitely happens in my circuit.”

Lawyer 2: “Has your circuit considered adopting the first-argued rule?”

Judge 2: “No. One problem with that approach is that it sometimes takes a panel forever to get an opinion out. The other panels don’t want to hold up their opinions while they wait for the first panel to publish.”

Other circuits take preemptive action to avoid having the same issue pending before two different panels. As a participant from one such circuit explained, when two or more cases raising the same issue are filed at roughly the same time, the clerk’s office tries to assign all of the cases to the same panel. If a later appeal is filed raising an issue that is already pending before another panel, the clerk’s office will often hold the second appeal until the first appeal is decided and then ask for supplemental briefing.

The participants also discussed practices that allow a panel to repudiate circuit precedent without the need of rehearing en banc. In the Seventh Circuit, a panel may frontally overrule a prior decision if it circulates a draft opinion to all active judges and “a majority of them do not vote to rehear en banc the issue of whether the [new] position should be adopted.”<sup>25</sup> The Second Circuit has a similar procedure, but its availability is considerably more limited. As one participant described it,

The panel will write an opinion narrowing or rejecting the prior precedent and will circulate the opinion to the full court. If no judge objects, the opinion will issue with a footnote saying that the panel’s decision to reject the precedent has been circulated to the entire court and no judge has objected. In this way, the en banc court de facto modifies a prior precedent without the need for an en banc argument.

Thus, in the Second Circuit, panel overruling requires unanimous *consent* of the active judges—a sharp contrast to the

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25. 7th Cir. R. 40(e).

Seventh Circuit practice, which allows overruling unless a majority of the judges *object*. Further, the Second Circuit procedure is generally not used to “frontally overrule” a precedent, but rather when the precedent has already been weakened by being “distinguished to death.”

In the Fourth Circuit, if a panel wishes to depart from a prior decision, the panel will circulate a letter to the full court requesting an *initial* hearing en banc. But it appears that if a majority of the active judges do not vote for the en banc hearing, the panel must adhere to the precedent notwithstanding its disagreement. In some other circuits, published opinions are circulated to the full court before filing “so that potential en banc cases can be identified even before an en banc petition is received.” However, this procedure does not free panels from the obligation to adhere to the law established by prior decisions.

Overall, participants in the Conference—lawyers as well as judges—seemed to agree that court of appeals panels generally follow circuit precedent.<sup>26</sup> At the same time, they recognized that there are “conflicts in terms of how the law is applied to the facts.” But this phenomenon was not viewed as reflecting any kind of systemic defect. One Reporter’s summary is illustrative:

The group agreed that appellate judges rarely will deliberately refuse to follow binding precedent. Instead, conflicts generally arise in how judges apply the law to particular facts. Everyone agreed that in the application of law to fact, the outcome in a case could well depend on which judges are assigned to the panel. But the group, while clearly troubled by such conflicts, did not think that anything realistically could be done. No one favored the use of frequent en bancs to apply the law to specific facts. All agreed that such conflicts were an inherent part of our judicial system.

As this quotation suggests, the participants used the term “conflict” in a rather broad sense, encompassing unpredictability as well as inconsistency. Unpredictability came up in some other

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26. One lawyer said that this is not true of the Ninth Circuit: “In the Ninth Circuit, an attorney can find a precedent for just about any proposition. It is very easy to find flatly conflicting precedents without any acknowledgment of the conflict by the panels or the en banc court. This is terribly frustrating for attorneys and their clients.” No other participant voiced this criticism of the Ninth or any other circuit.

contexts as well. In particular, a few participants expressed concern that extensive use of visiting judges on court of appeals panels “reduces predictability.”

### *C. Uniformity and Predictability in State Systems*

Not surprisingly, it is more difficult to generalize about state appellate courts than about the federal circuits, but here too there was little evidence of serious malfunction in the system of precedent.

In most states, the appellate structure resembles that of the federal system: “the intermediate courts . . . handle the great mass of appeals,” while the supreme court is “reserved for decision of the more important cases, usually those of significance to the law and the administration of justice and not solely of interest to the litigants.”<sup>27</sup> But based on the breakout session reports, it appears that the actual relationship between the state supreme court and the intermediate court is often quite different from what we see in the federal system. There is a greater sense of participation in a shared enterprise, and little if any of the Olympian aloofness that has characterized the United States Supreme Court in recent years.<sup>28</sup> Here are some examples:

- “The judges in [my state’s] intermediate appellate courts work very hard to avoid conflicts and will sometimes order en banc sua sponte while a panel case is pending. If conflicts persist from one intermediate court to another, the [state] Supreme Court is good about resolving such conflicts.” (A lawyer.)
- “Our state intermediate appellate courts face conflicts from time to time. There are [several] divisions, and one is not bound by another. But this is usually not a problem because (1) judges bend over backwards not

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27. Daniel John Meador, *American Courts* 14 (West Pub. Co. 1991).

28. See Hellman, *Shrunk Docket*, supra n. 11, at 432-38; Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 Wash. & Lee L. Rev. 271 (2006).

to create conflicts, and (2) conflicts that do arise are resolved fairly rapidly by the [state] Supreme Court.” (A judge.)

- “In my state, one court of appeals cannot overrule another. The courts of appeals decide 1600 to 1700 cases a year. Given the volume, sometimes a precedent is overlooked; in those instances the state Supreme Court lets the intermediate appeals court know about it.” (A judge.)

Some participants explicitly noted differences between the federal system and state systems that might lead to more frequent intervention by the state high court. One participant said:

We should not assume that the federal approach is necessarily appropriate for the states. In the federal system, only the Supreme Court can fix conflicts among the circuits, and getting Supreme Court review is very difficult. In the states, though, the supreme courts have greater capacity. Perhaps the states should permit panels of intermediate appellate courts to disagree. That would spur the state supreme courts to address issues that they should address but might otherwise duck.

Another participant commented that “state supreme courts will grant review for conflicts involving different formulations of a legal principle, whereas the U.S. Supreme Court is much less likely to do so in that circumstance.”

Participants also discussed techniques that allow judges on an intermediate court to “send a signal” to the supreme court that they “are not entirely content with [some] existing precedent.” In one state, dissenting opinions serve that purpose; there is an appeal as of right to the supreme court if there is a dissenting opinion in the intermediate court. Another state uses the “special concurrence”:

In essence the special concurrence states that the court did X because existing precedent required it to do so, but the court is not comfortable with that result and requests review by the Supreme Court. Such special concurrences are sometimes written even when the panel is unanimous

(because of precedent), and all members of the panel may join in the concurrence.

Other participants offered more mixed assessments of the operation of precedent and the governing institutional arrangements in particular states.

- A judge: “Our court has a rule that says that one panel cannot issue an opinion that conflicts with another panel. One effect of this is that it leads some judges to spend a lot of time trying to distinguish existing precedent. Of course, sometimes it can’t be done, and the cases have to be taken en banc.”
- A lawyer: “In [the largest city in my state] there are twenty-four appeals court judges. Lawyers in [that city] tell their clients that it is impossible to predict the likelihood of success on appeal until the panel is selected. [But this is not a matter of ideology.] Unlike the situations described in [two federal courts of appeals], all of the appellate court judges are [members of the same political party]. In contrast, it is possible to give a clearer idea of what the [state] supreme court will do.”
- A state supreme court justice: “In my state, panels of the intermediate courts are not required to follow each other’s precedents. When a conflict develops, the supreme court will take the case.” An intermediate court judge from the same state (but a different small group): “It is a problem when intermediate courts in the state have conflicts that are not resolved by our supreme court.”

