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**EXPERIMENTATION IN FEDERAL APPELLATE CASE MANAGEMENT AND THE PREHEARING
CONFERENCE PROGRAM OF THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PAMELA MATHY FN* **

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I. INTRODUCTION

Our society imposes great demands on the federal judicial system. In the past twenty years, courts have been called on to resolve more varied types of disputes: employment, product safety, consumer protection; as well as such collateral questions as expanded rights to attorneys fees and costs. n1 At the same time, the courts must protect individual rights and liberties.

The number of cases filed in the United States Court of Appeals has increased at a much higher rate than has the number of active judges, but the median time between the filing of the complete appellate record to the final disposition was reduced by nearly one-fifth. n2 This increase in judicial productivity has been achieved in the main by the courts' changing, often on an experimental basis, the process of adjudication while preserving unaltered the existing structure of the court.

The success of the reforms has not been unquestioned. For decades the literature of judicial administration has been written in the vocabulary of crisis and emergency, if only to command the attention of those with the power to change the status quo. Thus, it has been feared that in the name of greater efficiency judges' time would be overly regimented so that, a "cottage industry" of judging would be supplanted only by "cafeteria [*432] justice." n3

This Article explores in general terms the dimensions of the caseload problem in the United States Court of Appeals in order to analyze the major changes implemented to cope with the bursting caseload and the accompanying delays in decisionmaking. There are two principal theses to the Article. First, the package of procedural reforms already implemented should be reassessed, now that the principle of appellate case management has been accepted and the techniques have been in place long enough to permit meaningful review.

A second thesis is that the effectiveness of the reforms must be assessed not merely by self-limiting statistics n4 measuring volume, disposition rates and caseload -- of which there is an alarming scarcity n5 -- but by inquiries of how well the reforms support the mission of the courts of appeals in society. Are courts to make discrete, pragmatic judgments regarding sensible, moderate judicial accommodations to resolve potentially divisive public controversies or are they to provide collegial, reasoned decisions that correct error but do not invoke policy? n6 In other words, has the growth in caseload not been a "crisis in capacity" at all, but a reminder to the court of its true role?

Following a brief description of the dimensions of the federal appellate caseload problem and a discussion of its causes, consequences and implications, four primary procedural innovations and structural adaptations implemented by federal courts of appeals will be examined: (1) changes in decisions formats so that more cases are decided without lengthy opinions; (2) curtailment of opportunities for oral argument; (3) addition of appellate judges by increasing the size of appellate courts and by using visiting judges; and (4) expansion of support personnel and the establishment of staff attorney programs.

This article also focuses in part on one particular innovation in case management, the prehearing settlement conference, and, more specifically, the Prehearing Conference Program of the Seventh Circuit. n7 The findings of a recent study sponsored by the Federal Judicial Center empirically [*433] supposes the conclusions that the Seventh Circuit's program is likely to be the most successful technique of appellate case management. n8 The program offers adaptable, individual attention by the Court to each appeal; significantly reduces the amount of judge time that must be devoted to predecision procedural matters; and copes with the problem of delay and cost without sacrificing a sense of duty to law and compassion to individuals. The prehearing settlement conference concept, integrated into a scheme of continuous case management over the lifespan of the appeal, presents an effective direction for future experimentation.

II. THE GENERAL DIMENSIONS OF THE COURT OF APPEALS CASELOAD PROBLEM

The story of the dramatic increase in the caseload of federal courts of appeals is one adequately told by the numbers. There are two consequences of the burgeoning caseload: wide-ranging changes in the procedures under which the courts do business, discussed in greater detail in Section III below; and the search for alternate non-judicial mechanisms for resolving appellate disputes, such as the prehearing settlement conference program discussed in Section IV below. A brief discussion of the general parameters of the growth in the courts of appeals' caseload thus introduces the more detailed analysis in Section III and IV of specific procedural changes adopted to accommodate the growth and illuminates the central question the changes pose: Do the changes alter or reinforce the ability of the courts to fulfill their function?

Between 1960 and 1974, the number of appeals filed in the United States Courts of Appeals increased 321 percent, while the number of active judges increased only 43 percent. n9 This translates into an increase of 112 filings per judgeship. n10

State appellate courts have experienced a similar upward trend. n11 In [*434] California, there was an increase from 3,872 appeals in 1964 to 9,186 in 1973. n12 In Illinois, there was an increase in appellate filings from 1,338 in 1965 to 3,020 in 1972. n13 Similar increases have been experienced in almost every populous state. n14 Moreover, the evidence also establishes that the rates of increase are similarly increasing. State appellate court findings increased 9 percent per year from 1971-1978 but increased 32 percent per year between 1977 and 1981. n15 These figures represent a doubling of the caseload approximately every eight years. n16

Substantial backlogs might have been expected in both federal and state appellate courts. But, during the same period that federal courts of appeals' caseloads rose 321 percent, the median time from filing the complete record to disposition was reduced by nearly one-fifth. n17 State appellate courts may have experienced comparatively less dramatic success, increasing their output approximately as fast as the increase in filings, but "barely keeping their heads above water." n18 Statistical analyses of the caseload must be handled with care for two reasons. First, the statistical base used in the study can skew the results. n19 Second, it is difficult to compare accurately statistics on the federal courts of appeals because of varying definitions of key variables. n20 Thus, an examination of collected statistics can only form the first level of analyses of caseloads. n21 [*435] Nonetheless, the statistics certainly demonstrate the significant increases that have taken place. This is a clear contrast to the post-World War II period in which it was not uncommon to fear that there were too few cases for appellate courts to successfully declare and settle the law. n22

Identifying the causes of the increased volume is even more problematic than charting the numbers. There are three variables related to the rise in appellate caseloads: (1) the rise in population; (2) the rise in business activity; and (3) the rise in criminal appeals since 1960. n23 One supervising theory is that the addition of trial judges leads to more appeals. n24 According to this theory, a 10 percent increase in trial judgeships will lead to a 7 percent increase in criminal appeals and a 6 percent increase in civil appeals. n25 Another likely contributing cause to the increase in federal caseloads is the rise in the number and complexity of new federal causes of action in the areas of products liability, civil rights, employment law as well as collateral areas such as increased possibilities for awards of attorneys fees and Costs. n26 More importantly, legislation [*436] enacted for one purpose has been used in ways arguably not foreseen by Congress and which create even more litigation. The Racketeer Influenced and Corrupt Organization (RICO) provisions of the Organized Crime Control Act of 1970 n27 is an excellent case in point. In the 1980's lawyers successfully applied RICO in garden variety business and commercial disputes which have no relation whatsoever to organized crime. n28

There are five major consequences of the increased caseload and the inability of federal courts of appeals to declare federal law. First, attorneys and parties experience a delay in receiving a final resolution of their case. Delay can have substantial impact on the cost of taking an appeal. The deterrence effect of delay is arguably the single-most adverse effect of the caseload problem. n29

Second, judges may lack a body of precedents adequate for a confident decision. When judges are not bound by clear Supreme Court precedent, they are free to hand down a myriad of decisions. n30 Attorneys may experience a parallel lack of stability in the law to provide predictability. Whenever a legal or constitutional issue is left unresolved, attorneys

file new lawsuits in the hope that they will eventually prevail. Of course, stability and perfect certainty is never possible in our common law system based on case-by-case development of principles. Ambiguity, after all, is often the impetus for change in rules. Nonetheless, a balance must be struck between clarity and uncertainty.

Third, a corresponding increase in the United States Supreme Court's caseload n31 has underlined the significance of a court of appeals [*437] decisions and elevated those courts, practically speaking, into courts of last resort in many instances. Courts of appeals are often asked to address questions that may not be reviewed by the Supreme Court for some time to come, even if the court's anticipated ruling creates a conflict among the circuits. n32

Fourth, the rising caseload has also encouraged a change in the style of judicial writing. More cases to decide and less time to devote to each case has reinforced the shift from the "grand style" of judicial opinion writing used in the formalistic school of jurisprudence in favor of a more pragmatic style in which judges attempt to provide reasons why their decisions are correct within the authorities. n33

Fifth, the crisis of volume in the federal courts has been the main impetus for experimentation with alternate mechanisms for resolving disputes outside of the judicial system, that is, programs into which cases can be diverted for decision in a quasi-judicial setting with or without a right to a de novo review in the trial court and ultimate appeal. n34 Such extra-judicial method of resolving disputes include mini-trials before nonjudicial officers in which parties may waive their right to judicial action, n35 non-binding court-annexed arbitration, n36 and binding [*438] arbitration. n37

Implementation of such extra-judicial forms of resolving disputes constitutes an attack on the very concept of adversarialness as a means for finding the truth, bringing into question whether judges should be more than umpires in neutral arenas for the discovery of correct results. n38 The more visible role played by courts and judges when there is departure from the neutral umpire concept has not gone without criticism. n39

A similar questioning of the ability or need for courts to resolve all disputes at all levels n40 has also spurred the more specific re-examination [*439] of the structure and procedures of federal appellate courts, discussed in Section III and IV below. n41 Despite the implementation of the procedural reforms -- and independently of them -- the caseload of federal courts has continued to rise prompting a renewed debate on new proposals to handle the volume. Unlike procedural changes which attempt to restructure resources to simplify and speed decisionmaking, the further proposals redefine the structure and function of the courts. There are proposals to limit the subject matter jurisdiction of federal Courts, n42 to limit the issues that can be heard in federal court or appealed, n43 to create a new intermediate federal appellate court to intervene between the existing courts of appeals and the Supreme Court which would firmly redefine the function of the courts of appeals to elimination of error and not resolution of matters of legal policy, n44 to increase the costs of appeal by significantly increasing filing fees and routinely imposing costs and attorneys [*440] fees on the losing side. Other, less controversial proposals are also being considered including making significant increases in the number of judges sitting on the court and, as necessary, subdividing existing circuits to keep them at an administratively manageable size, n45 charging reasonable interest rates; n46 charging attorneys fees and costs to those who abuse the appellate process; n47 increasing utilization of word processing equipment and computers to free judges from routine administrative work; n48 changing appellate briefing requirements to make it mandatory that the standard of review be included in each brief as to each and every issue raised n49 and limiting the number of pages of principal briefs to something less than the 50 pages allocated under the Federal Rules of Appellate Procedure. n50 In sum, a decision on whether and which structural changes are necessary depends in part on an assessment of whether or not procedural changes, existing or proposed, are in adequate response to the increase in caseload.

III. PROCEDURAL INNOVATIONS AND STRUCTURAL ADAPTATIONS TO STREAMLINE THE APPELLATE PROCESS

Federal appellate courts have implemented four major changes in the way that appeals are processed in an attempt to increase the numbers of appeals that can be handled without adversely affecting the quality of the decisionmaking process. These innovations are: (1) changes in the format in which appeals are decided, by relying on rulings announced from the bench and memorandum decisions; (2) curtailing the opportunities for oral argument; (3) adding more judges to the Court -- whether by increasing the size of the Court or relying on the services of visiting [*441] judges who are invited to the Court in order to participate in the resolution of a certain number of appeals; and (4) diversification in court

support personnel, including increasing the number of law clerks, and hiring staff attorneys.

Each of these four innovations will be described, highlighting the practice in the Seventh Circuit whenever possible, and the competing advantages and disadvantages set out. Each of the innovations, standing alone, may provide a court with significant relief by reducing the amount of judge time required to decide cases. But, none of the innovations are likely to be as effective in addressing the volume and at the same time maintaining the quality of appellate decisionmaking as a coordinated, comprehensive appeal management program involving continuous screening in which varying amounts of judge time is devoted to appeals depending on the subject matter of the appeal, the type of issues presented, the complexity of the case and, at any given moment in the lifespan of a single appeal, the particular problems requiring immediate judicial intervention. Because the prehearing conference program is arguably the single most effective case management technique in flexibly focusing judicial time on appeals, a discussion of the four primary procedural reforms provides an excellent introduction into a more detailed examination of the Seventh Circuit's prehearing conference program.

A. Changes in the Decision Format

Some federal courts have changed the methods by which they decide cases in order to economize the time it takes to issue final orders and close cases. Specifically, some federal courts have increased their reliance on memorandum decisions or decisions announced from the bench when ruling on specific cases. Briefly, a memorandum decision is a one-page document that indicates which party has prevailed and, perhaps but not always, includes a few sentences which cite cases in support or otherwise indicate the reasons for the ruling. A memorandum decision is rarely published.

n51 A decision announced from the bench is the oral announcement in open court of the court's decision, made either before or after oral argument, and is always followed by the issuance of a one-page final judgment issued by the clerk and perhaps also a memorandum decision. The advantage of memorandum decisions and decisions announced from the bench is obvious: the less time a court must devote to writing and clearing its decisions, the more quickly it can focus on another appeal. [*442] Writing and clearing opinions is a time-consuming process, as illustrated by the Third Circuit's Time Study, conducted in 1971-72, which disclosed that almost one-half (48.2%) of the judges' time was so devoted. n52 This was in addition to the time spent reviewing a case prior to oral argument or submission for decision of the briefs (32.3%), conferring on a tentative disposition (5.4%) and on the bench hearing argument (7%). n53

All cases docketed in federal courts may not need complicated written rationales to justify the court's decision; often, it is the function of the court to give a "judgment"; that is, to decide a dispute, more than to elaborate upon principles of law. The public interest is served by the court's ability to allocate its efforts according to the complexity and importance of the questions it must decide. Announcing the court's decision from the bench, either before or after hearing oral argument, is one method of quickly resolving disputes when no law-generating rationale must be provided. On the other hand, reliance on decisions announced from the bench and memorandum decisions may diminish the educative function of the court. A "judgment" provides no guidance to the litigants on how to best shape their conduct in the future. The litigants will also be significantly handicapped in appealing the judgment. The interested public may glean little else from the case than one party was "wrong" and "lost" while another party "won."

1. Decisions Announced from the Bench

Of all the circuits, the Second Circuit has most relied upon rulings from the bench in deciding cases. Approximately one-third of the Second Circuit's decisions are signed and per curiam opinions, n54 but at least two-thirds of the Second Circuit's dispositions consist of rulings from the bench or by unpublished order. n55

This manner of expediting rulings on cases is not without criticism. The Second Circuit's Internal Rules provide for summary rulings from [*443] the bench only if the "decision is unanimous and each judge of the panel believes that no jurisprudential purposes would be served by a written opinion." n56 The rule has been criticized on the ground that it does not provide specific standards on when a ruling from the bench is likely. Thus, litigants will spend needless time and money in preparing for oral argument and traveling to the courthouse only to be informed that they will not be asked to argue their case. The resources of the court are conserved, but the resources of the parties are not.

When a decision is announced from the bench, the court often will deliver a brief oral statement as to the reasons for

the decision. But, reasons may not be provided for every ruling. Oral rulings are transcribed by court reporters and a transcript is available to counsel upon payment of the transcription charges. In other words, when reasons are provided, the litigants may obtain a memorandum decision by paying the costs associated with its transcription.