But the overall impression that emerges from the breakout session reports is that the system of precedent works pretty much as it should. The point is illustrated by these comments:

- A lawyer: “I’ve found that occasionally, within a jurisdiction, you’ll find inconsistency, but generally it gets resolved fairly quickly once it’s pointed out,

so I'm not sure it's as big of an issue as some make it out to be. Seems like, if you tell the [state] Supreme Court, 'Hey, you've got two cases, and they seem to say opposite things,' in the third case, they tend to deal with it; so I think it's just kind of a function of a growing number of judges and cases that you're going to get those inconsistencies, and I don't see a problem getting them worked out."

- An intermediate court judge: "Our court has a process in place to avoid creating conflicting precedents; that is the primary use to which we put our central legal staff. I don't think that they catch every potential conflict, but the existence of conflicting precedents is not cited frequently as a basis for granting reargument."
- A Reporter (summarizing several comments within the group): "It is not common for conflicts among panels of intermediate state courts to remain unfixed. Either a state will follow the horizontal-precedent rule and conflicts will not develop, or the state will not follow the horizontal-precedent rule and the supreme court will fix the conflicts that arise."

#### *D. The Non-Precedential Precedent*

Based on what I have reported thus far, it would seem that the system of precedent operates fairly smoothly in both state and federal courts notwithstanding the volume of appeals. But we have not yet reckoned with the phenomenon of the non-precedential precedent—in common parlance, the unpublished appellate opinion.<sup>29</sup>

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29. The term "non-precedential precedent" was first used by Judge Robert Sprecher of the Seventh Circuit at a hearing of the Hruska Commission in 1974. See William M. Richman & William L. Reynolds, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1167 (1978).



“Unpublished” is of course a misnomer.<sup>30</sup> In all circuits and in many states, “unpublished” opinions are readily available on court websites and on Lexis and Westlaw. Sometimes (as in the federal system) they are published in bound printed volumes. Thus, the problem is not that unpublished opinions are literally unpublished or inaccessible. Rather, as participants pointed out, unpublished opinions implicate concerns about uniformity and predictability in three interrelated ways.<sup>31</sup>

First, unpublished opinions are not treated as binding precedent. Even if an unpublished opinion appears to present the identical issue in an identical factual setting, a later panel is not obliged to follow it.

Second, in many appellate courts, *published* opinions are circulated in draft form to all members of the court before they are released to the public. Unpublished opinions are not. Thus, off-panel judges do not have an opportunity to review the opinion and identify possible conflicts with existing precedent.

Third and most critically, when an opinion is designated as “not for publication,” the panel is permitted—and indeed often encouraged—to provide only a skeletal statement of the facts (perhaps not even that) and a conclusory statement of the rationale.<sup>32</sup> One consequence of this format is that, as a state judge observed, there is very little that litigants can cite in future disputes. What is more important, neither litigants nor anyone else can determine, simply from reading the opinion, whether the panel has failed to follow a precedent on point or has otherwise created a conflict.

In this light, it is not surprising that several lawyers in the breakout sessions voiced the concern that unpublished opinions are used as a device to avoid controlling precedents. Said one: “One hears about it anecdotally that panels wanted to avoid the law of circuit, so they decided not to publish.” Said another:

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30. See Stephen L. Wasby, *Publication (Or Not) of Appellate Rulings: An Evaluation of Guidelines*, 2 Seton Hall Cir. L. Rev. 41, 42-43 & n. 4 (2005).

31. In planning the 2005 Conference, the Steering Committee made a considered decision to de-emphasize the subject of unpublished opinions. This Report deals with the topic only in the present context.

32. The Ninth Circuit offers this model for treating an issue in an unpublished opinion: “Defendant’s statements were volunteered rather than made in response to police questioning, and were therefore admissible. *U.S. v. Cornejo*, 598 F.2d 554, 557 (9th Cir. 1979). AFFIRMED.” 9th Cir. General Orders 4.3.a (“Memoranda Dispositions”) (2005).

From my perspective, there are lots of cases where what appears to be happening is that the court is avoiding a certain result by issuing an unpublished opinion. [The proliferation of] unpublished opinions creates the perception that it's worth taking a chance on an appeal because you might be the one who gets an unpublished disposition going your way.

The judges in the groups generally took the position that unpublished opinions are not used in cases that do not warrant them. As one judge said of his own court, "The judges play it straight." But comments by other judges lend some support to the lawyers' concerns. One state judge described unpublished opinions as "the elephant's burial ground for bad cases." Another state judge said:

It used to be that "hard cases make bad law." Now "hard cases make unpublished opinions." There is a temptation to duck difficult issues by addressing them in unpublished opinions, and [my court] sometimes succumbs to that temptation.

One federal judge said that if a panel on his court disagreed with a prior published opinion, it might use "an unpublished, non-citable opinion in order to achieve a just result without running afoul of the first-panel rule." But no other judge, state or federal, made a comment along those lines.

If unpublished opinions are being widely used—as this judge suggests—to achieve a just result without running afoul of the first-panel rule," this would obviously be a cause for concern. What is at stake is not so much the fabric of precedent as the basic responsibility of courts to treat like cases alike. Based on the breakout session reports, it is impossible to reach a conclusion on this point; the material is simply too sketchy. But it is worth emphasizing that even the lawyers who expressed greatest concern about the misuse of unpublished opinions recognized that a supposedly controlling precedent "may not in actuality be all that controlling." That is, there may be superficial similarities to a published opinion, but there are also differences. Those differences mean that the panel probably has not failed in its obligation to treat like cases alike.

The more complex question is whether appellate courts, in withholding so many decisions from the corpus of binding precedent, are being faithful to what one participant called "the

way of the common law.” On this point the debates at the breakout sessions mirrored those that have taken place in many other forums. The following exchange from one group (only slightly edited) gives a sense of the competing views:

Judge A: “What is the conceivable value of the one thousandth precedent on the standard of review for a summary judgment?”

Lawyer B: “If the law is being applied to a unique set of facts, it could have value.”

Lawyer C: “Why not let the lawyers decide if it has value?”

Judge D: “The bar would be much better off doing traditional legal research using published precedent.”

Judge E: “At common law, every decided case was available. Courts did not distinguish between correcting error and establishing precedent.”

Judge F: “The problem today is the availability of computer research. Briefs that string-cite seven cases for every point are not useful to the court. Lawyers should reason by analogy, not example. More examples are not useful.”

Lawyer G: “That doesn’t give much credit to appellate lawyers. I’m not going to win my cases by citing a lot of sludge. I’m going to cull out the most persuasive authority.”

Another group took the discussion one step further, as the Reporter’s summary indicates:

The group recognized that the way of the common law is to perform both functions—correcting error *and* declaring the law. Indeed, the fine factual distinctions that lead to unpublished opinions are the heart of the common law. And from the standpoint of the practicing bar, opinions that draw fine factual distinctions are the very opinions that lawyers need to give better guidance to clients.

But the account cannot end there. Several judges made the point that they “could not possibly vet all of the decisions” that their colleagues hand down. A federal judge commented: “Publication is a signal that we’ll stand behind every word of the opinion; it’s just too hard to keep up with [everything that every judge writes for the court].” A state judge agreed: “As a lawyer I would have thought that everything should be published. My

perspective changed as an intermediate appellate judge. In that position you don't have the time to think through the precise language that you use in every decision." The federal judge added: "Or to worry about the language that your colleagues use." And if that is the reality, is it accurate to say that a lawyer could "give better guidance to clients" based on the "fine factual distinctions" drawn in an opinion designated as "not for publication"?

The arguments about unpublished opinions can easily call to mind the labyrinthine drawings of M.C. Escher: Just when you think you are looking at a different level of the structure, you realize that you're actually back where you started. It is not surprising that the participants in the 2005 Conference did not solve the puzzle.

#### *E. The Significance of Conflict and the Role of Precedent*

At a conference on appellate courts, it is only natural to look closely at the role of precedent. And in view of the history recounted at the start of this Report, it was to be expected that the planners for the 2005 Conference would focus particularly on issues of uniformity and predictability in appellate decisions. Yet as I review the breakout session reports, what stands out is skepticism about the salience of conflict and even about the importance of precedent. This is evident in some of the comments I have already quoted, but the point emerged quite directly in an exchange in one of the groups:

A trial judge: "I really resonated with what [one of the plenary speakers] said about the different degrees of precedent and the different kinds of issues. If there's a discrete issue on which there's [controlling precedent], then it's easy: you follow it, like it or not, and then you go on to the next case and the next issue. But I've found both as a lawyer and as a trial judge that there are many issues on which the precedents aren't totally controlling. They give you values, preferred values, or [they point you to] the weight of certain factors [or] multi-factored tests which are not controlling in the sense that they end your analysis. [In that situation], the lawyers as advocates ought to be able to argue from the force that the opinions give to how they apply in the particular circumstances of this case. And I as

a judge have the obligation and the privilege of explaining why I think those values apply in [one way and not another]. And [if that means a degree of uncertainty], I'm OK with that."

A lawyer: "I agree with that totally. I think this idea that that we need all these precedents for dictating a particular result [is just not correct]. I think there's far more of danger that you get a lot of cases that end up saying something on the way to a result that ends up inappropriately binding lower courts down the road."

Another lawyer: "On the idea of precedent, [another of the plenary speakers] has a good way of describing it. He says, 'We're still calling it law school; it ought to be "fact school,"' because so much of the law is driven by the facts. I agree with that. It's rare that I have conflicting precedents that I can't get around by saying, 'Your facts and my case might be different.'"

A state appellate judge: "You've really said what I had not said as an appellate judge, which is that I think we ought to be careful about breathing life into this illusion that on every given statement of facts there is a controlling law. But we don't have Hammurabi's Code, thank goodness; we don't have that kind of system of law and, you know, those of us who believe in the common law tradition ought not forget the value of that. The citizenry tends to think—maybe from watching Judge Judy or reading newspapers—that on every given dispute, there is a controlling point of law; well, it's an absurd illusion, because why would you have courts and lawyers, if that were the case?"

Comments like these help to explain why the various proposals for a National Court of Appeals or an Intercircuit Tribunal never gained any real traction among judges and lawyers. The point is not that precedent is unimportant. The point, rather, is that in the cases that claim the time of judges and lawyers, precedent does not "end [the] analysis;" it simply provides a starting-point. Enlarging the corpus of authoritative precedents may move the starting-point in one direction or the other, but it does not substantially alter the process that judges and lawyers must engage in.

## IV. VOLUME, PROCESS, AND THE RESPONSIBILITY FOR DECISION

As already noted, a central theme of the 1975 Conference was the effect of the “staggering inflation in caseload” on the appellate process. The Conference briefing book painted a bleak picture: “[N]one of the options for dealing with increased caseload is likely to be attractive. . . . *An important point of beginning . . . is that there is no wholly benign solution.* The price can be paid in one or more of several currencies, but pay we must.”<sup>33</sup> And the threat was not simply to the quality of the process. Professor Paul D. Carrington, in his report on those breakout sessions, described the far-reaching consequences that the participants feared: “For a judge to serve only as an agent of quality control and to provide a visible front for an otherwise faceless apparatus involves not only a departure from tradition, but also a real sacrifice in the human sensitivity of the government.”<sup>34</sup>

In 1985, ten years after that first Conference, Judge Richard Posner published a book with the title *The Federal Courts: Crisis and Reform*. In it, he noted the particular difficulty of dealing with increases in caseloads at the appellate level: You cannot simply add judges without generating adverse consequences somewhere in the appellate hierarchy. Judge Posner acknowledged that judges and commentators had been complaining about caseloads for twenty-five years, but, he said, this time “the wolf really does seem to be at the door.”<sup>35</sup>

Fast-forward now to 2005, or rather 2004, when the Steering Committee started planning the 2005 Conference. There was no widely shared sense of crisis such as the one that existed in 1975 and for some years thereafter. No one was saying that “there is no wholly benign solution” to the problems of appellate courts or that “pay we must” for the consequences of volume.

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33. *Appellate Justice 1975*, *supra* n. 6, at vol. I (*Summary and Background*) 3 (emphasis in original).

34. Paul D. Carrington, *Report on Group Discussions*, in *Appellate Justice 1975*, *supra* n. 6, at vol. V (*Supplement, Proceedings, and Conclusions*) 65.

35. Richard A. Posner, *The Federal Courts: Crisis and Reform* 317 (Harvard U. Press 1985).

The absence of a sense of crisis was one of the things the Steering Committee focused on in planning the 2005 Conference. After all, caseloads did not decline. In most courts, particularly in the federal system, they continued to increase. Few appellate courts added any significant number of new judges. So if the wolf was really tearing the door down in 1975 or 1985, by 2005 the door should have been no more than a pile of splinters, and the wolf should have been sitting in the center seat, the master of the courthouse.

But almost no one thinks that that is the reality today. So one of the things we hoped to accomplish with the 2005 Conference was to find an answer to the question: What did happen between 1975 and 2005?

There are many possible explanations, and they are not mutually exclusive, but for purposes of this Report I will concentrate on two points at opposite ends of the spectrum.

One possibility is that there never really was a crisis. There was change, and there was growth, but there was also adaptation. People overreacted at the time because the phenomenon of rapid growth was new, and its consequences could not be foreseen. Moreover, some courts responded to increased caseloads with innovative techniques and practices. Most lawyers respect tradition, and many mistrust change. It would not be surprising if people overreacted, not only to the increased volume, but also to the measures taken to cope with that volume.

If that is the explanation, we do not have to worry. But there is another possibility: That the quality of appellate justice *has* deteriorated, but the participants in the system have not noticed any falling-off. They have not noticed it because it has happened so gradually, and also because the measures that were initially adopted as stopgaps—as triage, to use a familiar metaphor—have become accepted as the norm. In other words, we've lost something valuable that we used to have, but we don't miss it (or most of us don't) because we don't realize that we've lost it.

To determine which of these explanations is closer to the truth, the Conference proceeded in two steps. First, we invited some outstanding plenary speakers to present facts and figures as well as their hypotheses. Second, we used the breakout

sessions to get the individual and collective perceptions of participants in the system: the judges and the lawyers.

The lead plenary speaker was none other than Judge Posner. But between 1985 and 2005 his own perception had changed substantially. The second edition of his book, published in 1996, was not subtitled “Crisis and Reform”; its subtitle was “Challenge and Reform.”<sup>36</sup>

What Judge Posner said at the 2005 Conference was that, contrary to dire predictions in the 1970s (and, he might have added, his own comments in 1985), the increased caseload per judge has been accommodated with relatively little difficulty by a number of changes that enhance judicial productivity. He listed several of these changes:

- curtailment in the frequency and length of oral argument;
- more law clerks;
- greater use of staff attorneys;
- better screening of judicial candidates; and
- advances in information technology.

Judge Posner also said that appellate judges were underworked in the 1950s, so that there was capacity to deal with increased caseloads without corresponding increases in judgeships. Finally, Judge Posner cited statistics showing that, at least in state courts, the volume of appeals has leveled off in recent years.<sup>37</sup>

Much of the discussion in the breakout groups—even when other issues were ostensibly on the table—sheds light on the correctness of Judge Posner’s assessment. I begin with some

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36. Richard A. Posner, *The Federal Courts: Challenge and Reform* (Harvard U. Press 1996).

37. See Richard A. Posner, *Demand and Supply Trends in Federal and State Courts over the Last Half Century*, 8 J. App. Prac. & Process 133, 134 (2006). As Judge Posner noted, state court data were unavailable for the period before 1987. *Id.*



general perceptions, then turn to some of the particular developments on which participants expressed their views.