The court reporter's transcription, however, is not the functional equivalent of a memorandum decision issued by the court itself. The transcribed ruling cannot be cited to the court as precedent. The transcribed ruling is not published. No Second Circuit court rules specifies when a written decision or opinion must be issued. The lack of a detailed published circuit court opinion significantly handicaps a litigant's request for immediate relief from judgment, presented on a motion for stay or extraordinary writ. But even in non-exigent circumstances, it lessens the likelihood of review on rehearing or by the Supreme Court. An oral ruling from the bench is less likely to reveal a conflict with the law of another circuit and is less likely to be perceived by the Supreme Court Justices as a precedent requiring their correction. Finally, an oral summary disposition issued from the bench increases the parties' reliance on district court opinions because it is those decisions which may contain a rationalization, synthesization or collection of prior authorities.

2. Memorandum Decisions

One method of eliminating many of the disadvantages of oral rulings announced from the bench is to supplement or to replace the oral announcement of the decision with a memorandum decision; that is, with a short document that indicates which party has prevailed n57 and also [*444] may include a few sentences which set out the basis of the decision.

The memorandum decision is brief, thus minimizing the time required by the court panel and the clerk of court to issue the decision; the memorandum decision is not published, so the panel need not labor over precedent-setting language; and the memorandum decision can educate the litigants and the interested public on the precise nature of their "error." Nonetheless, memorandum orders, too are limited instruments of judicial decisionmaking. As the oral ruling issued from the bench, the memorandum decision lessens the likelihood and quality of further appellate review, whether by rehearing, certiorari or appeal. Moreover, the memorandum decision may not fully inform the parties as to the reasons for the court's ruling. When the court issues summary rulings each as "affirmed substantially for the reasons [stated below]," the court does not make it plain which arguments on appeal were rejected and why. A remand for "further proceedings not inconsistent herewith" may leave what is to be done in the district court a matter of speculation.

Finally, memorandum decisions, like rulings from the bench, are unpublished decisions. The question of whether unpublished decisions should ever be used is one of spirited debate in the legal literature. n58 Typically, courts issue written decisions or opinions when they are making new law in the circuit, when there are conflicts among the circuits, or when the reason for the ruling may need further explanation. n59 Selective publication of opinions minimizes the logistical problems caused by the [*445] ever-increasing volume of official reports n60 and saves some judicial time because judges no longer need to polish their prose. But, the "no citation" rule, when operating in conjunction with a summary order issued by the court, may prevent future litigants from citing cases that have a substantial precedential effect. n61 An alternative to unpublished opinions may be preparing an opinion but simplifying its preparation by omitting the statement of facts. The parties do not need the facts reiterated to them but, of course, opinions without a statement of facts are less able to be cited as precedent, as with memorandum decisions. n62

3. The Importance of Reasons

Appellate courts have two main functions: to review individual cases to assure that substantial justice has been rendered, and to develop laws for general application to guide conduct and to be used in other similar cases. n63 Although there may be persuasive reasons for using memorandum decisions and oral decisions, this method of streamlining appellate review to make the courts more economical has serious limitations. [*446] n64 When the district court has entered a comprehensive, persuasive, "error"-free decision that collects relevant authorities, there is little jurisprudential reasons for not adopting expressly the district court opinion (or those portions of it deemed essential), or issuing a memorandum decision which has the practical effect of increasing the importance of the district court decision. But appellate courts should not neglect their educative role. Courts persuade litigants to respect their judgments by appealing to common sense, logic and compelling precedent. Moreover, courts must inform fully the litigants and the interested public as to the reasons compelling the ruling so that they can learn from the past and conform their conduct to the dictates of the law. When a non-frivolous case is decided without oral argument, there may

be a special need for a relatively exhaustive consideration of the arguments advanced in the briefs to assure the court than the panel judges share a common perception of what the case involves and how it should be decided and to assure the parties that despite the lack of oral presentation, their case received thoughtful consideration.

A recent study commissioned by the American Bar Association and the Federal Judicial Center on attorney attitudes to case processing methods in the Second, Fifth and Sixth Circuit Courts of Appeal illustrates dramatically the importance which attorneys attach to a written decision which provides reasons for a decision. n65 Some of the reasons for issuing written opinions relate to the role of the appellate court and others relate to the need for attorneys to receive specific direction on how best to advise their clients.

The same American Bar Association study discloses, however, that a majority of the attorneys surveyed have no objection to deciding cases by means of unpublished orders. Moreover, the attorneys see no problem with affirming clear-cut cases by means of adopting the lower court's order or citing the applicable precedent. n66 .

In brief, a change in time-consuming opinion writing practices offers a possibility of significant relief. The practical problems posed by ever-increasing reliance on unpublished orders may be a less desirable alternative than limiting the length and number of the traditional signed opinion and using instead brief per curiam opinions and short memoranda which [*447] apprise the litigants of the reasons which underlie the conclusion of the court and can be available for stare decisis.

A change in opinion writing practices can offer an over-worked court significant relief. The savings in time can be dramatic when judgments are announced from the bench. Even more dramatic economies can be achieved when the oral ruling is not followed by a written decision that carefully parses the reasoning of the court. A program of selective publication provides for some record of the reasoning which impelled the court's decision, without aggravating the logistical problems created when large numbers of decisions without any precedential value find their way into the federal reporter system. Nonetheless, in many cases, a full exposition, in the traditional manner, of the facts and the law will be required.

The American Bar Association attorney survey n67 also illustrates that the practicing bar will accept a variety of final decision formats but that the written memorialization of the court's reasoning, however brief, should always be required. Arguably, the thorniest problem is whether the unpublished order should be available to be cited as precedent. If the opinions are not published, attorney access to them may be unequal. Yet, there are strong arguments that evenhandedness and consistency in our common law system requires that all decisions be cited.

B. Curtailment of Oral Argument

A second, recent innovation in case flow management in federal courts is an across-the-board curtailment of the opportunities for oral argument. n68 Although most lawyers would consider oral argument to be an essential element of the decisionmaking process, n69 many have urged that significant economies would result if courts ration oral argument as [*448] a method of increasing judicial productivity and expediting decision without sacrificing the quality demanded by due process. n70 Because deciding cases without oral argument is an innovation in case processing and decisional practices that affects the Bar directly and because it is a concept that strikes at the very heart of the role of the federal appellate courts, the procedures by which cases are decided without oral argument are likely to be the focus of a continued provocative debate.

A brief review of the positions favoring and opposing a presumption of oral argument in all appeals, then, will disclose that in fact the two camps tacitly accept that oral argument is not necessary in all cases but differ on the degree of latitude ceded to court personnel in selectively denying oral argument. One side would support the strict construction of the elements of the narrowly-drawn litmus paper test, as promulgated in Federal Rule of Appellate Procedures 34; the other side would support a more flexible approach in which the panel members examine the issues raised, the complexity of the record, and their own assessment of the case in deciding on the benefits of oral argument. The key to successful screening n71 and the ingredients for any happy compromise between the two camps, will be found in the successful formulation of a screening strategy that provides explicit reassurance to all concerned that the integrity of the decisionmaking process as a whole and as applied to the specific case on appeal are preserved. A brief discussion of

the two camps, then, at once explains current screening practices and illuminates the role of federal appellate courts.

1. Elimination of Oral Argument in "Appropriate" Cases

Those commentators who favor the selective curtailment of oral argument offer two interlocking justifications for their position: (1) oral argument consumes large amounts of time which is often misallocated; [*449] and (2) oral argument is often superfluous to the quality of the decisionmaking process.

The first major premise of the position favoring selective denial of oral argument notes that the increase in the dockets of federal appellate courts has caused both an increase in the demands placed on each appellate judge and court and an increase in the amount of time which can elapse between the filing of the notice of appeal and the entry of final judgment. n72 This position presupposes, perhaps inaccurately, that the increase in caseload has caused an increase in the time between the completion of briefing and the scheduling of oral argument and concludes that if an appeal need not wait in line to receive a scheduling date, the appeal could be decided earlier. In other words, it considers the slot of the oral argument calendar to be the scarce resource, not necessarily the judge's time, so that the judges do indeed have sufficient time available in which to discuss and draft and review opinions in cases decided without oral argument even when the oral argument calendar has been filled. It is possible, however, that the queue forming to receive a calendar date acts as an indirect method of rationing the judges' time and that there is little additional time available.

Because the first main argument for curtailing oral argument is empirically based, it is useful to examine some available statistics on the impact of screening practice has had on the docket of a federal appellate court. The Fifth Circuit Court of Appeals has published the results of its informal in-house study of its Summary Calendar. n73 In 1981, the year the Fifth Circuit was divided into the Fifth and Eleventh Circuits, n74 the caseload of the former Fifth had reached approximately 5,000 cases. n75 In the statistical year ending June 30, 1984, the caseload of the reorganized Fifth Circuit had grown to 3,610 filings. n76 In the statistical year ending July 30, 1984, 1,542 fully briefed cases were sent to the judges for screening on the need for oral argument. n77 Of these, 849 cases (55.1%) were decided on the Summary Calendar and 693 cases (44.9%) were decided after oral argument. n78 In general, over half of the Fifth Circuit's appeals [*450] are disposed of without oral argument. n79

In further evaluating the 55% of the appeals decided without oral argument, approximately 20% of the cases are appeals involving pro se prisoners where oral argument is routinely denied due to the absence of an attorney and the difficulties of transporting the prisoner to the court to present his own oral argument. n80 The percentage of other types of cases decided without oral argument varies substantially, but over half of all prisoner appeals with counsel, all criminal appeals and all diversity jurisdiction appeals are decided without oral argument. n81

By adoption and relatively stringent application of the screening rules, the Fifth Circuit increased its average output per judge by approximately 100%, from 61 opinions per judge before the adoption of the screening rules to approximately 125 per judge each year for the last ten years. n82 Although the increase in productivity is undoubtedly enhanced by a number of other factors, including the geographical dispersion of the Fifth Circuit and the time saved by eliminating pre-argument deliberations and travel by the judges and staff to New Orleans for argument, there is no doubt that the Summary Calendar has freed time for the judges to use to better advantage in disposing of cases.

The Fifth Circuit Study thus lends support to the unstated empirical premise of the position favoring oral argument: the oral argument calendar rations the judges' time but does not completely monopolize it. But, if the screening criteria are not well defined, if there is not a relative consensus among the judges and court staff about the definition of the criteria and how they are to be applied, or if the demands placed on the judges from responsibilities to rule on motions, to handle emergency matters and to conduct the administrative business of their chambers and the court already claim most of the judges' time not occupied by deciding orally argued cases, then a screening program might actually take more of the judges' time, distracting them from the task of deciding cases on the merits, and, thereby decreasing judges' productivity. The second advantage of the selective denial of oral argument is that it is plainly not required in every appeal and the judges can effectively decide cases without the socratic exchange of oral argument. As illustrated [*451] by the foregoing analysis of the Fifth Circuit's Summary Calendar, statistics on productivity can be influenced by any number of factors in addition to the time required to hear oral argument and can tell only part of the story. The essential premise

of an argument for aggressive application of screening must be that screening is a necessary tool of case management because productivity is increased without sacrifice of the quality of the decisionmaking function. Society and litigants have a right to expect not only "decisions" resolving real world legal disputes, but reasoned, analytically based decisions that expose their logic to the members of our educated democracy. Statistics do not easily quantify the collective sense of judges, attorneys, parties, and interested members of the public that the over-all decisionmaking process is one of quality.

In sum, those favoring the selective denial of oral argument do so with respect to "frivolous" appeals, appeals in which there is a recent dispositive case, appeals from comprehensively researched lower court orders, and cases where the facts and arguments otherwise are presented adequately in the briefs and record. The proponents of selective argument are confident that these questions are no more troublesome than the legal questions to be resolved and can be evenhandedly and uniformly applied by the judges. n83

The proponents of a presumption of oral argument, however, assert that the give and take of oral exchange is an essential element of the appellate decisionmaking process. This position is premised on two conclusions about the importance of oral argument to the over-all decisionmaking process.

First, the proponents urge that oral argument provides judges with a unique opportunity to discuss with counsel those issues that the panel members consider to be dispositive, whether or not the matters have been addressed in the briefs.

n84 Judges can ask questions to clear up ambiguities in the record or argument not perceived by counsel. Judges can ask counsel to address themselves to cases decided since briefing was completed, [*452] or to a line of analogous cases not addressed in the briefs or record. Counsel, in turn, can respond to the questions in a way more personalized, more immediate and, arguably, more effective than the written word. As Judge Rehnquist recently emphasized, oral argument is one of only two collegial events in an appeal, the other being the judges conference discussion of the case (excluding the question of whether a prehearing conference has been conducted). n85

Second, the proponents emphasize that oral argument makes visible a portion of the decisionmaking process, thus educating the public as to the integrity of the process. n86 For the most part, appellate deliberations are in private and rely primarily on written submissions. Oral argument adds a human dimension to the process of deciding. To those scholars who agree with Alexander Hamilton's assessment that the judiciary is the weakest branch of our three-branch constitutional system, the importance of the visibility cannot be underestimated. Oral argument contributes to judicial accountability. Oral argument symbolizes and manifests the judges' personal attention to the case at hand. Moreover, oral argument also has the collateral benefit of providing a visible role for appellate attorneys, a visibility that is important not only in the attorneys' relations with their respective clients and in society's perception of a function of attorneys, but also in the attorneys' own sense of pride in craftsmanship and conviction that advocates do shape cases for appeal and define issues for resolution.

Three groups of "constituents" of federal appellate courts have emphatically urged the retention of oral argument: judges, appellate attorneys and, surprisingly, advocates of aggressive case management. Further examination of their positions, however, discloses that the majority view of each group does not oppose the elimination of oral argument in frivolous cases. Thus, for all practical purposes, the debate on the need for oral argument reduces to a pragmatic decision on the criteria and means to be used in screening cases off of the calendar and a policy judgment on how those criteria relate to the role of the appellate court. n87 The proponents of oral argument would insist upon a few, conservatively worded criteria applied unanimously by the panel members; [*453] the proponents of selective denial would accord more discretion to the court.

Judges, as a group, disfavor the elimination or excessive curtailment of oral argument. Many jurists have written convincingly of past experiences which illustrate the value of oral argument. n88 Justice Harlan, for example, has described the benefits of personal exchange with counsel during argument:

[O]ral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for

the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies. n89

A recent study by the Federal Judicial Center statistically quantifies the judges' collective preference for oral argument. The results for the study show that judges do not oppose limiting the time allocated for the presentation of oral argument, but do oppose the elimination of argument in all but frivolous appeals. n90

It is not surprising that attorneys as a group also favor oral argument. n91 A recent study of all attorneys in three circuits discloses that 90% believe that oral exposition of the appeal assists in both intelligent decisionmaking and in informing the public of matters of public interest, [*454] regardless of the substantiality of the issues involved. n92 This same study, however, also shows that a substantial number of attorneys in the sample also believed that oral argument could be eliminated "in appropriate cases." n93

Finally, a number of scholars and promoters of aggressive case management have spoken out on the need to preserve oral argument. n94 The case managers' advocacy, however, may be linked to their equally forceful advocacy of the aggressive implementation of new case management, "fast tracking" techniques, such as limiting the size and number of briefs, expediting their filing, and limiting the time allotted for oral argument. In general, fast tracking procedures are not imposed unless the attorneys so stipulate to them. The promise of oral argument scheduled immediately after the filing of the last brief is often the case managers' bargaining chip in obtaining the agreement of counsel. Thus, were oral argument itself severely limited, the quid pro quo of the fast track dialectic would collapse. Because case managers have little reason to favor the expediting of frivolous appeals, it can be expected that they have little opposition to screening those cases off of the oral argument calendar.