*A. Accommodation or Surrender?*

In asserting that courts have accommodated increased caseloads through changes that enhance judicial productivity, Judge Posner was actually putting forward two propositions. Explicitly, he was saying that the various developments that he listed have, in fact, made appellate judges more productive. Implicitly, he was saying that this enhanced productivity has been achieved with little if any harm to other values served by the system. I did not expect the first proposition to generate much disagreement, and it did not. I expected the second proposition to be at least somewhat more controversial, and it was.

The opposing view was stated forcefully by another prominent federal appellate judge. (I'll call this judge "the dissenting judge.") The dissenting judge asserted that "there *is* a crisis," and that the shortcuts taken to accommodate the crisis are "appalling." Turning to particulars, the dissenting judge said that in the substantial majority of cases today, there is no oral argument, and the attorneys, after submitting their briefs and getting an opinion, have no idea whether anyone read or understood their contentions. Rather strikingly, this judge attributed the lack of agitation about the deterioration of the decisionmaking process to the "docility of the bar."

I wish I could say unequivocally that there was a consensus in support of one view or the other, but there was not. My sense is that there were more who agreed with Judge Posner than those who disagreed, but certainly there was not unanimity. Moreover, the reports from the breakout sessions point to a threshold difficulty in making any kind of overall assessment, namely that the situation varies enormously from one court to another. Some judges feel besieged; others feel no more than the ordinary pressures of an important job in a profession that requires a certain level of intensity and application.

It is particularly difficult to generalize about state appellate courts. Each state is different. State supreme courts, most of which can control their dockets, face far fewer problems than

state intermediate courts, which are courts of mandatory jurisdiction. In addition, no state except California and perhaps Texas had more than a handful of representatives at the Conference.

Another obstacle to generalization is that, not surprisingly, lawyers and judges often differed in their assessments. In particular, judges were generally confident that they have avoided undue delegation to staff; lawyers tended to have some doubts.

### *B. Oral Argument*

One of the changes that Judge Posner cited as enhancing judicial productivity is the curtailment in the frequency and length of oral argument. These are really two distinct phenomena, and I shall discuss them separately.

In connection with the denial of oral argument, several participants pointed out that, at least in the federal courts, a very large percentage of appeals—more than fifty percent in one circuit—are filed by pro se litigants. Oral argument is almost never allowed in those cases, so if you look only at counseled cases, the drop in oral argument is not nearly as steep as the overall figures suggest.

How valuable is oral argument? We must distinguish between instrumental and symbolic purposes. Some participants emphasized the functional utility of oral argument. There were several comments to the effect that “mistakes are more likely in cases that are not orally argued,” in part because “often, the written briefs are like ships passing in the night.” In a different vein, a state judge observed: “Oral argument helps to focus the judges, since they are all hearing the answers to questions at the same time.” A federal judge said: “It changes the judge’s minds in five to ten percent of the cases. Also, the level of preparation by the judges is higher when there is oral argument.” Another federal judge summarized a widely held reaction:

Oral argument is the first opportunity the judges in [my] circuit have to “confer” with each other on a case. Often, there are still questions remaining despite reading the briefs. But most oral argument is not well done by the

lawyers. It rarely changes anyone's mind, but may affect how the opinion is written.

As this last comment indicates, even judges who saw value in oral argument also acknowledged its limitations. But judges and lawyers alike emphasized that oral argument has value even if it does not affect the decision. A recurring theme is that oral arguments help to maintain public confidence in the system. A federal judge said: "Oral argument is important from the perspectives of making the appellate process visible and making appellate judges accountable. Otherwise, you could be dead, and nobody would know it, because you never appear in public." As a state judge commented, "Lawyers who have oral argument feel that they have been heard." A lawyer added: "It is the one point of face-to-face contact between the public—especially the clients—and the appellate judges." This focus on client perspective was widely embraced. Several participants said that if courts offered a choice between having oral argument and getting a written opinion, lawyers would probably opt for the opinion, but the client generally would choose the argument.

Does this suggest that courts have gone too far in cutting back on oral argument? Not necessarily. My sense is that with the possible exception of some lawyers in the Eleventh Circuit (and I don't know if this is a majority view), few of the lawyers in the breakout groups felt that oral argument had been denied in a case that they thought really deserved it. But it may be that the lawyers whose cases are most likely to be sent to a screening panel without oral argument were under-represented at the Conference.<sup>38</sup> (The Invitations Committee tried very hard to get them, but those efforts were not always successful.)

Several judges made the point that the decision to forego oral argument is not always made by the court; sometimes it is the lawyers who opt to submit the case on the briefs. For example, a judge on a state intermediate court said that his court allows oral argument in any case where it is requested, but that it is now requested in roughly forty percent or less, down from around sixty percent. Several participants (including lawyers) criticized the practice of waiving oral argument. Said one: "It's hard to believe that anyone who appeals a case doesn't

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38. In particular, there were few lawyers from Public Defender offices, state or federal.

recognize that he or she is sending a tremendous message to a court by not requesting argument.”

There was also some interesting discussion of cutbacks in the *length* of oral argument. Perhaps not surprisingly, this was one area where the judges saw things differently from the lawyers. The judges were confident that they could get what they needed from oral argument even in ten minutes. They pointed out that extended argument is unnecessary if both the judges and the lawyers are well prepared. Several judges also emphasized that if in the course of argument it became clear that more time was needed, it would be granted.

In contrast, the lawyers identified a number of problems with extremely brief arguments. One lawyer said that answering a single question from a judge could take up the entire allocation of time. Several lawyers wondered about having to travel long distances for a brief argument, especially if the judges did not end up asking any questions.

There was the further question: How much time do the judges really save by cutting back on the length of argument? A partial answer is that in courts where some or all judges must travel to the argument site, there are substantial efficiencies in reducing the number of *weeks* of argument, or the number of days that the judges must be away from their home chambers. After all, even with laptops, email, and mobile phones, travel time is surely less productive for judges than time in chambers.

### *C. Staff Attorneys and Screening*

Another of the changes that Judge Posner listed as “enhancing judicial productivity” is greater use of staff attorneys. I suspect that many of the Conference participants who heard that remark wondered: Exactly how does that happen? If the staff attorneys help the judges to make more efficient use of the time they spend on cases, that’s one thing. But if the staff attorneys are doing work that the judges ought to be doing themselves, that’s something else.

This, too, is an area in which judges and lawyers had different perceptions. Judges expressed confidence that they are using staff appropriately and that there is no danger of excessive delegation based on their current practices. Lawyers were more

agnostic. I use that word, rather than “skeptical,” because what lawyers *see* is that judges are (in their view) making errors or giving short shrift to appeals. But they have no way of knowing whether this is because of overdelegation or some other failing.

One of the most important functions of staff attorneys is that of screening cases for disposition without oral argument. Judges from several courts emphasized that even after a case has been placed on the non-argument track, a single judge can “bump” the case to the argument calendar. Most of the judges were confident that this backstop avoids undue delegation at the screening stage. But they acknowledged that there are differences in the “degree of comfort” with screening practices.

Screening by staff attorneys is by no means universal, however. Judges in other courts (state and federal) emphasized they had not delegated the screening function, and that only judges “decide what track every case is going to go on.” Some of these judges indicated that they viewed screening by staff as an improper form of delegation.

Staff screening is often—though not invariably—associated with staff preparation of draft dispositions. Judges from several courts took pains to assure lawyers that in cases selected for the screening track, the staff “doesn’t even begin drafting dispositive orders until a screening panel has given them direction about what to do.” But in other courts, staff attorneys routinely prepare draft dispositions in advance of judicial consideration.

This latter group includes the largest of the federal courts of appeals, the Ninth Circuit. The breakout groups at the Conference included several judges from that court. Based on their comments and other sources, it is possible to offer a rather complete picture of the process. Here is the way it works.

A three-judge screening panel meets at the courthouse in San Francisco. Sometimes one judge will participate by video conferencing from his or her home chambers in another city. The staff attorneys present the cases orally, along with a draft memorandum disposition. The judges can ask questions, and the record is there on the table for them to leaf through. If the judges want to see a particular exhibit, the staff can get it for them. Using this process, a screening panel can dispose of up to sixty cases in a day. If the panel sits together for a week, as typically

the panels do, the three judges can dispose of 300 cases. As in other courts, a single judge can send a case to the argument calendar.

Some attorneys find it troubling that judges would not read the briefs and the record in a case, but only a staff memorandum. In fact, in the Ninth Circuit (and other courts that follow this approach), the judges do not even read a staff memorandum; the process is entirely oral. On the positive side, all three members of the panel focus on the cases at the same time in the same physical (or occasionally electronic) space. This makes it very easy for any one judge to express reservations about the proposed disposition, and, if the judge is not satisfied with the response, to knock the case off the screening calendar. In contrast, in a “serial screening” court, the case files are sent to each of the three judges on the panel in sequence. Perhaps the judges read the briefs, but there would be no opportunity for them to discuss the cases, because by the time Judge B looks at the file, Judge A has long forgotten the case.

Apart from the merits of the various approaches to screening, participants flagged other concerns raised by the use of staff attorneys. Judges acknowledged that “staff attorneys develop expertise in different kinds of cases, and they may become a little cynical about certain kinds of cases they see frequently.” “Career staff modifies and changes the work product” and “tends to allow judges to become more lazy in their role.” And some lawyer participants had doubts about the practice itself. As one lawyer said, “Attorneys want a fair opportunity to persuade the judges of their correctness of their clients’ position. Summary dispositions, especially when screening attorneys are heavily involved, deny attorneys that opportunity.”

Other attorneys reported “relatively low levels of indignation about the practice [of screening] on the part of appellate lawyers who have come to expect it.” But low expectations may not be the only reason for acceptance. Judges made a number of points that may help to explain the absence of indignation:

- A very large proportion of the cases that are handled by staff attorneys are pro se cases. The briefs

probably aren't going to be very helpful, and in any event they will certainly benefit from thorough review by staff attorneys.

- Many of the appeals (including the counseled appeals) raise identical issues—issues that may have been definitively resolved by a previous panel. Use of staff attorneys enables the court to benefit from economies of scale.
- In state intermediate appellate courts, public defenders “have to operate under the *Anders* system,” which means that a high proportion of criminal appeals are frivolous or nearly so.<sup>39</sup>
- Petitions for rehearing help the judges determine if there are systemic problems with quality.

Judges also offered a number of suggestions for improving the operation of screening systems and staff attorney offices, either to enhance efficiency or to avoid undue delegation:

- Frequent rotation of screening panels produces a dynamic that keeps both judges and staff attorneys from falling into a routine that produces too-easy acceptance of staff recommendations.
- Regular and frequent turnover among the staff attorneys serves a similar purpose.
- Staff attorneys can be particularly useful in handling non-merits matters that would otherwise take up judicial time, e.g. attorney's fee applications.
- Petitions for rehearing in nonargued cases should be

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39. The reference is to *Anders v. Cal.*, 386 U.S. 738 (1967). Under *Anders*, if counsel for a criminal defendant “finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.” *Id.* at 744.

reviewed by a different staff attorney than the one who worked on the case originally.

The issue of undue delegation to staff was often linked with concerns about undue delegation to a single judge on the court. A state judge made the point this way:

There's a real danger that what's supposed to be a three-judge process becomes a one law clerk process, because it's too easy for a judge to simply adopt the work of a law clerk, which is then passed along to the other chambers where judges are likely to essentially rubber stamp. For me a big part of the job is to figure out which of my colleagues' opinions I need to take a closer look at in order to decide whether I can join it. This is the case in both argued and non-argued cases.

#### *D. Law Clerks and Opinion Drafting*

Appellate judges today depend heavily on assistance from law clerks, particularly in the drafting of opinions. That is a fact that no one would deny. But does that kind of delegation pose a threat to the proper performance of the judicial function? That question generated extensive discussion in the breakout groups, with no clear answer.

Several participants—including both judges and lawyers—pointed out that assistance in drafting is commonplace elsewhere in the legal profession, particularly in the higher reaches. One judge asked rhetorically, “Do senior partners in law firms write their own briefs in all the cases where their names are on the bottom?” A lawyer in the group expressed agreement:

What you say is so true. It is very strange to me that the private bar would be so suspicious of [law clerk drafting] when, at least in large law firms, that's exactly the way they prepare the briefs to begin with. One of the reasons I left a large firm was I was doing the administering and I never could read the case law myself!

Although the judges described a variety of practices, they overwhelmingly expressed confidence that they had not delegated any core judicial functions in the preparation of opinions. Here are comments by some federal judges:



- “Judges [on my court] do use law clerks to do first drafts of opinions, but judges give those drafts careful attention.”
- “I’m comfortable with using a bench memo as the initial basis for the opinion. After conference I write an initial memo to the rest of the panel describing in some detail the panel discussion concerning what we agreed to do. This memo forms the basis on which a clerk is to create a draft.”
- “I use my law clerks to take a ‘first cut’ at tasks like doing legal research; I retain for myself the ultimate function of interpreting cases and statutes.”
- “I find it very useful to have the clerk set out the pertinent facts, describe the issues raised, and take a first stab at applying applicable precedent to those issues. But I do a fair amount of reorganizing of clerk drafts, I make substantial revisions to almost every paragraph, and about the only statements of black-letter law that I may leave untouched are boilerplate, such as standard of review. In most opinions there are only a few sentences that are the key to the analysis, and I almost always am the ultimate drafter of that language.”

Some judges suggested that the present system may actually be preferable to the traditional model:

- “I love to write; I’d rather write than do anything. [As for reliance on clerks,] I basically rewrite eighty percent of the average published opinion issued under my name. There’s a danger in writing the opinion yourself and then sending clerks off to find law to support it.” (A federal judge.)
- “Let’s not lose sight of the fact that it’s not whether the law clerk provides the first draft (in intermediate court), or whatever—there are a lot more eyes and

minds looking at the cases than used to be the case; this is a large aid in support of the error correction function; the staffing arrangements work well to serve that end.” (A state judge.)

There were also different views about how much importance to attach to the writing of opinions, particularly in cases that do not involve novel legal issues. One perspective was expressed by a justice on a state supreme court:

Most of my work is reading intermediate court decisions and deciding what to decide. The one thing I always read is the [IAC] opinion. And, not a huge amount of the time but more than I wish, I read something that leads me to say to myself, “Judge Smith didn’t read this as closely I have.” [The reason is that] something is said [in the opinion] about the facts and how the law in the field works—this puts it a little too strongly, but [what I see is] a rookie mistake, a law clerk mistake, that I would expect the judge to have uncovered. This to a certain extent is due to the difference between published and unpublished [opinions]; I assume they read the [draft of a published opinion] in a different way. But you can see fraying around the edges, maybe in ways that don’t alter the outcome, but they probably alter the perspective of the lawyers in that case and their clients about whether this case did get the appropriate amount of judicial time.

Perhaps other judges would have the same reaction if they read opinions as closely, and with as much sensitivity to nuance, as this participant does. Yet there is another way of looking at the matter. A state intermediate court judge said:

Some opinions are what a colleague of mine calls a “meat and potatoes opinion.” If it’s that kind of opinion in an error-correcting court (and intermediate courts *are* error-correcting courts), no one thinks it makes a damn bit of difference who writes the opinion if it’s grammatically correct and legally correct. What difference could it possibly make? But if it’s a significant case, most judges will want to write that opinion, just because of the kind of person that becomes an appellate judge.