2. The Criteria for Screening Cases Off of the Oral Argument Calendar

Notwithstanding the strong support for maintaining a presumption of oral argument, most courts nonetheless have become increasingly selective about when a case warrants oral argument. Only in the Second and Ninth circuits is argument granted to all non-prisoner parties represented by counsel who request it. n95 Each of the other circuits have attempted to fashion express criteria and procedures to be used in screening some cases off of the oral argument calendar. n96

[*455] The benchmark screening criteria are set out in Federal Rule of Appellate Procedures 34(a) which requires that oral argument shall be allowed in all cases, unless pursuant to a local rule, a panel of three judges is of the unanimous opinion that oral argument is not necessary. Federal Rule of Appellate Procedures 34(a) also sets out the "minimum standard" to be incorporated in the local rule as ground for denying argument: (1) frivolity; (2) recent dispositive case; or (3) adequate presentation of facts and law in briefs and record and "the decisional process would not be significantly aided by oral argument." n97

The Seventh Circuit's local rule on oral argument is typical of the other circuit's local rules on screening: (1) there is controlling Supreme Court or circuit court precedent; (2) there is absence of any factual or complicated issues; (3) the appeal involves only the issue of the sufficiency of evidence, the adequacy of jury instructions, or rulings on the admissibility of evidence; (4) there is a party who is proceeding pro se; 5) the decisional process would not otherwise be significantly aided by oral argument. n98

The specificity of the criteria limiting oral argument is merely illustrative and somewhat deceptive. Specific judgments are required to decide whether or not oral argument truly is necessary. In other words, if oral argument is not a uniformly applicable right, then the question arises of who is to decide whether oral argument is needed and when the decision is to be made. In the Fifth, Seventh, and Ninth Circuits, staff attorneys can play a role in screening appeals to decide if the questions presented are of sufficient public interest or of sufficient legal complexity so that oral argument is required. n99 In each of the Circuits, screening is performed by judges of the court with the assistance of the Office of Staff Attorney. n100 In the usual course, staff attorneys can prepare memoranda [*456] that discuss why the case does not merit argument, including a discussion of the substantive issues raised by the appeal. This memorandum is then reviewed by a randomly selected three-judge panel who decides whether the case can be resolved without oral argument and how it is to be decided. As specific in the text of Federal Rule of Appellate Procedures 34(a), the parties are provided

with an opportunity to file a statement on the reasons why oral argument is necessary, but the statements are purely recommendations that can be rejected by the court and are not equated with waivers of presumptive "rights."

On the other hand, in the Third Circuit, the judges of the panel to which a case is assigned determine the need for oral argument, apparently without any input from court personnel such as staff attorneys, law clerks or deputy clerks in the clerk's office. n101 Although students of procedural due process justifiably may be concerned that staff attorneys -- or judges -- may apply different and irreconcilable standards when deciding when a case merits oral argument, the unavoidable fact of the matter is that the decision on the need for argument, like the decision on the merits of the appeal, is one about which reasonable judges can differ. Because the decision of how a case is to be decided can affect the resolution of a specific case as well as the appearance of exhaustive deliberation by the court of its decided cases, it is important that the judges alone make the decision.

In sum, because it is part of our legal culture that oral argument be a central feature of the deliberative process, it is especially important that the standards used to deprive counsel of oral argument be specifically articulated and unambiguously applied. When oral argument is denied, it need not mean that the appeal is unimportant, or accorded an inferior level of appellate scrutiny, only that its resolution is possible without oral argument. There is nothing to suggest that a reasoned decision on how a case is to be decided will not be as well accepted as a decision on the merits.

C. Addition of Appellate Judges

A third method to meet the burdens imposed by the increasing caseload is to add appellate judges to each court. The reasoning is patently [*457] simple--because there is a limit to the decisional output of any one judge, adding judges means more cases can be decided.

There are two methods by which courts can increase judicial personnel: (1) enlarging the number of active judges with congressional approval and nominating, appointing and promptly confirming able candidates; (2) inviting judges from other courts to sit on the court for a limited period of time as a visiting judge. n102

1. Increasing the Size of the Court

Increasing the size of an appellate court is arguably the most obvious response to an increasing caseload. Adding judicial personnel, however, is not a panacea. Increases in the number of judges can reduce collegiality and increase the administrative burden of keeping the lines of communication among the judges open. Further, many studies have shown that as the number of judges has increased, the number of extra cases the judges must decide has also increased.

n103 Simply put, more judges may create more work as much as more work creating an increased need for more judges. Nonetheless, the traditional response to growth in the caseload has been to increase the number of judgeships. In 1961, Congress increased the number to 78 federal courts of appeals judges for all circuits. In 1978, further increases brought the total to 132. In 1984, still further increases were authorized. n104

But, there is a ceiling on the number of judges who can be added without exceeding the economies of optimal size. Eventually a decision must be made on whether a court can be permitted to grow, whether the circuit need be split into two courts or whether increased backlog due to inadequate capacity can be tolerated. For example, in 1981 the Fifth Circuit, which had become unwieldy in caseload and administrative upkeep, was divided into the Fifth Circuit and the Eleventh Circuit. One of the main motivations for the split was the difficulty in administering a circuit composing 6 states, covering an expansive area, comprised of 26 judges residing throughout the circuit who devoted a considerable amount of their time to travelling with their staff to and from oral argument. n105 [*458] In addition, the proliferation of federal judges eventually could diminish the prestige of the judiciary. Justice Rehnquist has summarized this concern, stating

[T]he danger is that if we pile on too many disadvantages or remove some of the advantages, we will eventually be dealing with a pool of lawyers for whom judicial salaries are not a deterrent, because the judicial salary is more than they could make as a lawyer [A] pool so limited does not offer a promising reservoir for maintaining the present quality of the federal judiciary. n106

Chief Justice Burger has also described the limitations of creating new judgeships:

As additional burdens are placed on the federal courts, the capacity of the District Courts and the Courts of Appeals can be expanded by increasing the manpower of those courts. In other words, when acts of Congress or new developments from any source, including the opinion of the courts, give rise to more litigation, the solution lies essentially in an increase in the number of judges or the units of the judicial system -- either district or circuits. I do not advocate more judges as a prime solution to problems, but more judges are inescapable if the workload continues to increase. n107

2. Visiting Judges

An alternative to appealing to Congress to increase the number of judges is to issue invitations to judges from other courts to decide cases by designation. The Fifth Circuit's heavy use of designated judges was a motivating force behind the push to divide the Fifth Circuit into two smaller circuits within which the active judges could handle the bulk of the caseload. For example, in the Second Circuit, two-thirds of all argument panels contained only two active judges, and frequently only one of those active judges was a Second Circuit judge. n108 The Second Circuit's use of senior judges has been the most frequent of all circuits and its use of visiting judges has been among the highest. n109 Serious questions can be raised about extensive reliance on visiting judges. From the court's [*459] perspective, the presence of visitors on the panel may reduce the collegiality of the court.

Both the court and litigants may be concerned that visitors are not as sensitive to trends in circuit law. It also might be feared that the designated judge may defer to the circuit judges, and that district court judges sitting by designation may be hesitant to reverse a colleague. A recent study performed in the Second Circuit indicates that there is a "slight suggestion that the probability of affirmance is affected by panel make-up" but that the difference does not rise to a level of significance. n110 The same study demonstrated, however, that visiting judges seldom write separate opinions; visiting judges are said to be less likely to be a member of the panel disposing of a case summarily from the bench, except perhaps in criminal cases. n111

In sum, adequate numbers of judges to decide cases with due deliberation is, without doubt, the most important premise to an effective appellate system. but, the addition of judges and the creation of new circuits cannot supplant the need for a more searching reevaluation of the procedures under which the courts operate.

D. Diversification of Support Personnel: Staff Attorney Programs

The increase in the caseload has also prompted an increase in the number of court personnel. Adequate staff support is necessary if judges are to work at a maximum degree of desired efficiency, consistent with the integrity of the judicial decisionmaking process. If more judges are members of the court, more court personnel arguably are required to keep pace of the output of the court. And, even if the number of judges remains constant, there may be desirable efficiencies to be gained by the addition of court personnel to perform administrative functions or to work on court-wide legal problems and thus free more time for the judges to perform judicial functions.

The burgeoning in support staff has not taken place with indiscriminate abandon. The addition of court employees with a wide variety of skills has been attempted in order to tailor the management structure to the functional needs of the court.

Clerk's office employees with a special expertise in word processing and computers allow the court to adopt sophisticated procedures of docket monitoring. Federal and state courts alike have installed automated [*460] information systems with great success. n112

Court managers such as the clerk of court, the circuit executive and the senior staff attorney, can provide technical assistance to help the court digest and accommodate the technological changes and to put the technology to the constructive use of the court. The addition of new court administrators to federal appellate courts in the 1960's has promoted research and development, has assisted the court to focus on management options and strategy, and has helped to center the executive power firmly in the courts themselves. n113 In brief, court administrators, by bringing

a cybernetic view to the court's operations, assist in marshalling support for the court as a whole.

The personal law clerk selected by and working for an individual judge is a court employee familiar to most appellate practitioners. The growth in their number may be a less visible trend in court. Congress first provided one law clerk for each Court of Appeals' judge in 1930. n114 A second law clerk was authorized in 1969, n115 and, a third clerk in 1979. n116

Of all the employees of an appellate court, the role of the personal law clerk has probably changed the least since its institution in 1930. He or she can perform a wide variety of tasks for the judge, including attending oral argument, reviewing briefs, writing research memoranda, and assisting the judge in issuing final decisions.

The staff attorney working for the court as a whole is a relatively recent innovation implemented by every United States Court of Appeals in the country n117 as a refinement of the concept of law clerk. In general, [*461] a staff attorney is a lawyer who works for the court as a whole rather than any one individual judge. n118 The staff attorney program was commenced on an experimental basis in 1973 with the appointment of the first staff attorney n119 and, in fiscal year 1981, the number of staff attorneys in the federal appellate courts had grown to 119. n120 In 1982, the staff attorney program received formal recognition from Congress. n121

Perhaps because the staff attorney program is the most recent innovation in the use of non-judicial court personnel to increase the productivity of the courts, it has been the focal point of the most serious questioning of whether the quest for efficiency has caused a sacrifice in quality. Thus, a brief explication of the general workings of the staff attorney program nationwide, with a special emphasis on the Seventh Circuit, may ease fears of over-delegation of judicial power as well as explain why many court administrators believe that staff attorneys can encourage judicial productivity without necessarily adversely affecting the quality of the decisionmaking process.

1. Organization of Staff Attorney Programs

a. Circuit-Wide Generalizations

The development of each federal circuit's staff attorney program properly has arisen as a result of the unique problems within each circuit. [*462] n122 Thus, it should not be surprising that the tasks staff attorneys are asked to perform differ from circuit to circuit and change within a period of time within each circuit. n123 Part of the administrative strength of the staff attorney program as a whole is that its role is flexible and can adapt relatively easily to changing needs.

Three principal categories cover all of the attorney functions observed in the federal staff attorney programs in a 1980 nationwide survey conducted by the Administrative Officer of the United States Courts: (1) administrative support; (2) legal research; and (3) caseload management.

The prime task of administrative support offer by some staff attorney programs consists of operating the court's case weighting program. Case weighting is the process by which cases are reviewed in an attempt to balance the judicial caseload. In the Ninth Circuit, for example, staff attorneys implement and elaborate two-step case weighting process in which the briefs and record are reviewed and a weight is assigned to each case according to an accepted typology that accords different weights to different categories of cases, depending on their differing burdens on the judges' time. In the Seventh Circuit, case weighting is usually performed by the circuit executive. n124 The staff attorneys of the Fifth Circuit also screen cases prior to decision.

Screening is the name given to the method by which the court determines whether or not a case should be orally argued or decided on the briefs only. Screening is a judicial function but is performed with the assistance of staff attorneys in the Fifth n125 and Seventh Circuit. n126

[*463] With respect to legal research assistance offered the courts, the caseload has led all circuits to assign staff attorneys a variety of research on dispositive motions, prisoner and pro se appeals, and bench memoranda. n127 In

every circuit, staff attorneys are asked to prepare the record and to research pro se prisoner cases eliminating a substantial burden on the judges' time. n128 The Second Circuit has created a separate unit which handles only prisoner appeals. It can be expected that the members of this unit acquire a substantial degree of expertise in current developments in prisoner law which should translate into increased quality of bench memoranda and increased efficiency. n129 In every circuit, the judges, or course, independently adjudicate each prisoner appeal notwithstanding the involvement of the staff attorneys.

Circuits also delegate initial research on substantive or complicated procedural motions n130 to Staff attorneys. The prime motivating force behind removing responsibility for motions from law clerks to staff attorneys is that speedier rulings can be issued when there is an attorney outside of an individual judge's chambers -- who has developed a specialization in federal motions practice -- who can coordinate the processing of the motions with whichever judges are involved in their decision. At present, the District of Columbia, Second, Seventh and Ninth Circuits have virtually completed the transfer of the individual law clerks former participation in motions practice to the staff attorneys. n131 Staff attorneys also perform research on bench memoranda to be used by the judges in disposing of cases that will be decided with or without oral argument. Considerable diversity exists among the circuits in scheduling such research work among the staff attorneys. n132

Finally, with respect to caseflow management, staff attorneys assist the court through their participation in preappeal settlement or docketing conference programs, n133 and when reviewing motions for the court and in screening functions. For example, in the Seventh, Second, Ninth and District of Columbia circuits, n134 staff attorneys review appeals at an [*464] early stage to determine whether jurisdictional or procedural defects would affect further consideration of the appeal, whether expedition is warranted, whether the appeal is related to others already before the court so that the cases can be consolidated for briefing or for decision before the same panel of judges.

b. The Seventh Circuit's Staff Attorney Program

At present, staff attorneys in the Seventh Circuit are asked to assist the court in each of the three general areas of motions practice, case screening and administration. n135

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n the Seventh Circuit, staff attorneys have been asked to assist the court in disposing of cases in which oral argument is not necessary, cases in which oral argument is unlikely because one of the parties is proceeding pro se, or cases which present issues that do not require oral argument before they can be resolved. In these cases, staff attorneys are asked to prepare memoranda of proposed disposition that are reviewed together with the briefs and the record by the panel of judges who are assigned to the case. When the staff attorneys review the cases, they have not yet been informed of the identity of the judges on the merits panel. The panel of judges, after fully reviewing the case, may accept the proposed disposition, accept it only after revision, or reject the disposition and prepare its own, or order that the case be argued. Three rotating judges meet with the staff attorney in an in-person conference to discuss the case and the staff attorney's proposed disposition. The direct contact between the judges and the staff both heightens the job satisfaction of the staff attorney and increases the sensitivity of the judges to the staff who serve them. Seventh Circuit staff attorneys may also be asked to assist a panel of three judges in the disposition of a case that will be argued, either during an abbreviated oral argument of 10 minutes for each party or, on occasion, on the regular calendar in which each party is granted 15 to 30 minutes for argument. In these cases, the staff attorney might prepare research memoranda on points of law or work with one of the judges in issuing the final decision.

Seventh Circuit attorneys also assist the court in handling the regular flow of motions, extraordinary writs such as mandamus and prohibition, and applications incident to appeals. Motions attorneys develop an expertise in federal practice and become familiar with technical problems of procedure. Their involvement assures the court that motions are administered [*465] consistently under the governing rules and policies. n136 However, non-routine motions are presented to a motion judge or, when required, to a panel.

2. The Benefits of Professionalism In the Support Staff Outweigh the Risks

Professionalism of the administrative staff has now become recognized as a desired feature of appellate court

administration. n137 Because staff attorneys are centrally organized, they are peculiarly well-suited to address court-wide problems and provide consistent administration of court rules. But, there are limits to the increase in efficiency that can be obtained by the addition of court personnel, including the enlargement of the staff attorney program. Moreover, the role staff attorneys play in particular courts is not without controversy.

The fear is that central legal staff may diffuse judicial responsibility to the detriment of the appellate process. Justice Rehnquist has expressed concerns about the "bureaucratization" of the federal courts as well as the increased delegation of authority to United States Magistrates and court clerks. In a recent address, he noted that judges' reliance on new mechanisms utilizing these personnel has been essential to get the work of the courts done, but should be employed, he cautioned, only "so long as the judge remains in charge, . . . not merely of the court as a whole, but of the disposition of each case that is before him." n138 A greater shift of the judging function could result in "opinion writing bureaus" like those used by many federal agency commissioners, who "decide an issue before them, and summon one or more members of the 'opinion writing bureau' to write an opinion justifying the result they have reached." n139

Other commentators have shared a view that central staff are suspect institutions, concerned with quantitative output rather than the quality of the process of making decisions and operating largely autonomously rather than under the direct restraining supervision of the judges. n140 This critique is not so much based on Justice Rehnquist's fear [*466] that judges will delegate decisionmaking but the realization that the proliferation of staff has forced judges into a management role. Judges could thus become less the collegial arbiters and solitary craftsmen and craftswomen and more the managing partners of law firms. Judges must devote a considerable portion of their time to supervising staff attorneys and other court personnel -- delegating work to them, reviewing their final product -- which can only detract from the amount of time available to them to devote to judicial tasks.

A related concern over burgeoning appellate staff is that confidentiality of decisionmaking processes may be compromised when the numbers of individuals implicated in a decision is increased. Judges might also fear that staff personnel, more than law clerks, might collaborate in promoting the staffs review on a given legal question rather than owing their allegiance to an individual judge.

Notwithstanding these questions which can be raised about the desirability of employing staff attorneys at all, there are countervailing arguments which encourage their use.

Utilization of central staff attorneys has been credited with dramatic increases in the productivity of a number of state appellate courts. For example, in the Superior Court of New Jersey, Appellate Division the project year saw an increase in disposition. During the year prior to the Project, the Appellate Division decided 1,931 appeals. During the project year, the court decided 2,300 appeals, an increase of 369 While there is no precise measure of the staff contribution, "the fact of some contribution is uncontestable." n141

In the California Court of Appeals, First Appellate District, there was a 51 percent increase in judicial productivity between 1969, the year before the adoption of the central staff, and 1974, after the staff had been in operation for several years.

Moreover, there are a number of safeguards against the risk of internal bureaucratization or undue delegation which can be implemented. One safeguard is to describe with particularity in the court's internal operating procedures the role of legal staff. Such a statement can act to reassure the parties that the merits of their case are receiving meaningful [*467] consideration by judges. The aura of unsupervised, discretionary action must be dispelled. It must be emphasized to the bar that the principle of some staff involvement in routine cases, or in all cases routinely, demonstrates the courts concern for increasing the quality and consistency of the court's decisions; that all cases are carefully analyzed and all relevant matters are collected (in prisoner or pro se appeals, for example) insures that all cases -- not matter how "trivial" or "frivolous" they may appear -- receive individualized handling. n142

Moreover, because there is comparatively little published discussion of the staff attorney program readily accessible to the practicing bar, it is important that courts take an active role in informing the bar. Attempting to hide or to deprecate the role that staff counsel play may cause knowledgeable parties to exaggerate staff counsel's influence or encourage an undue cynicism about the appellate process. Specification of the functions of staff attorneys in the now-published internal operating procedures of each appellate court considerably enhance that role. n143

With staff attorneys now part of the appellate system for nearly a decade, circuits are confronting the question of whether they should hold career positions. n144 Limiting the tenure of staff attorneys may reduce possibilities for "digital" handling of cases. Regular turnover of staff members increases the attendant administrative burdens, but insures the court of fresh input of its employees and avoids the adverse effects of institutionalism. n145 Clerks willing to remain indefinitely at the court may also lack the quality of rotating staff. Experienced attorneys hired in certain specialized areas can bring a maturity and a predictability to work product in those areas. On the other hand, it is important that staff attorneys [*468] are not perceived as a "lower caste of 'court law clerks'" who are denied the opportunity to engage in "extensive research and dialectic debate" about pending cases. n146 The salaries of staff attorneys must reflect any increased experience they might have, and the opportunities for staff counsel working individually with judges on substantive legal questions cannot be so limited as to eliminate the attraction of the job to well-qualified individuals. Moreover, the supervising staff attorney position appears to require a career or long-term slot held by an attorney experienced in trial and appellate litigation. The District of Columbia, Second, Fifth, Seventh and Ninth Circuits have had success in recruiting experienced attorneys to administer the appellate management program, although they differ over the length of acceptable tenure.

Publication of an ethical code of conduct for staff attorneys has been undertaken. The code serves again to inform the bar on the standards of behavior to be demanded of staff attorneys as well as to refine further the role staff attorneys play. n147

In sum, the goals of an appellate staff attorney program can be simply stated:

In principle, staff attorney processing of routine cases -- or of all cases on a routine basis -- is intended to enhance the time available for judges to devote to novel cases in collaboration with their personal law clerks, thereby improving the quality of decisionmaking in cases of true public significance. n148

The task remaining is to answer the open questions of the effective utilization of staff attorneys within any court. What is the proper structure of a staff attorney program? Is staff specialization good or bad? What is the optimum size of the program? What is an acceptable tenure? In the past, the circuits have differed in the way they have answered these questions. There is no reason why such nationwide experimentation should not be encouraged to continue, tailoring each program to the needs of its court and modifying the program as needs change.

Although surveys of attorneys and other statistical studies might add flesh to the debate on the role of staff attorneys, the bar's dissatisfaction with respect to the program may be related to lack of familiarity or exposure to staff attorneys, or the unpopularity of other court procedures, such as the denial of oral argument, with which the program is associated. The single-most important point that needs to be emphasized [*469] in the local rules of each court is that no work that a staff attorney completes is unreviewed by a circuit judge, just as no work that a personal law clerk does is unassociated with a judge. The constant supervision of staff attorneys preserves collegiaty of the court, n149 and avoids the appearance of undue delegation or diffusion of decisionmaking authority n150 or bureaucratic decisionmaking in the genre of "cafeteria justice." n151

IV. THE SEVENTH CIRCUIT COURT OF APPEALS PRELIMINARY CONFERENCE PROGRAM

A. General Principles and Historical Context

Under the rubric of the Federal Rules, appellate case management is theoretically self-initiating and self-enforcing. Attorneys are charged with the responsibility of alerting the court to possible jurisdictional defects by filing a motion; the time intervals applicable to record preparation and briefing are specific in the Federal Rules of Appellate Procedure; then, the court takes over the case when it has been assigned to a panel of judges for final decision. The appellate prehearing conference program developed in response to two perceived diffidencies in the Federal Rules of Appellate Procedure and the corresponding local rules of the court. First, the Federal Rules of Appellate Procedure established only a broad framework for processing appeals that must be adapted individually to each appeal to speed decisionmaking and that the attorneys' practical interests as adversaries may not cause them to request such individualized management. Second, the federal appellate courts had not yet aggressively used an in-person conference in order to induce settlement of the case. Prehearing conference, docketing conference or preappeal settlement conference are names that variously

describe the set of procedures under which parties to appeals are asked to consult with the court at or near the time of docketing the appeal in order to resolve procedural problems, establish briefing schedules, improve the quality of briefs and argument, and provide a forum for settlement negotiations. n152

[*470] Prehearing conferences, then, are part of the larger movement in both state and federal trial n153 and appellate courts to establish alternative methods to formal court resolution of disputes. n154 The purpose of the "diversion-from-court movement" is to minimize the time and expense required to dispose of litigation without diminishing either the quality or the appearance of even-handed justice. n155

On the appellate level, there are no paths unto which appeals can be diverted. Cases are removed from the appellate court docket when they are decided or when the parties agree to dismiss the case. The first court of appeals to adopt a prehearing conference, the Second Circuit in 1974, did so precisely to provide a forum of such settlement negotiations. n156

The authority for docketing conferences is found in Federal Rule of Appellate Procedure 33 which provides:

[t]he court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course, of the proceeding, unless modified to prevent manifest injustice. n157

The major goal of the Second Circuit's Civil Appeal Management Program (CAMP) was to encourage settlement. Although the statistical evaluations of CAMP have reported inconsistent conclusions on the effectiveness of CAMP to induce settlement, n158 it could be anticipated, [*471] even before the Second Circuit took the historic first step of implementing CAMP that the likelihood of settling an appeal might be considerably less than the success in settling or diverting trial level cases. By the time a trial in the district court has been completed, from the filing of the complaint through an exhaustive discovery and motion practice to resolve post-trial motions, the parties have already likely committed a substantial amount of resources to their case and, it is hoped, explored the competing advantages of settlement. Accordingly, the pressures placed on parties to settle an appeal must be imposed more selectively than in trial court.

Partly in recognition of the reduced expectations for settlement of appeals, the Seventh Circuit Court of Appeals, which implemented its conference program shortly after CAMP n159 and substantially modeled its program on CAMP, n160 chose to emphasize complementary functions of conferences: screening cases for jurisdictional defects; individually calendaring record preparation, briefing and even oral argument; streamlining the briefing process; and resolving some issues, if not the entire appeal, prior to submission to the court for decision. n161 The Seventh Circuit program capitalizes on the fact that conferences are held near the time of docketing. As the prosecution of cases advances after the time of docketing, opportunities diminish for realizing efficiencies through differentiation among appeals according to their complexity, subject matter or the parties involved. Even if there is no reduction in workload traceable to an increase in settlement, the conference is an opportunity for the court to take control over the movement of appeals at the earliest possible time after docketing. Litigants' plans can be coordinated with the courts clear procedures on the caseflow process, including policies establishing tight limits on continuances and avoiding unnecessary and excessive delays in submitting the case for decision.

B. Conference Procedures in the Seventh Circuit

An appeal proceeds through the prehearing conference program in the following manner: n162 after the notice of appeal has been filed in the [*472] district court, the district court clerk prepares the "short record" consisting of a copy of the notice of appeal, certified copies of the district court docket sheets and a copy of a completed "Seventh Circuit Information Sheet." n163 The short record in every newly docketed civil or criminal appeal is reviewed by the senior staff attorney within a few hours of docketing. The senior staff attorney verifies that the court has jurisdiction over the appeal. If there is a question about whether or not the order appealed from is final, the senior staff attorney will see that

an order is issued from the clerk's office asking the parties to file a brief statement on jurisdiction. Civil appeals are sorted into three mutually exclusive categories: appeals satisfying the eligibility criteria for a conference; appeals not satisfying the eligibility criteria but meriting the individualized attention of a scheduling order; appeals satisfactorily governed by the normal operations of the Federal Rules of Appellate Procedure.

If jurisdiction is proper, the senior staff attorney will decide if a preargument conference ought to be conducted. A copy of the order or memorandum opinion of the district court is sent for and added to the materials already a part of the short record. n164

A conference in a civil case is held if one or more of the eligibility [*473] criteria have been satisfied. That is, (1) the case involves multiple parties; (2) the case involves multiple appeals; (3) favorable settlement possibilities are present; (4) the case involves broad public interest or public impact; (5) expedition of the appeal is essential; or (6) one of the parties has requested a conference. n165 The court is reasonably confident that cases satisfying at least one of these criteria are likely candidates for settlement or the procedural streamlining effects which are one of the benefits of the conference procedure.

The decision to hold a conference is made very early in the civil appeal on the theory that the parties are more willing to consider a compromise when their investment in the appeal is still small. In addition, the more promptly the parties inform the court of any procedural oddities presented by their appeal the better able is the court to tailor-make procedures to accommodate their case.

If a case is selected for a settlement conference, the secretary to the senior staff attorney will contact local counsel to schedule a conference as soon as possible. Usually, conferences are held within five days of docketing. Counsel outside the Chicago area are telephoned and asked to participate by telephone or, at their option, in person. n166 The Ninth Circuit requires counsel to file a settlement statement concisely setting forth the facts, contentions, citations of authority, and damages. n167 Counsel are informed of the purposes of the conference as well as any additional specific matters that might be on the agenda. Advance scheduling is important not only to insure attendance but to provide an occasion to emphasize that the court will expect that they will be familiar with their cases and be empowered and prepared to discuss matters related to settlement and scheduling.

A typical conference lasts between fifteen and forty-five minutes. The senior staff attorney begins the conference with an introduction explaining the procedures and that all matters discussed at the conference will remain confidential and would not be communicated to the court. n168 [*474] Assurances of confidentiality are designed to encourage candor among the attorneys on the possibility of settlement. Usually, the appellant is asked to explain his theory of error in the district court, the appellee responds, and the senior staff attorney poses questions to both parties as they present their opposing views. Typically, the attorneys informally discuss compromise or settlement of the appeal. The presence of all persons needed to effect a binding settlement is required.