In a somewhat similar vein, a federal judge offered these reflections:

On the whole, the increased use of law clerks or staff attorneys has probably not changed the outcomes in many cases, although it is hard to know for sure. But what is written on the page—that is, how opinions are worded—is definitely different than it would be if judges drafted all opinions. By “different,” I do not necessarily mean “worse.” The quality of law clerks and staff attorneys is very high, and, in some chambers, the clerks probably write better opinions than the judge.

The fact that law clerks and staff attorneys do so much drafting does not particularly bother me, because I believe that it is the outcome or the holding of a case that is important, and not the precise words chosen by the authoring judge (or law clerk). But this is lost on some attorneys and trial judges, who put far too much weight on the precise wording of opinions.

### *E. Other Aspects of Delegation*

Apart from the specific issues raised by screening and the writing of opinions, have appellate judges, in their efforts to keep up with their caseloads, gone too far in delegating responsibility to law clerks and staff attorneys? Would they necessarily know if they had? We asked the discussion leaders to put these questions to the judges in their groups.

#### *1. Assessing the Extent of Delegation*

Almost every judge emphasized that the amount of delegation varies greatly from one judge to another, even within the same court. Some indicated that one or more of their colleagues might have crossed the line. One state judge said:

Judges on [my court] vary dramatically in how much they delegate to law clerks. Some almost never read briefs, but instead rely entirely on summaries prepared by clerks. Others read every word of every brief. As far as drafting opinions, most judges ask their law clerks to do initial drafts. Some judges will edit those drafts substantially; others will not. In a few extreme cases, judges delegate too much to their clerks, and the clerks perform core judicial functions.

A judge from another state said:

Delegation does vary a lot from judge to judge, but no judge could survive without doing some delegating. And you need to pay attention to the people to whom judges are delegating. In [our state], incoming law clerks are [not paid enough] to consistently attract the best law school graduates, especially when student loan debt often exceeds \$100,000. Most of the clerks are pretty good, but some aren't, and delegating to them can cause real trouble.

Another state judge said point blank that there *is* too much delegation in his court. As evidence, he commented that if he wants to have a serious conversation about a case, it has to be with a senior law clerk, not another judge. In a similar vein, a member of a state supreme court said he has felt for a long time "that there are staff handling motions from prisons who are actually making the decisions, which I'm very uncomfortable with. I try to look at everything that comes before me, but I'm not sure my colleagues do."

These expressions were not limited to state judges. A federal appellate judge offered this assessment:

I do feel that there is too much delegation of difficult cases to one judge and that judge's clerks. I also believe that the nonargued cases clearly are not given the [kind of scrutiny they should get] by judges, although I see that as less a problem with those easier cases. Given the volume, it is difficult to do serious collegial checking on other judges' work product.

Other judges expressed confidence that their courts had avoided any undue delegation, although some indicated that the breaking point might be near. One state judge said simply, "My court controls the staff, not the other way around." Another state judge commented: "The ultimate responsibility of any decision issued out of my chambers is with me. I look at the [material] that's presented to me and give it further review and consideration as necessary." A federal judge spoke in similar terms: "Although we get substantial assistance from staff in screening and preparing cases, each judge fully informs himself and makes his own best decision on the law and the facts." But a state judge emphasized the cost of avoiding undue delegation:

Our court has resisted going down the road of delegating responsibility. Just about every facet of the work, including screening, stays in the hands of judges. The problem is that we end up with backlogs of opinions, and so we're struggling to find ways to remain "hands on" while avoiding the problems of delay. We've tried mediation but sometimes the lawyers don't want to do it.

Another state judge went even further, saying: "My problem is not delegating too much, but rather that I don't delegate enough. I essentially have no life outside the court."

## *2. Keeping Delegation within Proper Bounds*

How would judges know if they have gone too far in delegating elements of the judicial function? Some participants said that it is impossible to find objective benchmarks—perhaps even to answer the question at all. One judge added (in a comment that was echoed in other groups): "Delegation happens bit by bit, one step at a time, and each incremental delegation is rationalized. By the time the delegation has become excessive, it's too late."

Nevertheless, there were a number of comments that, explicitly or implicitly, suggested ways of monitoring delegation and keeping it within proper bounds. Some participants pointed to possible quantitative measures. One lawyer raised the question whether the business school literature on "span of control" might be applied to judicial chambers. Management literature, the lawyer added, "indicates that eight direct reports is at the limit of one person's span of control." But probably very few appellate judges supervise as many as eight subordinates, even including secretaries. A federal judge put the limit much lower: "I don't think any judge can give meaningful supervision to more than three law clerks. More than three would spread the judge too thin."

Other participants, at least implicitly, rejected numeric measures. One lawyer noted that, in her practice, she confronts the issue of how many associates she can responsibly supervise. She said that "one knows when one gets to the point that" delegation has gone too far.

Beyond this, the discussions in the various groups made clear that the question "how can a judge know when he or she

has gone too far?” cannot be completely separated from the question of what constitutes a core judicial function in an appellate court. And the latter is as much open to debate as the former. Even individual judges may have some ambivalence as to where the line should be drawn. For example, one federal appellate judge said, “When I first started [on the federal bench], I felt that editing the law clerks’ work was cheating. Now I accept that I am an editor.”

One group’s discussion is particularly interesting. Several judges in the group pointed out that “there are lots of internal pressures to give judges incentives to take responsibility for fully preparing for each case.” As one federal judge in the group put it, each member of his court feels the need to be fully prepared in order to avoid “letting your colleagues down.”

These comments tie in with the state judge’s remark, already quoted, to the effect that if he wants to have a serious conversation about a case, it has to be with a senior law clerk, not another judge. The common thread is that an appellate court can go a long way toward controlling delegation by providing frequent occasions for the judges to demonstrate *to one another* that they have actually thought through the issues presented by the cases and are not simply accepting the conclusions of law clerks. Probably that is not difficult to do when cases are orally argued, even for ten minutes. But screening-docket cases, at least in most courts, would not easily lend themselves to this preventative.

### *3. Delegation and Transparency*

A recurring theme in the breakout sessions was that when lawyers do not know much about the way in which appellate judges use their law clerks and staff attorneys, the lawyers often assume the worst. Thus, in group after group, the participating lawyers repeated the call for greater transparency in the internal processes of appellate courts.

The belief in the value of transparency is not grounded solely in concerns about overdelegation. On the contrary, it also implicates the issues discussed in Part II about the politicization of appellate courts. One lawyer explicitly linked the two themes:

What we need is greater transparency in the processing of cases which would acknowledge the responsibility given to staff. “Just trust us” is not a sufficient argument to support judicial independence in the current political climate, and appellate courts need to find ways to make their processes more visible and understood in order to defeat the popular perception that judging is as personal as legislating.

Transparency can have other benefits as well, as a colloquy in one group highlights. A state judge in the group expressed skepticism about how helpful it would be to get “attorney input about the internal policies of the court.” He continued:

Most of what [our court] does internally it does as a matter of necessity. If attorneys were to say, for example, “we don’t like all of this delegation to law clerks,” the court could do little more than respond, “We don’t like it either, but we don’t have much choice.”

This prompted a state judge from another state to comment: “One thing that might come out of increased transparency is the bar pushing the legislature to provide more resources to the court so that some objectionable internal practices will no longer be necessary.”

Transparency also has a practical side, as the discussion in another group emphasized. As summarized by the Reporter: “The lawyers felt that they could deal with any system as long as it was transparent and they knew who actually would decide how their appeal would be handled. That knowledge would permit them to tailor their arguments to the decisionmaker.”