The docketing conference has evolved into a clearinghouse for procedural motions of all kinds and substantive motions of certain kinds. Procedural motions routinely handled in a conference include motions for extension of time, for delayed filing of exhibits, and for supplementation of the record. The senior staff attorney also might handle motions to stay an appeal pending the resolution of related cases or collateral matters in the district court (such as questions of costs and fees from which a second appeal might be taken) or pending the disposition of a United States Supreme Court case involving the same issue. n169 The senior staff attorney also might handle a motion to accelerate the briefing of the appeal so that, for example, two cases involving similar legal issues could be set for decision before the same panel. Conferences are virtually indispensable in handling appeals that must be expedited to decision, such as recalcitrant witness cases or appeals involving injunctions. A conference should be held as soon as possible after docketing to explore remedies such as an interim stay or settlement of the underlying controversy. Any agreed resolution of a motion by this means is particularly beneficial to the court, which otherwise might be required to convene a three-judge panel to decide the motion.

Certainly the early identification and discussion of jurisdictional problems to save parties the cost of preparing motion papers and briefs and to relieve the court of the need to "manage" defective appeals is critical to a court attempting to keep current in its work. Prior to the institution of docketing conferences in the Seventh Circuit, some appeals which were not properly before the court because of lack of jurisdiction were briefed and orally argued before the jurisdictional

problem was discerned, [*475] resulting in a lengthy delay in litigation as well as a waste of the time of the court and counsel.

All orders are entered in the name of the clerk of the court and copies of all orders are included in the case files. The office of the senior staff attorney maintains separate confidential files. If the parties have agreed to settle the case, the agreement must be memorialized and a stipulated motion to dismiss must be filed with the clerk of the court. The clerk of court will enter judgment so that the docket sheet and files remain correct. If the parties cannot agree to settle the case, then orders specifying the time for filing briefs and other matters agreed to at the conference are entered by the clerk's office.

If a conference is not held because one or more of the criteria have not been satisfied, the senior staff attorney may draft a scheduling order which gives the parties dates certain for the filing of the record and the briefs n170 and may also indicate a probable date for oral argument. Instead of a scheduling order, the senior staff attorney may draft an order for the court holding in abeyance record preparation and briefing on the merits until a collateral matter, such as costs and attorneys fees or a motion for in forma pauperis status on appeal, is disposed of by the district court. In the Seventh Circuit, a "Memorandum to Counsel," a Practitioner's Manual and other instructional packets made available to attorneys of record are attempts to provide helpful procedural advise. Scheduling orders issuing from the clerk's office can provide litigants with dates certain for the filing of briefs and thereby discourage delay. The clerk's office must also monitor scheduled events and see that sanctions, including the dismissal of the appeal for default, are imposed. Computerized applications for appeals expediting systems must be generated.

If a conference is not held and if a scheduling order is not entered, attorneys must consult the Federal Rules of Appellate Procedure and the local rules of the Seventh Circuit in computing the due dates for their briefs and in ascertaining their responsibilities for prosecuting their appeal. In order to make this task easier for attorneys of record and pro se appellants, the senior staff attorney has prepared a six-page "Memorandum to Counsel" that summarizes the key rules, informs counsel of the court's expectations under the existing procedural rules, and attempts to answer those questions most frequently posed by counsel at the beginning [*476] of their case. The clerk's office mails an informational "Memorandum to Counsel" to the attorneys with notification of docketing. Nonetheless, the lack of a scheduling order may result in these appeals languishing on the docket if counsel for appellant does not file a brief in a timely fashion. Although Clerk's Office procedures do provide for the issuance of Rules to Show Cause which carry the threat of dismissal in the event of default, the Rule to Show Cause typically does not issue until after a significant period of time has elapsed after the presumptive due date for the brief.

C. The Effectiveness of the Seventh Circuit's Program

The central problem posed in evaluating the conference programs, then, is whether they satisfy the elusive standard of cost-effectiveness. If prehearing settlement conferences accelerate dispositions without briefing, argument, or opinions, then they have achieved a distinct benefit. On the other hand, if conferences merely intellect another time-consuming step into the appellate process, or if undue pressure to settle is brought to bear on the parties, or if the only cases being settled are those which would have settled anyway, then conferences serve no useful purpose.

The Federal Judicial Center funded an officially controlled experiment to determine the effects of preappeal docketing conferences on reducing the workloads of Seventh Circuit judges. n171 The data was collected and evaluated by Jerry Goldman, a professor in the Department of Political Science of Northwestern University. The basic findings show that preappeal docketing conferences are clearly effective in focusing and narrowing the issues on appeal and otherwise expediting the preparation of an appeal.

[*477] The findings emerge as a result of comparing the process and results in "control" cases (cases not selected for a conference in which the parties received a copy of the informational "Memorandum To Counsel") with "experimental" cases that went through a preappeal conference conducted by the senior staff attorney, alone or with one circuit judge. The crucial issue for the evaluation was whether and to what extent court intervention above and beyond the informational letter is effective and whether or not the presence of a judge at the conference is necessary to achieve positive results.

The results of the study establish first and foremost that the prehearing conference had a significant effect in reducing the number of motions -- both routine and nonroutine -- that judges must hear. n172

For example, stipulations to dismiss appeals, stipulations to supplement the record, agreements on bond pending appeal or on stays of appeals all removed the need for automatic judicial intervention. Moreover, there was a dramatic reduction in elapsed time from the filing of the appellant's brief and the date of submission or argument n173 and, consequently, a significant reduction in the elapsed time from filing the notice of appeal to termination. In other words, realistic scheduling orders adapted to the scheduling needs of counsel-with a recognition that the goals of counsel may not always coincide with the goals of the court-are more likely to be observed. It is also possible that the early attention to procedural problems reduces a large number of relatively minor disputes which could otherwise prolong the appeal.

In addition, the length of the average appendix filed with the appeal briefs was significantly less than in cases not conferred. n174 This positive result may be more a result of counsel being informed of the Seventh Circuit's Rule 12, which substantially modifies the more extensive appendix requirements of Federal Rule of Appellate Procedure 30, rather than an effect of the senior staff attorney's admonition that appendices must be short. n175

Furthermore, a higher proportion of cases in which a conference was held were settled than control cases, but the observed difference was [*478] not great enough to exclude chance as a explanation. n176 Even if a statistically significant number of cases do not settle, there is an appreciable reduction in the amount of judicial time required to process and decide those appeals in which a conference was held due to the reduction in post-conference motions and agreements of counsel to eliminate arguments on appeal. n177

Finally, the study showed that there were no situations in which the circuit judge's presence at the conference increased any of the beneficial results of the program, to a statistically significant level. The only variable affected by the presence of a circuit judge concerned the number of briefs filed in an appeal, with a greater number filed when a circuit judge presided over the conference. n178 Thus, delegating the task of holding conferences to the senior staff attorney in an effort to further economize judicial time is not likely to decrease the effectiveness of the conference. n179

The results of the Federal Judicial Center's study of the Seventh Circuit's program is supported by the three studies of the Second Circuit's CAMP program, n180 notwithstanding the fact that evaluations of the Second Circuit focused on settlement rates, given the priority on settlement in CAMP. n181 The Second Circuit's own in-house evaluation of [*479] CAMP, covering data collected between 1978 and 1981 show that CAMP successfully expedited preparation of an appeal, focusing and narrowing issues on appeal, and encouraging the settlement of approximately 19% of civil appeals. n182 A Federal Judicial Center reevaluation of CAMP released in 1983 supports the results of the in-house study and discloses that CAMP results in the settlement or withdrawal of a statistically significant 10% of the appeals.

n183 The first Federal Judicial Center evaluation of CAMP -- A study which did not demonstrate any statistically significant effect on settlement rates -- additionally demonstrated that the CAMP conferences encourage an improvement in the quality of counsel's over-all preparation, but the level of improvement was at low, yet statistically significant, levels. n184 Many Second Circuit judges, however, have indicated that they did not perceive any beneficial effect in overall quality of appellate presentation. n185 Finally, the Federal Judicial Center's reevaluation of CAMP demonstrates a high degree of acceptance of conference procedures by participating members of the bar. n186

D. Cost Effective Technique Case Management

The Judicial Center's study of the Seventh Circuit's conference program illustrates that the program successfully fulfills a number of important case management goals: it encourages settlement; it streamlines the appellate process by adapting the norms of appellate practice codified in th Federal Rules of Appellate Procedure to individual cases; it personalizes and institutionalizes the court's concern with litigants' own unique problems and questions on the appellate process. It appears to be "cost effective" both for the parties -- who can receive tailor-made scheduling orders and immediate answers to their questions on appellate procedure thus obviating a costly motions practice -- and for the court.

[*480] The only serious question that could be raised concerns the role the conference attorney must play in the conference. In most conferences in which settlement is to be seriously discussed, the senior staff attorney must take a position on the merits of the appeal. They can urge settlement only with rhetoric and logic; thus they may need to express their options on the likelihood of appellant's success on the merits. A recent survey of attorney attitudes by

the American Bar Association supports this conclusion and suggests that in fact what attorneys believe most assists in settling cases is the expression of analytical opinion. n187

But, an expression of such discretionary decisions and stances may cause concern that a staff attorney is in some way deciding an appeal, or is making procedural decisions which directly affect the parties' willingness or practical ability in maintaining an appeal. For example, a refusal to expedite briefing may remove the possibility of calendaring the case before the end of the court's term. It thus goes without saying that the conference attorney must always explain the tactical options available to any attorney who objects to an action taken as a result of a conference, namely to re-open the matter by filing a motion which, of course, will be reviewed by a judge.

When the scope of authority of the conference attorney is appropriately defined, there are five reasons to prefer that the senior staff attorney rather than a circuit judge conduct the conference.

First the study of the Seventh Circuit's program discloses that the presence of the circuit judge did not enhance the utility of the conference. n188

Second, there is nothing to suggest that attorneys prefer the presence of a judge. n189

Third, if a judge were to participate in settlement negotiations and make decisions on how quickly a case should be processed, he or she might become predisposed subtly on the merits of the appeal. n190 But, management of appeals first by court administrators and then by judges [*481] reduces the likelihood that a decision made by an earlier official can prejudice the likely decision on the merits.

Fourth, a recent survey of attorney attitudes on the settlement of trial court cases discloses that the attorneys' views vary in relation to the type of case involved and the background of the attorney and not whether or not a judge is involved at all.

Fifth, as the conference procedure itself becomes a regular feature of a court's practice, the acceptance of the participation of the senior staff attorney in lieu of a circuit judge is likely to rise. For example, in the Seventh Circuit, it may well be that the participation of a circuit judge talking to attorneys "eyeball to eyeball" was necessary to make the conference a success. n191 But, the local legal culture and the norms and expectations of the attorneys on the pace and processing of appeals will change over time, in validation of the success of the program.

In sum, prehearing conferences which offer the possibility of settlement and which enable the court to assume control over an appeal early, when the control is likely to be most effective, offers "a degree of cost effectiveness . . . [which has] . . . no precedent in the judiciary." n192 The Seventh Circuit's program, which emphasizes continuous, flexible, personalized case management over the life-span of the appeal can only enhance and not impeach the effectiveness of the appellate process.

V. CONCLUSION

In the 1970's and 1980's, federal courts of appeal have experimented with a wide variety of procedural adaptations and structural changes to better deal with an ever-increasing case-load while preserving the fairness of the system. n193 The application of management analysis to the "business" of the courts has resulted in experimentation in every circuit with a [*482] variety of techniques for (1) simplifying the appellate process; (2) increasing the order and predictability of the appellate process; (3) reducing the costs to litigants; (4) reducing the amount of time required to complete an appeal; and (5) streamlining the process to eliminate wasted time for attorneys and judges. Courts have implemented various reforms including changes in decision format, in the availability of oral argument, in the effective size of courts and in the type and number of court support personnel.

The development of staff attorney programs and the prehearing conference programs are arguably the two reforms likely to have the most long-term benefit for the court. The former consists of adding new support personnel to assist the judges on a wide variety of matters, which can change as the court changes. The latter consists of adding a new procedural level to the processing of all appeals in order to flexibly focus the management ability of court personnel on each appeal. That the precise structure of a court's staff attorney program can vary from circuit to circuit is a positive sign of experimentation and responsiveness to local needs. Staff attorneys, from their involvement in continuous case

screening programs, and prehearing conferences on the Seventh Circuit's model which emphasizes management of appeals during their entire lifespan, offer meaningful relief to circuit judges with immediate, recognizable benefits to appellate attorneys and their clients.

Each of these techniques of case management have been implemented only after the most careful deliberation on their likely effectiveness and impact on the functioning of the court. The statistics on the federal appellate caseload is a testament to their success in increasing the overall productivity of judges.

Increased productivity, however, is not the primary criterion by which the program's utility must be measured. That a court continues to dispose each year of all cases ready for disposition cannot be the sole test of success. The authority of an appellate court depends on the fairness with which it is perceived to act and the persuasiveness of its positions. Procedural reforms along the lines of the Seventh Circuit's prehearing conference program, which balances procedural gains with careful definition of delegated authority, do not derogate the court's ability to perform its historic obligations with a quality that endures.

FOOTNOTES:

* LL.M., Georgetown University, 1982; J.D., University of Wisconsin, 1978; M.A., University of Texas at Austin, 1976; A.B., District of Columbia, Illinois and Wisconsin.

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n1. A. CARRINGTON, D. MEADOR, M. ROSENBERG, JUSTICE ON APPEAL 4-5 (1976) [hereinafter cited as Justice on Appeal]. See generally Bell, Toward A More Efficient Federal Appeals System, 54 JUDICATURE 237 (1971); Carrington, Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law, 82 HARV. L. REV. 542 (1969); Edwards, Exorcising the Devil of Appellate Court Delay, 58 A.B.A.J. 149 (1972); Wright, Overload Fifth Circuit: A Crisis in Judicial Administration, 42 TEX. L. REV. 949 (1964).

n2. COMMISSION ON REVISION OF THE FEDERAL APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (Washington, D.C., 1975), at 169-71 [hereinafter cited as Commission of Revision].

n3. Commission of Revision, *id.* at 47.

n4. For a discussion of the problems in selecting an appropriate statistical data base and in analyzing results, see *infra* notes 19-21 and accompanying text.

n5. The courts of appeals must maintain data on a fiscal year basis on certain information such as rates and types of disposition, but there are few empirical tests evaluating the effectiveness of the reforms. See Commission on Revision, *supra* note 2.

n6. Moser, Delay Reduction in Intermediate Appellate Courts, 1982-83 APPELLATE COURT ADMIN. REV. 17, 19 [hereinafter cited as Moser].

n7. See *infra* notes 135-170 and accompanying text. A prehearing settlement conference or docketing conference is a conference between a representative of the court and attorneys to an appeal in which an attempt is made to settle the appeal or to streamline the presentation and insure the speedy adjudication of the nonsettling appeal. For a discussion of analogous types of alternate methods of resolving disputes outside of the judicial system, see *infra* text accompanying notes 34-39.

n8. See *infra* notes 171-179 and accompanying text.

n9. Commission on Revision, *supra* note 2, at 1, 169-71. For discussions and studies of the federal courts' caseload, see Carrington, Crowded Dockets in the Courts of appeals: The Threat to the Function of Review and the National Law, 82

HARV. L. REV. 542, 567-70 (1969). See also Clark, Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century, 55 S. CAL. L. REV. 65 (1968); McIntosh, 150 Years of Litigation and Dispute Settlement: A Court Tale, 15 LAW AND Soc. REV. 823 (1981); Justice on Appeal, supra note 1.

n10. Id.

n11. For a general discussion and study of appellate caseloads, see Demos, Speedy Trail Judges, 22 THE JUDGES' J. 38 (Fall 1983); Flango and Elsner, The Latest State Court Caseload Data: An Advance Report, 7 STATE COURT J. 16 (Winter 1983); Kagan, The Business of State Supreme Courts, 1870-1970, 30 STAN L. REV. 121, 135 (1977); Marvell and Kuykendall, Appellate Courts -- Facts and Figures, 4 STATE COURT J. 9 (Spring, 1980); Marvell, Appellate Court Caseloads: Historical Trends, 1982-83 APPELLATE COURT ADMIN. REV. 3; McIntosh, supra note 17; Trotter and Copper, State Trial Court Delay: Efforts At Reform, 31 Am. U.L. REV. 213 (1983). See also infra note 15.

n12. Justice on Appeal, supra note 1, at 4-5.

n13. Id.

n14. Id.

n15. Marvell, Recent Appellate Caseloads, 1982-83 APPELLATE COURT ADMIN REV. 25, 26-30.

n16. Id.

n17. Commission on Revision, supra note 2, at 1, 169-71.

n18. Marvell, supra note 15 at 25. Despite the trend of ever-increasing dockets, there is data showing that the number of state supreme court decisions in states with intermediate courts remained rather constant during the past 100 years. This suggests that intermediate appellate courts have successfully absorbed the increase.

n19. Some commentators have suggested that the number of filings is not the proper statistical base to be used in examining the workload of the courts of appeals. Filings counts all cases regardless of whether any judicial effort is devoted to the appeal. Some cases are disposed of through voluntary dismissal or consolidation. Commission of Revision, supra note 2, at 170. Others suggest that an alternative base, the number of terminations after hearing or submission, presents a more accurate picture of the workload of a court. But this base has limits, too. Circuits differ in the criteria for classifying cases for hearing or submission. Commission on Revision, id.

n20. For example, at certain times the Fifth Circuit classified its Local Rule 21 opinions, namely decisions using forms which announce the court's ruling with or without indicating the reasoning impelling the result, as cases decided "without opinion." But in 1974 these opinions were classified as decisions "with opinion." During the same period of time in the Seventh Circuit, Local Rule 28 unpublished orders, which could be many pages in length, were classified as dispositions "without opinion." Commission on Revision, supra note 2, at 170 n.3 (Local Rule 28 has now been superceded by Local Rule 35. See infra note 59). Moreover, the individual circuit courts themselves may often be compiling statistics using different fiscal years. Commission on Revision, supra note 2, at 171.

n21. For additional discussion of the advantages and limits of statistical studies and comparisons, see Marvell, Appellate Court Caseloads: Historical Trends, 1982-83 APPELLATE COURT ADMIN. REV. 3, 5.

n22. See e.g., Desmond, Where Have All the Litigants Gone? 20 FORDHAM L. REV. 229 (1951); Rossman, Quo Vadis? 33 OREGON L. REV. 1 (1952); Seacat, The Problem of Decreasing Litigation, 8 U. KANSAS CITY L. REV. 135 (1940). See also Justice on Appeal, supra note 1, at 14-16; L. FRIEDMAN A HISTORY OF AMERICA LAW 296-99 (1973).

n23. Marvell, supra note 11, at 3, 6.

n24. Marvell, *The Appellate Caseload Deluge*, -- *THE JUDGES' J.* -- (1985), reviewed in advance of publication in *A.B.A., JUD. ADMIN. Div., LAWYERS LETTER*, 2:1 at 2 (Aug. 1984). Mr. Marvell has further analyzed the variables correlating fluctuations in the volume of civil cases with economic downturns and war.

For a discussion of the low volume in criminal appeals prior to the Supreme Court's rulings in *Douglas v. California*, 372 U.S. 35 (1963) (right to counsel) and *Griffin v. Illinois*, 351 U.S. 12 (1952) (indigent's right to a free transcript), see Foreman, "The Law's Delays," 13 *Mich. L. Rev.* 100 (1914) (10 percent of all appeals are criminal cases) and Kagan *supra* note 22.

n25. *Id.*

n26. See Griswold, *The Explosive Growth of Law through Legislation and the Need for Legislative Scholarship*, 20 *HARV. J. ON LEGISL.* 267 (1983). See also *THE LITIGATION EXPLOSION*, a series of articles reprinted from the *Los Angeles Times*, at 1-5, 11, 16-19. Justice Rehnquist has described the growth in federal causes of action as follows:

Congress . . . has repeatedly added to the burdens of the federal courts by 'carv[ing] out a small chunk of traditional state court tort law or domestic relations law, with respect to which there is scarcely conclusive evidence that state courts were not doing a thoroughly adequate job of adjudicating, and turn[ing] it into a federal cause of action.'

Third Branch, Oct. 1982, at 2, col. 2 (excerpts from Justice Rehnquist's comments in his September 22, 1983 MacSwinford Lecture at the University of Kentucky). Statutes cited by Justice Rehnquist as illustrative of this ever-increasing tendency of Congress' are the Federal Child Support Enforcement Act, the Truth in Lending Act, and the Motor Vehicle Information and Cost Savings Act (which allows a civil action to be brought in any U.S. district court, without regard to the amount in controversy, for knowingly operating a motor vehicle with a disconnected or nonfunctional odometer). Justice Rehnquist comments were taken from his September 22, 1983 MacSwinford Lecture at the University of Kentucky, excerpts from which appeared in *The Third Branch*, vol. 14, no. 10 (Oct. 1982) at 2 col. 2.

n27. Title IX of the Organized Crime Control Act of 1970 is the Racketeer Influenced and Corrupt Organizations Statute (RICO), 18 U.S.C. § § 1961-1968 (1982). The purposes of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969). The plain language of the RICO statute is not so limited. See 18 U.S.C. § 1962(a)(b)(c) (1982).

n28. Civil RICO had been applied to nearly all forms of commercial fraud. E.g., *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983), cert. denied, 104 S. Ct. 508 (1983).

n29. See e.g., T. Church, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (National Center for state courts, 1978); R. NEELY, *WHY COURTS DON'T WORK* (1983); FEDERAL JUR. CENTER, *COMPARATIVE REPORT ON INTERNAL OPERATING PROCEDURES OF U.S. COURTS OF APPEALS* (1973); Flanders, *Case Management and Court Management in the U.S. District Courts* (Federal Judicial Center 1977); Flanders, *Case Management in Federal Courts: Some Controversies and Some Results*, 4 *JUST. SYST. J.* 147, 161 (1978); Landon, *Lawyers and Localities: The Interaction of Community Context and Professionalism*, 1982 *A.B.F. RES. J.* 459 (Spring 1982) (correlates lawyers' views on judicial roles with extent of urbanization); Symposium: *Reducing Court Costs and Delay*, 16 *U. MICH. J. LAW. REF.* 456 (1983).

n30. Even when the Supreme Court does address a legal issue it often, of late, decides cases by plurality opinions or with multiple concurrences which only undercut the clarity of the Court's rule of decision. For example, see *The Litigation Explosion*, *supra* note 26, at 20-23.

n31. In 1951, about 1200 cases (appeals and certiorari) were filed in the Supreme Court. In 1971 the number had tripled to about 3600. The number of cases argued and decided on the merits, however, have totaled almost a constant 125 every year since 1925. Commission on Revision, *supra* note 2, at 5-6; Casper and Posner, *A Study of the Supreme Court's Caseload*, 3 *J. OF LEGAL STUDIES* 339, 361 (1974). See also Griswold, *Rationing Justice -- The supreme Court's Caseload and What the Court does not Do*, 60 *CORNELL L. REV.* 335, 339 (1975).

n32. Commission on Revision, *supra* note 2, at 14; *SP. CT. REV.* 17(a) (conflict among the circuits is only one, non-dispositive criterion which the court may consider before granting certiorari).

n33. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 37-41 (1960); Moser, *Delay Reduction in Intermediate Appellate Courts, 1982-83 APPELLATE COURT ADMIN., REV.* 17, 18.

n34. For a discussion of diversion in the criminal justice system, see R. NIMMER, *DIVERSION: THE SEARCH FOR ALTERNATE FORMS OF PROSECUTION* (American Bar Foundation 1974).

In that study, "diversion" is operationally defined as any means of disposing of a criminal complaint without a conviction. (*Id.* at 5).

n35. See e.g., *Managing' Company lawsuits to Stay Out of Court, BUS. WK.* Aug. 23, 1982 at 54-65; *How to Stay out of Court, MONEY,* May 1983 at 177-182; Waxman, *Moving The Apart Together: Alternatives to Litigation, DIST. LAWYER,* March/April 1983, vol. 7, no. 4. at 28-31, 54-60. See also *THE LITIGATION EXPLOSION,* *supra* note 26, at 40-42.

n36. The Federal Judicial Center has completed a study of court-annexed arbitration in the District of Connecticut, the Eastern District of Pennsylvania and the Northern District of California. Under the rules adopted in the pilot courts, cases eligible for arbitration undergo a hearing before a panel of one of three experienced attorneys within a specified period after filing. Any party to the case may reject the arbitration award and demand a trial *de novo*. As part of the study, the Center monitored all cases eligible for the programs, surveyed counsel and arbitrators, and interviewed court personnel involved in administering the programs.

The evaluation produced strong evidence that the arbitration rules have caused a decrease in time from filing to disposition of arbitration cases (in two of the three districts), but this is attributable most exclusively to settlement of cases prior to the arbitration hearing. In the third pilot court, no such effect was found. It appears that court-annexed arbitration can serve as an effective deadline for case preparation, substituting for trial not as a forum for case resolution but as a stimulus to settlement.

E LIND, J. SHEPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS,* (Fed. Jud. Center, March 1981) at ix. A revised edition, published in 1993, includes a number of cases that were still pending when the study was first published. When the new data is included, 50% of cases referred to arbitration do not go to trial and only 2% of the cases arbitrated in the Eastern District of Pennsylvania in 1979 reached a trial *de novo*. E. LIND, J. SHAPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS,* Fed. Jud. Center (Sept. 1983) at viii.

Commenting on the Federal Judicial Center Study in a recent article for the symposium on reducing court costs and delay (*Court-Annexed Arbitration, 16 U. Mich. J.L Ref.* 537 at 544 (1983)), FJC Director A. Leo Levin noted that while court-annexed arbitration "[a]lone . . . cannot dissolve the backlogs," the analysis of the data obtained from this federal experiment reveals a potential savings of approximately forty trials a year. That savings represents "more than the total number of trials that any one judge can be expected to try over the course of an entire year." *Id.*

n37. In February, 1983 the Courts of Cook County, Illinois established a new division to handle pretrial mediation of civil cases.. The District of Columbia Superior Court established a voluntary civil arbitration program and is studying the feasibility of compulsory arbitration.

n38. Frankel, *The Search for Truth: An Umperial View,* 123 U. PA. L. REV. 1031 (1975); Frankel, *The Adversarial Judge,* 54 TEXAS L. REV. 295 (1977).

n39. One of the most provocative and controversial critiques of the active role of district court judges in Rule 16 settlement conferences was advanced by Reznick in *Managerial Judges,* 96 HARV. L. REV. 374, 445 (1982). Reznick's concerns about the entry of ad hoc, unreviewable decisions which can color the impartiality of the judge (*Id.* at 380) do not so easily generalize to the appellate settlement conference, however, since there, as Reznick concedes, it is easier to make judgments about the appropriate pace of litigation. *Id.* at 412-13, 424-31, 436-38. Reznick's insistence, however, that pace and not merely time elapsed in the key concern is well-taken. Pace is the rationalizing principle of the Seventh Circuit's docketing conference program. See *infra* section IV.

To avoid what Reznick considers to be conference procedures that violate due process, she urges courts to appoint "magistrates, arbitrators, specially trained mediators, or even therapists -- whoever is effective -- to perform the management tasks that judges now undertake. 96 HARV. L. REV. 374 at 436. For other discussion more favorable to the

trial judge's role in Rule 16 conferences, see THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS, FEDERAL JUDICIAL CENTER STUDY (H. Will and R. Merhinge, Jr. 1977); THE JUDGE'S ROLE IN THE SETTLEMENT OF CIVIL SUITS, FEDERAL JUDICIAL CENTER STUDY (F. Lacey (1977)). But at least one management review of a district court has disclosed that some judges do not delegate pretrial matters to magistrates because they lack confidence in some magistrates' abilities and they cannot predict which magistrate will receive a case under the random assignment system. MANAGEMENT REVIEW OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS MANAGEMENT REVIEW DIVISION, (January 1981) at 6.

n40. Court diversion projects such as arbitration and mediation are thus part of the larger legislative trend to remove causes of action from the courts (e.g., medical malpractice and no fault automobile legislation) and limit jurisdiction of the courts. On one level these movements may appear to signal a low confidence in the courts. Yet, paradoxically, there are accompanied by an increased willingness to bring matters to the court for resolution. Courts are relatively accessible, inexpensive, prompt and impartial. Nonetheless, Justice Burger may be correct when he insists:

[w]e Americans are a competitive people and that spirit has brought us to near greatness But that competitive spirit gives rise to conflicts and tensions. Our distant forbears moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, of course, trials will be the only means, but for many, trials by adversarial contest must in time go the way of the ancient trials by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that simply must be corrected.

THE LITIGATION EXPLOSION, *supra* note 25 at 43.