What does transparency mean, and how can courts do more to promote it? Participants described several measures that they viewed as successful or planned to undertake:

- “[Our state] has an active bench-bar committee. It provides a forum for frank exchanges between the bench and bar about how the courts are functioning. It’s been very helpful.” (A state judge.)
- “In [our state], after a meeting at which the bar gave negative feedback about the use of summary dispositions, judges stopped issuing them. Transparency is helpful not only to get input about

specific practices but to increase confidence in the work of the courts.” (Another state judge.)

- “The decision whether or not to publish is a resource issue. The judges on my court simply cannot write a full-blown published opinion in every case. They have to pick and choose. The judges spend time on the most important cases, and the others are largely delegated to staff attorneys. [My state’s] appellate courts plan to be more transparent about this process and invite attorneys to speak up if they have better ideas.” (Another state judge.)
- “The circuit judges [in our circuit] travel around the circuit and meet with attorneys to talk about procedures.” (A lawyer.)
- “One of the best parts of a conference like this is hearing judges tell how things actually get done, which provides some reassurance.” (Another lawyer.)

Admittedly, these ideas are hardly earth-shaking. But on the evidence of the breakout sessions, it is clear that many lawyers feel that state and federal appellate courts do not sufficiently explain such matters as how they handle their caseloads, what responsibilities are allocated to staff, and (in the words of the lawyer quoted earlier) why judging is *not* “as personal as legislating.” At the same time, judges may be relying on an exaggerated sense of what lawyers know and how much courts disclose about their processes.

I note, too, that not all judges were equally enamored of transparency. Perhaps there was a concern that transparency will create a sense of entitlement. As one judge said, “If you tell [the lawyers] what the process is, the lawyers will want to argue about it.” But most of the judges agreed that greater transparency would benefit courts as well as lawyers.



### *F. Technology and Appellate Processes*

Not surprisingly, Judge Posner listed “advances in information technology” as one of the reasons that appellate courts have been able to “accommodate” increases in caseload without strain. In describing the reaction of Conference participants, it is useful to divide these advances into four categories: electronic documentation; video conferencing and argument; video-recorded testimony; and other technologies.

#### *1. Documents in Electronic Form*

“Electronic documentation” is a shorthand for the new technologies that allow lawyers to submit their briefs and the record in electronic form. In many appellate courts today, the medium of preference is the CD-ROM. As one lawyer explained, a hyperlinked brief and electronic record on a CD permit the reader “to move with a single click from a statement of supposed fact set forth in a brief directly to the relevant portion of the record.”

Electronic documentation aroused almost universal enthusiasm among the Conference participants; this is one development that enhances quality as well as productivity. Two interrelated points were discussed in the various groups.

First, when the record and briefs are submitted via CD, judges and their law clerks can readily check assertions or quotations in briefs against the record. This allows the court to detect misstatements by the parties; as one participant observed, it enables the judges to “keep the attorneys honest.” Interestingly, one federal judge expressed the suspicion that such misstatements might be on the increase because attorneys think judges will be too hard pressed to notice them:

We’re actually hoping [that hyperlinks] will keep lawyers a little more honest about their citations. That’s a problem I’ve noticed from volume as well. We’re getting some good lawyers who have good reputations, and I tend to think sometimes they fudge on the record in rather a cynical view that judges are so busy they won’t catch it.

Second, electronic documentation enhances the accuracy of appellate decisionmaking. As summarized by one Reporter,

it allows judges to reach a more informed decision by having more ready access to the evidence in the case. Moreover, with the ability to do term searches through the record, rather than sifting through boxes of transcripts and other documents, it is easier for judges to catch relevant portions of the record that attorneys may have missed.

Electronic documentation can perform a similar function with respect to the precedent-focused aspects of decisionmaking. Links to decisions bearing on the legal issues raised on appeal can be included in the briefs, so that the judges have immediate access to all of the authorities the brief relies on. Taking this one step further, a federal judge reported that his judicial assistant “can change the citations in his draft opinions into hyperlinks, so that the other judges on the panel can easily look up the cases cited.” This too saves judges’ time.

The discussion did point to some downsides of these widely supported uses of technology by courts. To the extent that technology makes it much easier for courts to do their own independent investigation into the evidence or facts of the case, some lawyers are concerned that the judges will “take over their cases.” One lawyer expressed concern that “furnishing a brief in electronic form makes it easy for a judge to use large portions of the brief in the opinion.” The lawyer found that worrisome. As for term-searching in electronic documents, some participants commented that it becomes quite easy to miss relevant material if you don’t use the right search term. On the whole, though, the participants strongly favored interactive briefs and other forms of electronic documentation.

## *2. Argument and Conferencing by Video or Telephone*

In contrast to electronic documentation, the use of video transmission for oral argument and conferencing generated more negative than positive comments. The lawyers in particular emphasized the downside. One Reporter summarized the reaction of the lawyer participants: “Argument via videoconference is awkward in that it can be difficult to have visual contact with all the judges. In addition, the procedure denies lawyers the non-verbal cues that they get from the judges when the judges and the attorneys are assembled in the same location.”

Some judges joined in these expressions of dislike, but others were more supportive of the practice. Here are some of the points that they made:

- In one federal circuit, some senior judges are now offering to hear a certain number of appeals if they have to travel to the seat of court, but a greater number of appeals if they can stay home and participate via two-way video. It is hard for the court to insist on physical presence in those cases.
- In another circuit, when severe winter storms have made travel especially difficult or unsafe, videoconferencing (or even teleconferencing) has allowed the court of appeals to be able to proceed with arguments from remote locations instead of postponing argument.
- In one state, the appellate courts use videoconferencing quite a bit. The judges and lawyers in that state are widely dispersed geographically. Videoconferencing saves judges and attorneys considerable time and expense.

It is noteworthy that all of these comments rely on special circumstances of one sort or another. They do not suggest that argument or conferencing via video would be desirable otherwise.

Indeed, throughout the groups, the participants identified only a single benefit from holding argument by video: It saves money for lawyers and their clients. As one federal judge said, “An attorney in [a distant city in the circuit] with a small case before the [Court of Appeals] appreciates not having to travel to [the seat of court] for oral argument.” In a similar vein, some lawyers commented that alternatives to in-person argument can be useful “where clients cannot afford to pay for attorneys to travel to a distant court.” But observations like these were outnumbered by comments emphasizing the value of having judges and lawyers physically present in court for oral arguments.

Telephonic arguments aroused even greater dissatisfaction. As one lawyer said, "I cannot imagine presenting an oral argument without seeing the judges' faces." In one group, the lawyers generally agreed that they would rather delay the decision of a case than have a telephone argument, unless that is all that was available.

Overall, it seems clear that argument and conferencing by video or telephone can *not* be counted among the technologies that have enabled appellate judges to "accommodate" their increased caseloads. These forms of technology are not widely used; they are widely disliked; and (with the possible exception of the comment about senior judges), no one suggested that they enhance judges' productivity.<sup>40</sup>

### *3. Video Recording of Trial Testimony*

Several of the groups discussed a form of technology that is not yet in widespread use and may never be: video recording of trial proceedings to supplement (or replace) the written transcript. Two questions predominated. Would appellate judges have the time to watch recordings of witness testimony? And would the use of video recordings alter the standard of appellate review?