For further discussion of public confidence in the courts see Rifkin, Are We Asking Too Much of Our Courts, THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE at 51, 52 (1979); Yankelovitch, Skelly and White, Inc., Highlights of the National Survey of the General Public Judges, Lawyers and Community Leaders, in State Courts: A Blueprint for the Future, at 5-69 (Williamsburg: Nat'l Center for State Courts, (T. Felter ed.) (1978) (public confidence in state courts was 23%, a bare 4% above the public's confidence in prisons). See also Mahoney, Sarat and Weller, Courts and the Public: Some Further Reflections on Data from a National Survey, *id.*, at 83, 85.

n41. State courts have also experimented with radical changes in procedure. Arizona had implanted an accelerated "Procedure B" in which parties file their briefs according to the usual schedule and are granted oral argument within 60 days thereafter, but they receive an oral ruling from the bench. Contreras, Accelerated Procedure B: A "Fast Track" Way to Avoid Appellate Delay NOW, 1982-83 APPELLATE COURT ADMIN. REV. 10, 11. California, on the other hand, has implemented a new program which permits the resolution of some civil appeals in as few as 120 days from the filing of the notice of appeal to the issuance of the written opinion. Kramer, California: Expedited Appeals by Scheduling Order, 1982-83 APPELLATE COURT ADMIN. REV. 11, 12.

n42. Chief Justice Burger has announced his support for the "elimination of diversity jurisdiction [which] will give no relief to the Supreme Court and only a moderate amount of relief to the courts of appeals, but it is a change which is called for to carry out the fair distribution of the total litigation of this country between the states and the federal system." Commission on Revision, *supra* note 2, at 177. See also *supra* note 40. See, e.g., Friendly, Averting the Flood by Lessening the Flow, 59 CORNELL L. REV. 634 (1974); Kastenmeier and Remington, Court Reform and Access to Justice: A Legislative Perspective, 16 HARV. J. ON LEGISL. 301 (1979).

n43. See *supra* note 40. See also COUNCIL ON THE ROLE OF THE COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY (1984), which divides all cases into five categories, three of which are said to present questions unsuitable for judicial resolution.

n44. For a recent article asserting that the goal of intermediate appellate courts is to eliminate error, see Moser, *supra* note 6, at 17-18. See also Leavitt, The Yearly Two Foot Shelf: Suggestions for Changing our Reviewing Court Procedures, 4 PAC. L.J. 1, 21-22 (1973).

n45. See *infra* sec. III, Part C, at 34.

n46. Moser, *supra* note 6, at 19-20; 28 U.S.C. § 1961 (19--).

n47. *Id.* See also P. Carrington, *supra* note 9, at 567-70; Oberman, Federal Courts Commentary -- Coping With Rising Caseloads: A New Model of Appellate Review, 46 BROOKLYN L. REV. 841 (1981) [hereinafter cited as Caseload]; Note, Disincentives to Frivolous Appeals: An Evaluation of the A.B.A. Task Force, 64 VA. L. REV. 605 (1978). Some courts have attempted to handle increases in the caseload by enforcing statutes or promulgating rules that discourage frivolous appeals. See, e.g., 28 U.S.C. § 1927 (1983); ILL REV. CODE CIV. PROC. § 2611 (1983); FED. R. APP. P. 38. But the prompt disposition of cases on the merits may be the best solution to the frivolous appeal. Screening of cases by staff counsel, whether at the time of docketing or a prehearing conference or after completion of briefing, should help to guarantee swift processing. See *infra* sec. III, Part D and Section IV.

n48. Moser, *supra* note 6, at 20; Lawscope: No Backlog, 69 A.B.A.J. 265-66 (1983) (addition of computer in the Detroit Recorder's Court reduced a 7,000 case backlog to no delay, even with a 12% increase in felonies).

n49. Moser, *supra* note 6, at 19. For a discussion of recent plans to severely limit briefing and rely instead on oral argument, see J.WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM ((1981).

n50. See generally ABA ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY (1984).

n51. For further discussion of the question of the publication of court orders, see *infra* text accompanying notes 58-62.

n52. Commission on Revision, *supra* note 2, at 49-50.

n53. *Id.* at 50.

n54. A per curiam opinion is a decision which is published, and therefore, can be cited as precedent but which does not identify the individual judge on the panel who authored the opinion. An unpublished order is a decision which is not published and does not indicate the identity of the authoring judge.

n55. Caseload, *supra* note 47. During the statistical year ending June 30, 1979 the Second Circuit decided 34% of its appeals by published and per curiam opinions and 63% summarily by oral decision from the bench or by unpublished memorandum order. Caseload, *supra* note 47, at 841, 863.

n56. 2D CIR. R. 0.23.

n57. The Fifth Circuit has specified when a ruling without an opinion will be used in its Local Rule 47.6 which provides for enforcement or affirmance without opinion in three situations: (1) district court order is based on findings of fact not clearly erroneous, (2) evidence in support of a jury verdict is not insufficient, and (3) order of an administrative agency is supported by substantial evidence, and the court determines that no precedential value would be served by issuance of an opinion. 5TH CIR. R. 47.6.

n58. For a discussion of "no publication" rules see, e.g., Chanin, A Survey of the Writing and Publication of Opinions in Federal and State Courts, 67 LAW. LIB. J. 362 (1974); Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice, 61 A.B.A.J. 1224 (1975); Goodwin, Partial Publication: A Proposal for a Change in the "Packaging" of California Court of Appeal Opinions to Provide More Useful Information for the Consumer, 19 SANTA CLARA L. REV. 68 (1979) [hereinafter Partial Publication]. Jacobstein, Some Reflections on the Control of the Publication of Appellate Court Opinions, 27 STAN. L. REV. 791 (1975); Joiner, Limiting Publication of Judicial Opinions, 56 JUDICATURE 195 (1972).

n59. Circuit Rule 35(c) of the Seventh Circuit provides for decisions of cases by published opinion:

(c) Guidelines for Method of Disposition.

(1) Published opinions.

A published opinion will be filed when the decision

- (i) establishes a new, or changes an existing rule of law;
 - (ii) involves an issue of continuing public interest;
 - (iii) criticizes or questions existing law;
 - (iv) constitutes a significant and non-duplicative contribution to legal literature
 - (A) by a historical review of law,
 - (B) by describing legislative history, or
 - (C) by resolving or creating a conflict in the law;
 - (v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or
 - (vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.
- (2) Unpublished orders.

When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain reasons for the judgment, but may not do so if the court has announced its decision and reasons from the bench. A statement of facts may be omitted from the order or may not be complete or detailed.

7TH CIR. R. 35(c).

n60. Commission on Revision, *supra* note 2, at 40.

n61. The practice of not publishing final orders is not without criticism. For example, in 1978 the Indiana Supreme Court ruled that litigants in Indiana state courts can cite unpublished rulings of the Seventh Circuit Court of Appeals but that the Indiana court is given "wide discretion in its determination of the weight, if any, to be given to the orders." 47 U.S.L.W. 2220 (Oct. 10, 1978). See also *Hughes v. Rowe*, 449 U.S. 5 (1980), in which the Supreme Court refused to the non-publication rule of the Seventh Circuit in a footnote: "Although petitioner's appeal was decided in an unpublished order purportedly having no precedential significance, three members of the Court of Appeals . . . nonetheless voted to rehear the case en banc." 449 U.S. at 7 n.2. For examples of the use of partial publication, that is, publication of only those portions of a decision that meet the criteria for publication, see *Partial Publication*, *supra* note 58. For a discussion of the hazards of reliance upon oral orders in the district court, see *Order In The Court Order*, Dombroff, *THE DISTRICT LAWYER*, Vol. 7, no. 2 (Nov./Dec. 1983) at 36. As Dombroff notes, the precise terms of oral orders can be especially important if there is question of contempt of court. *Id.* at 38. It may be necessary for counsel to move for clarification, an act that can defeat the economizing effects of ruling from the bench.

n62. See AMERICAN BAR ASSOCIATION, COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS (1977) [hereinafter cited as *Standards Relating to Appellate Courts*] at 60, 64-65, § 3.36-3.40.

n63. *Id.* at 4, § 3.00.

n64. The addition of certain safeguards to the Second Circuit's plan has been suggested. See *Caseload*, *supra* note 47 at 856-57. For example, it is less possible that subtle features of the circuit's own law will be misconstrued if an internal operating procedure of the Second Circuit required that active judges comprise the majority of every panel. Such a procedure would increase, of course, the burdens of pre-submission screening.

n65. Commission on Revision, *supra* note 2, at 49-50.

n66. *Id.*

n67. *Id.*

n68. Suggested standards for limiting oral argument are discussed in *Standards Relating to Appellate Courts*, *supra* note 62, at § § 3.32, 3.35 and accompanying commentary. For a discussion of the need for and the operation of the screening process, see, e.g., Bell, *Toward a More Efficient Federal Appeals System*, 54 J. AM. JUD. SOC'Y 237 (1971); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257; Jacobson,

Alleviating Administrative Burdens in Small-Staffed Appellate Courts, 1974 ARIZ. ST. L.J. 619, 621-23 (1974); Leavitt, The Yearly Two Foot Shelf: Suggestions for Changing our Reviewing Court Procedures, 4 PAC. L.J. 1, 18-22 (1973); McConkie, Decision-Making in State Supreme Courts, 59 JUDICATURE 337, 338-39 (1976); Meador, Appellate Case Management and Decisional Processes, 61 VA. L. REV. 255, 274-81 (1975). For a discussion of the criticisms judges make about the preparedness of counsel at argument and reciprocal complaints attorneys make about judges, see R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 31-36 (1976); Cameron, Improvement of Appellate Justice, IN JUDICIAL ADMINISTRATION DIVISION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, 207 (6th ed. 1981) [hereinafter cited as Cameron].

n69. Justice Rehnquist recently commented on the value of oral argument, which is something more than a "brief with gestures." "Justice Rehnquist Emphasizes the Importance of Oral Argument," 15 The Third Branch, no. 12 (Dec. 1983). See also Segal, Oral Argument in the U.S. Courts of Appeals: Can it be Salvaged? 2 LITIG. 3 (1975).

n70. See, e.g., Ganuchau, Federal Appellate Practice -- Fifth Circuit Rules and Procedures, FIFTH CIRC. DIG. 239, 240 (Oct. 1984) ("The summary calendar rule was at one time unpopular with some members of the Bar, since it deprived some parties of the ability to present oral argument. Over the course of time, however, the Bar, litigants, scholars and the vast body of people concerned with good judicial administration have come to recognize this procedure as a remarkable and necessary tool Over one-half of the court's appeals are disposed of without oral argument.") As discussed in the text accompanying notes 84-94 *infra*, few, if any proponents of oral argument insist that oral argument must be accorded every appeal. In fact, rationing oral argument has already been accepted in principle, as every circuit in the country already denies oral argument in *pro se* prisoner appeals and most other *pro se* appeals. If the Court believes argument would be helpful it will appoint Criminal Justice Act or *pro bono* attorneys to present argument.

n71. Screening is the name of the process of deciding whether or not a case should be decided without oral argument. G. Ganuchau, *supra* note 70.

n72. In fact, the increase caseload may not have dramatically increased the lifespan of the average appeal. If requests for extension of time in filing the record and briefs have been granted permissively, and if the number of days on which oral argument is scheduled is increased, then the two variables of total caseload and lifespan of appeal may not be directly proportional to each other.

n73. Ganuchau, *supra* note 70.

n74. Fifth Circuit Reorganization Act of 1980, Pub. Law 96-452, Oct. 4, 1980. 94 STAT. 1994, 28 U.S.C. 1 note (1980).

n75. See Ganuchau, *supra* note 70, at 239.

n76. *Id.*

n77. Ganuchau, *supra* note 70 at 241.

n78. *Id.*

n79. Ganuchau, *supra* note 70 at 240.

n80. Ganuchau, *supra* note 70 at 241.

n81. Ganuchau, *supra* note 70 at 242. The percentages of the other types of cases as identified by the Fifth Circuit are U.S. Civil Appeals: 43%; Federal Question: 40%; NLRB: 19%; Other agency: 64%.

n82. *Id.* During the same period the number of law clerks allocated each judge also increased and the staff attorney program was created. That these two significant increases in over-all personnel affect the interpretation of the Fifth Circuit study is acknowledged by the Fifth Circuit. *Id.*

n83. See supra note 69.

n84. Some courts have refused to eliminate oral argument of appeals but have instituted program whereunder the court will hear argument without extensive briefs or transcripts. At the oral argument the court will decide the case summarily or will order full record preparation and briefing. See J. Chapper, Oral Argument and Expediting Appeals: A Compatible Combination, AMERICAN BAR ASSOCIATION STAFF PAPER (Dec. 1982) cited in UNIV. MICH. J.L. REF. 517 (1983); Jacobson, The Arizona Appellate Project: An Experiment in Simplified Appeals, 23 U.C.L.A. L. REV. 480 (1976). See also Justice on Appeal Old Pyramids: Reshaping the Judicial System, 44 SO. CAL. L. REV. 901 (1971); Hufstедler, S. and Hufstедler, Improving the California Appellate Pyramid, 46 L.A. B. BULL. 275 (1971); Meador, Appellate Case Management and Decisional Processes, 61 VA. L. REV. 225, 274-81 (1975); Segal, Oral Argument in the United States Court of Appeals: Can It Be Salvaged? 2 LITIG. 3 (1975).

n85. See supra note 72.

n86. E.g., Schroeder, Judicial Administration and Invisible Justice, 11 U. MICH. J.L. REF. 322, 327-329 (1978).

n87. The ABA Commission on Revision concurs with this view by proposing the adoption of a revised F.R.A.P. 34(a) which expressly provides that "in any appeal . . . the appellant should be entitled as a matter of right to present oral argument . . ." and then delineated three exceptions to that "right" which are substantially equivalent to F.R.A.P. 34(a). Id. at 48. See also, infra note 98 and accompanying text.

n88. See Commission on Revision, supra note 23, at 46-49. The Commission quotes the views of Chief Judge Jon Biggs, Jr. who in 1955 equated decision without oral argument with "sitting in the rear of those dispensing slots in the cafeteria, dispensing some kind of cafeteria justice." Id. at 47. See also Parness and Reagle, Reforms in the Business and Operating Manner of the Ohio Court of Appeals, 16 AKRON L. REV. 3, 26 (1982) (recent survey of judges shows that most favor oral argument); and Day, Response to Prof. Parness and Mr. Reagle, 16 AKRON L. REV. 37, 49 (1982).

n89. Commission on Revision, supra note 2 at 47. See also supra note 69.

n90. ATTITUDES OF THE UNITED STATES JUDGES TOWARD ELIMINATION OF ORAL ARGUMENT AND OPINION WRITING, FEDERAL JUDICIAL CENTER (1975).; ATTORNEY ATTITUDES TOWARD LIMITATION OF ORAL ARGUMENT AND WRITTEN OPINION IN THE U.S. COURTS OF APPEAL, FEDERAL JUDICIAL CENTER (Drury, 1974). Abbreviating the time accorded parties to present argument may not be an acceptable compromise. Oral argument may become merely symbolic if the time is less than 10-15 minutes, even when the case presents few issues. Moreover, the limits could be unproductive if judges find themselves repeatedly compelled to permit counsel to exceed them to finish points. Finally, if the limits are too radical counsel may come to underestimate its importance.

n91. For a discussion of attorney attitudes toward oral argument see AMERICAN BAR ASSOCIATION, OPPOSITION TO CURTAILING OF ORAL ARGUMENT II APPELLATE JUSTICE: 1975 32 (1975) (Materials for a National Conference); AMERICAN BAR ASSOCIATION, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 46-49 (1975); DRURY, F., GOODMAN, L. AND STEVENSON, W., ATTORNEY ATTITUDES TOWARD LIMITATION OF ORAL ARGUMENT AND OPINION-WRITING IN THE UNITED STATES COURTS OF APPEALS (1975); Cutler, Appellate Cases: The Value of Oral Argument, 44 A.B.A. J. 831 (1958). See also Meador, Through the Appellate Courts in 127 Days, 20 JUDGES' J. 58, 61 (Spring, 1981).

n92. Commission on Revision, supra note 2, at 42.

n93. Id.