Most of the participants who spoke to the first question expressed doubt that judges would want to take the time required to view video recordings of testimony. For example, one state judge said, "If you want to really see what [a particular witness] had to say, you've got to watch it in real time, and that's a very laborious way of going about it." Another state judge agreed, saying that his state had considered adopting the practice, but "one of the reasons that ultimately our supreme court rejected that as an appropriate medium is because it was so tedious for appellate judges, clerks or whoever's watching it, to watch it in real time." A few participants spoke more positively,

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40. I must admit to some surprise there was not more support for video arguments from judges, particularly judges who must otherwise travel to the seat of court for oral arguments. As I have already observed, even with all of the benefits of modern technology, travel time is surely less productive for judges than time in chambers. To the extent that judges can participate in oral argument from their home city, they are gaining in efficiency. The explanation, I suppose, is that judges value the visual contact and the non-verbal cues (from their colleagues as well as from counsel) as much as lawyers do.

emphasizing that “you don’t have to watch the whole proceeding; you can watch on limited issues.” But that was a minority view. As one participant said, “Judges can read transcripts much faster than they can watch a recording of testimony. A judge may, out of curiosity, occasionally want to look at a recording, but, in the vast majority of cases, judges will want to stick to transcripts.”

There was no consensus on whether the use of video recordings would alter the standard of appellate review. One lawyer expressed the concern that with the ability to view trial proceedings, “appellate judges may start substituting their judgment about the credibility of witnesses for the judgment of trial judges.” Another lawyer foresaw “a new standard of review” with the equivalent of “instant replay” in Monday night football. A state judge spoke in similar terms of the prospect of “de novo review” of factual findings if appellate judges watch trial videos.

That was probably not the majority view, however. Several participants emphasized that deference given to factual findings by trial judges is not based solely on the trial judge’s ability to see the witnesses, but also on other considerations, including division of labor, pressures of volume, and tradition. Participants in several groups discussed the experience of Kentucky, which for some years has used *only* a videotaped record. A judge from another state reported that Kentucky appellate judges have said, “Well, I just tell myself that it’s not my job [to evaluate credibility], and then I don’t.” In another group, a participant said that empirical studies of the Kentucky practice “have found no effect on the degree of deference trial court findings of fact receive on appeal.”

#### *4. Other Technologies*

There was very little discussion in the breakout groups of the well-established technologies that undoubtedly have enabled appellate judges to handle a larger volume of cases than they could in 1975 without loss of quality. Primary among these are the three mentioned at the outset of this article: electronic legal research, word processing, and email. A few participants did note the transformation. For example, a state judge said:

Before word processing was introduced, judges [on my court] had to prepare an original and eight carbon copies of an opinion. [Other judges] were loathe to ask for changes, simply because changing an opinion was such a logistical nightmare. Now there is a lot more input from judges on [opinions prepared by their colleagues].

Judges from some courts, notably the Ninth Circuit Court of Appeals, also noted the value of computerized case management—for example, in facilitating the efficient handling of multiple cases raising similar issues.

Electronic legal research, word processing, and email have been in near-universal use for quite some time. But with the exception of electronic documentation, none of the newer technologies discussed by the participants seem to offer any real prospect of further enhancing judges' productivity. Does this mean that, at least in the technologically advanced courts, the ceiling has been reached, and there is no room for additional improvement? History tells us that it would be rash to proclaim the end of invention. Yet as comments by some participating judges implicitly suggest, there is a limit to the number of cases that a judge can actually understand and personally decide in a given number of hours or days. Beyond that point, technology cannot increase productivity.

## V. LOOKING AHEAD

In one of the breakout groups, as already reported, a state supreme court justice confidently told the other participants that when a conflict develops between panels of the state's intermediate courts, "the supreme court will take the case." Meanwhile, in another group, a judge from one of those intermediate courts was saying, "It is a problem when intermediate courts in the state have conflicts that are not resolved by our supreme court." One could hardly find a better illustration of how the same reality can look very different to different actors in the system.

Another illustration comes from one of the Reporters. The topic was undue delegation:

Judges tended to "circle the wagons" on this issue. They insisted, without exception, that they are conscious of the

need to avoid undue delegations to staff. On the other hand, they couldn't identify any benchmarks that could be used to determine whether delegation has become excessive. Nevertheless, they were convinced that none of them had reached, or were even close to reaching, the point of undue delegation to staff.

The reaction of the attorneys was very different. There was a pervasive sense among the lawyers that many appeals aren't getting the time and attention they deserve from the judges. Not surprisingly, as outsiders, lawyers weren't able, for the most part, to say whether it was excessive delegation to staff that caused the problems they see with appellate decisionmaking. They tended to look at external indicia of those sorts of problems.

But perceptions are not necessarily fixed. Recall the comment by a lawyer in another group: "One of the best parts of a conference like this is hearing judges tell how things actually get done, which provides some reassurance."

As Arthur England notes in his Introduction, one of the goals of the Conference organizers was to encourage "continuing discussions among those immersed in and most affected by the appellate justice systems."<sup>41</sup> In my view, that continuing discussion can be most effective if focused on particular states or courts. The Florida Bar has already taken the lead by sponsoring an "Appellate Justice Conference" focused on the state's District Courts of Appeal.<sup>42</sup> Earlier (and independent of the National Conference), the University of Arizona College of Law sponsored a symposium about the Ninth Circuit.<sup>43</sup>

Discussions at the 2005 National Conference suggest that a promising subject for such an examination is the Eleventh Circuit. Participants in at least six of the breakout groups voiced concerns about that court; these concerns centered on the size of the court's legal staff, the extensive use of visiting judges, and

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41. England, *supra* n. 2, at 69.

42. A full account of the conference should be available soon at the web site of the Appellate Practice Section of The Florida Bar, <http://www.flabarappellate.org/>.

43. See Arthur D. Hellman, Toni M. Massaro & Stephen L. Wasby, *Ninth Circuit Conference: Introduction*, 48 Ariz. L. Rev. 221 (2006).

the “screening box” approach to routine cases.<sup>44</sup> But at one of the plenary sessions, a judge of the court strongly defended the court’s practices. Moreover, it is clear that with respect to one of the concerns—visiting judges—the perceptions have outdistanced the reality.<sup>45</sup> A conference might provide “reassurance,” or it might alarm lawyers even more. But I have no doubt that a “candid assessment of the realities and directions of . . . appellate justice”<sup>46</sup> in the Eleventh Circuit would benefit the court as well as its constituents. It might also produce insights that would be helpful to other courts whose practices have generated concerns among lawyers and judges.

The participants in the 2005 National Conference on Appellate Justice shared a great deal of information with one another. This included perceptions as well as facts—the former perhaps as important as the latter. I hope that this Report, by making that information available to a wider audience, will encourage other organizations to provide additional opportunities for judges and lawyers to exchange views and experiences with the aim of improving the system of appellate justice in the various states and circuits.

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44. I have expressed similar concerns. See Arthur D. Hellman, *Assessing Judgeship Needs in the Federal Courts of Appeals: Policy Choices and Process Concerns*, 5 J. App. Prac. & Process 239, 253-60 (2003).

45. One participant said that a panel of three active circuit judges “is unheard of”; another said that “about fifty percent of all panels have at least one visiting judge.” Both statements are exaggerations (though the second is not far from reality if one considers only published opinions).

46. England, *supra* n. 2, at 69.



## NATIONAL CONFERENCE REPORT

205

## APPENDIX—DISCUSSION LEADERS AND REPORTERS

GROUP	DISCUSSION LEADER	REPORTER
1	Charles A. Bird	Carol Ann T. Mooney
2	Charles E. Carpenter, Jr.	William M. Richman
3	Mark R. Kravitz	J. Clark Kelso
4	James C. Martin	Patrick J. Schiltz
5	Eric J. Magnuson	Stephen L. Wasby
6	Luther T. Munford	Lauren K. Robel
7	Diarmuid F. O'Scannlain	Chad M. Oldfather
8	Craig T. Enoch	Gerald F. Uelmen
9	Sanford Svetcov	William L. Reynolds
10	Deanell Reece Tacha	Stephen F. Smith
11	John Charles Thomas	Robert H. Klonoff
12	Roger D. Townsend	Joan E. Steinman
13	Martha C. Warner	Carl W. Tobias