n94. Chapper and Nejelski, ABA's Action Commission on Appellate Programs, 1980-81 APP. CT. ADMIN. REV. 32 (1981); Chapper Fast, Faster, Fastest: Tracks to Fight Appellate Court Delay, 20 JUDGES' J. 50, 51-53 (Spring 1981) (reports the results of four courts' fast tracking procedures and notes that the Arizona Court of Appeals allows for oral argument

when it is requested, the California Court of Appeals allows for oral argument in 83% of its cases, the Colorado Supreme Court permits a judge to decide if oral argument is necessary and the U.S. Court of Appeals for the Ninth Circuit guarantees oral argument in all cases).

n95. The Second Circuit Court of Appeals couples the virtually uniform unavailability of oral argument with a frequent practice of deciding cases from the bench, either before or after oral argument, and of using only very brief written orders and judgments. See *supra* text accompanying notes 54-56.

n96. The Fifth Circuit Local Rule 34.2 incorporates Rule 34(a) by reference and adds the following safeguard; if any party requests oral argument, the ultimate decision of the court must be unanimous without any special concurrence or dissent. For a comparison of the internal operating procedures of the federal courts of appeals relating to oral argument, 5TH CIV. R. 34.2 LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS, 3-5 (1961).

n97. FED. R. App. P. 34(a).

n98. See, e.g., Circuit Rule 14(f) of the United States Court of Appeals of the Seventh Circuit:

Oral argument will be allowed in all cases except those in which a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed for one of the following reasons:

- (1) the appeal is frivolous; or
- (2) the dispositive issue or set of issues has been recently authoritatively decided; or
- (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Circuit Rule 14(f) is virtually identical to the model rule on curtailment of oral argument recommended by the Advisory Council for Appellate Justice. REPORTS AND RECOMMENDATIONS OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE ON IMPROVEMENT OF APPELLATE PRACTICES 52-53 (1975).

n99. See *infra* Section III, Part D.

n100. See Internal Operating Procedures, U.S. Court of Appeals for the fifth Circuit accompanying Local Rule 34; Internal Operating Procedures, U.S. Court of Appeals for the Ninth Circuit, II(D)(1).

n101. Third Circuit Local Rule 12(6). See also ABA TASK FORCE ON APPELLATE PROCEDURE EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS at 77-84 (1977) [hereinafter cited as ABA Task Force].

n102. These judges are referred to as "visiting judges" or "judges sitting by designation."

n103. Commission on Revision, *supra* note 2, at 55-63, 177.

n104. 28 U.S.C. § 44.

n105. The Fifth Circuit Reorganization Act of 1980, Pub. L. 96-452, Oct. 4, 1980, redefined the Fifth Circuit as consisting of Texas, Louisiana, and Mississippi with 14 judges and created the new Eleventh Circuit composed of Alabama, Georgia and Florida with 12 judges. The size of the old Fifth Circuit can be acknowledged by the fact that the two new circuits are the second and third largest in the country next to the Ninth. 94 Stat. 1994, 28 U.S.C. 1 note (1980). See Ganucheau, *supra* note 70 at 239 for further discussion of the Fifth Circuit's comparative caseload before and after the split.

n106. See *supra* note 26.

n107. Commission on Revision, *supra* note 2, at 173. Later in the same paper, Chief Justice Burger notes: "To continue large circuits such as the Fifth and the Ninth under one administrative direction is totally unrealistic. I have already expressed my view that no circuit should be geographically larger than can be cared for by nine circuit judges." *Id.* at 177.

n108. Caseload, *supra* note 47, at 861-62.

n109. Caseload, *supra* note 47 at 847, 861-62.

n110. Caseload, *supra* note 47 at 848-49.

n111. Caseload, *supra* note 47 at 850.

n112. See, e.g., Brachtenbach and King, What an Automated Information System Can Do For You, 23 JUDGES' J. 40 (Winter, 1984).

n113. P. NEIELSKI, AND R. WHEELER, WINGSPREAD CONFERENCE ON CONTEMPORARY AND FUTURE ISSUES IN THE FIELD OF COURT MANAGEMENT (Institute for Court Management, 1980) [hereinafter cited as *Wingspread*] at 3-4. In 1969, there were administrators in approximately one-half of the states. The number has since doubled. In the federal system, Congress authorized "circuit executives" in 1971 and the circuits have filled those positions. Another important part of court administration is the growth in the number of persons titled court clerk or court administrator or staff attorney who exercise administrative responsibility. *Id.* at 3 and n.2.

n114. 46 Stat. 774 (1930). Now necessary law clerks can be appointed under 28 U.S.C. § 774 (1930).

n115. 83 Stat. 418, 420.

n116. 93 Stat. 427, 428.

n117. The Judicial Conference of the U.S. has stated that these lawyers shall be known as staff attorneys and the supervising lawyer as the senior staff attorney. REPORT OF THE JUD. CONF. OF THE U.S. at 56 (Sept. 15-16, 1977). Nonetheless, many of the courts of appeals use other terms interchangeably: motions attorney, staff law clerk, and court law clerk. STAFF ATTORNEY'S OFFICE SURVEY (Administrative Office of the U.S. Courts, Management Review Division, 1980) at 1-2 [hereinafter cited as *Survey*]. For a general discussion of staff attorney programs, see AMERICAN BAR ASSOCIATION, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 53-454 (1975). Many state courts also use staff attorneys to assist the decisionmaking processes. See Lesinski and Stockmeyer, Prehearing Research and Screening in the Michigan Court of Appeals, 26 VAND. L. REV. 1211 (1973); Meador, Appellate Case Management and Decisional Processes, 61 VA. L. REV. 255 (1975).

n118. *Survey*, *supra* note 117 at 2-4.

n119. D. UBELL, REPORT ON CENTRAL STAFF ATTORNEYS' OFFICES IN THE U.S. COURTS OF APPEALS, (1980) [hereinafter cited as *Ubell Report*]. This report was commissioned by the Senate and House Appropriations Committees to determine the need for central staffs.

n120. *Survey*, *supra* note 117 at 1. At present Congress generally authorizes each federal circuit to employ staff attorneys, but has not set the maximum number of staff attorneys to be hired. The Judicial Conference has adopted a policy that limits the number of staff attorneys to the number of active judgeships authorized for that court. Special approval is needed for any circuit, such as the Ninth Circuit, to employ staff attorneys in excess of that number. When the judges of the circuit are located in one city or in a small area there may be less need for authorization of additional staff attorneys.

n121. Federal Courts Improvement Act of 1982, Public Law 97-164, 96 Stats. 25 (codified in scattered sections of 28 U.S.C.) (effective 10/1/82). The act added the following language to title 28 of the U.S. Code:

Sec. 715. Staff attorneys and technical assistants.

(a) The chief judge of each court of appeals with the approval of the court may appoint a senior staff attorney, who shall be subject to removal by the chief judge with the approval of the court.

(b) The senior staff attorney, with the approval of the chief judge, may appoint necessary staff attorneys and secretarial

and clerical employees in such numbers as the Director of the Administrative Office of the United States Courts may approve, but in no event may the number of staff attorneys exceed the number of positions expressly authorized in an annual appropriation act. The senior staff attorney may remove such staff attorneys and secretarial and clerical employees with the approval of the chief judge.

n122. There is comparatively little discussion in the literature of the role of law clerks or staff attorneys, perhaps due to the traditional bars of confidentiality on discussing the internal processes of courts. However, as one commentator puts it:

Each of the eleven Federal courts of Appeals is influenced by the environment in which it exists. Its operations reflect the practice of the state courts within its jurisdiction, the history of the locale which it serves, the traditions and expectations of the lawyers which make up its bar and the backgrounds, experience and education of the judges and supporting personnel who in the past and presently have determined the ways in which the court conducts its business. Several examples of cultural differences were identified during the course of this project.

J. LANGER AND S. GLANDERS, *COMPARATIVE REPORT ON INTERNAL OPERATING PROCEDURES OF UNITED STATES COURTS OF APPEALS*, FEDERAL JUDICIAL CENTER, July 1973, at 7.

n123. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974); Cameron, *The Central Staff: A New Solution to An Old Problem*, 23 U.C.L.A. L. REV. 465 (1976); Flanders and Goldman, *Screening Practices and the Use of Pars-Judicial Personnel in a U.S. Court of Appeals*, 1 *Just. Sys. J.* (March 1975).

n124. Survey, *supra*, note 117 at 9. The staff attorneys in the Second Circuit also weight cases but use a less complicated formula. *Id.* In the First and the Third Circuits either the Senior Staff Attorney or the Circuit Executive weight the cases. *Id.* at 9-10.

n125. The Fifth Circuit screens all appeals into four categories: (1.) frivolous appeals subject to summary affirmance or dismissal; (2.) appeals in which oral argument would not be helpful; (3.) cases in which attenuated oral argument is scheduled; and (4.) cases receiving full oral argument of 30 minutes per side. Ganuchau, *supra* note 70, at 240-42.

n126. Survey, *supra* note 117 at 16-17.

n127. Survey, *supra* note 117 at 11.

n128. Survey, *supra* note 117 at 12.

n129. *Id.*

n130. Most circuits' local court rules permit the Clerk's Office to handle routine procedural motions; however, courts differ on the definition of "routine."

n131. Survey, *supra* note 117 at 12-14.

n132. See *infra* text accompanying notes 152-93 for a discussion of the Seventh Circuit's program.

n133. See *infra* Section IV, Part E.

n134. Survey, *supra* note 117 at 16.

n135. Survey, *supra* note 117 at 12, 13, 16, 17.

n136. *Standards Relating to Appellate Courts*, *supra* note 62, at 12.

n137. See Wingspread, *supra* note 113, at 3-4.

n138. Rehnquist, *supra* note 29 at 2 col. 3.

n139. *Id.*

n140. See J. OAKLEY, R. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* 25 n.2, 68, 85-86, 111, 145 (1980) [hereinafter cited as *Law Clerks*]:

First, we assert that the bureaucratization of the judicial process is not a function of the use of law clerks per se. It results from a shift in the character of law clerks away from the traditional model by which freshly graduated lawyers of acknowledged brilliance were retained as law clerks for brief but finite periods to serve individual judges, and towards a new model by which generally less distinguished lawyers serve as law clerks for a career and frequently are responsible to groups of judges rather than individuals among them. Second, we assert that modern court conditions mandate not the abolition of staff bureaucracies serving judges but rather their careful exploitation, so that the profits of dealing with routine cases on a bureaucratized basis may subsidize the retention of labor-intensive but qualitatively superior law clerks of the traditional type.

Id. at 3. See also *id.* at 23.

n141. D. MEADOR, *APPELLATE COURTS -- STAFF AND PROCESS IN THE CRISIS OF VOLUME*, 104-05 (1974) (note omitted).

n142. "At the Ninth Circuit, routine matters are taken care of by the emerging central staff, which paradoxically makes elbow clerkships more attractive not only by the creation of the lower caste of "court law clerks," but also by freeing the upper caste of elbow clerks for cases in which the judges feel the need for extensive research and dialectic debate." *Law Clerks*, *supra* note 140, at 130.

n143. See, e.g., Schroeder, *Judicial Administration and Invisible Justice*, 11 *U. MICH. J. L. REF.* 322, 327-29 (1978).

n144. A recent study of law clerks informally polled judges on their opinions as to whether clerks and staff attorneys ought to be career or term employees. The majority of the judges polled expressed a preference for short-term clerks although they saw nothing wrong with career clerks per se so long as there were measures implemented to prevent the bureaucratization of justice. The judges emphasized that there should be no differences in quality between career and temporary clerks and that there should always be some short-term clerks to preserve a fresh viewpoint. *Law Clerks*, *supra* note 140, at 136-37.

n145. The Michigan Court of Appeals, one of the originators of the staff attorney program, uses career staff attorneys to supervise a small group of shorter-term staff attorneys employed upon graduation from law school. Most other jurisdictions try to hire staff attorneys with some years of experience. Cameron, *supra* note 68. The Seventh Circuit and the Ninth Circuit, however, also restrict the tenure of the senior staff attorney to a two to four year term in the belief that a higher quality individual thereby can be persuaded to fill the position and that the court receives benefits in the form of freshness of thought and purpose from newly appointed senior staff attorneys.

n146. See *supra* note 142.

n147. A Code of Conduct for Staff Attorneys was adopted by the Judicial Conference of the U.S. Courts on Dec. 14, 1982.

n148. *Law Clerks*, *supra* note 140, at 23. See also *id.* at 111.

n149. Moser, *supra* note 6, at 19.

n150. See Baier, *The Law Clerks: Profile of An Institution*, 26 *VAND. L. REV.* 1125, 1163-71 (1973) and Rose, *A Primer of Opinion Writing for Law Clerks*, 26 *VAND. L. REV.* 1203 (1973) for discussions on the supervision of law clerks and Lesinski, *Preliminary Research and Screening in the Michigan Court of Appeals: One Court's Method of Increasing Judicial Productivity*, 26 *VAND. L. REV.* 1211, 1227-28 (1973) on the supervision of staff attorneys.

n151. Vining and Stockmeyer, Justice, Bureaucracy and Legal Method, 80 MICH. L. REV. 248 (1981).

n152. For a general discussion of docketing conferences see, e.g., D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS VOLUME (1974); Christian, Using Prehearing Procedures to Increase Productivity, 52 F.R.D. 55 (1971); Flanders and Goldman, Screening Practice and the Use of Pars-Judicial Personnel in a U.S. Court of Appeals, 1-2 JUST. SYS. J. 1 (1975); Haworth, Screening and Summary Procedures in the United States Courts of Appeals, 1973 WASH. U. L.Q. 257; Mack, Settlement Procedures in U.S. Courts of Appeals: A Proposal, 1 JUST. SYS. J. 17 (1975); Meador, Appellate Case Management and Decisional Process, 61 VA. L. REV. 255 (1975).

n153. State courts have also established prehearing settlement conferences presided over by judges. The Third District Court of Appeals in California, the Appellate Division of the New York Supreme Court, the Minnesota Supreme Court and the Nebraska Supreme Court all set up conference programs. The Appellate Court of Wisconsin experimented with docketing conferences in 1983 but abandoned the program pending the addition of personnel to handle the conferences. See Birnbaum and Elman, Preargument Settlement Process in the Intermediate Appellate Court: The Second Department Experience, 43 BROOKLYN L. REV. 31, 44-45 (1976); M. OSTHUS AND R. SHAPIRO, CONGESTION AND DELAY IN STATE APPELLATE COURTS, (1974); D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974). More than one-half of all state appellate courts use settlement conferences. Bakes, Lasting Innovations, 23 JUDGES' J. 31 (Winter 1984).

n154. See supra text accompanying notes 34-39.

n155. Nejjelski and Ray, Alternatives to Court and Trial, IN AMERICAN BAR ASSOCIATION, JUDICIAL ADMINISTRATION DIVISION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, 263-78 (6th ed. 1981).

n156. Goldman, The Civil Appeals Management Program: An Experiment in Appellate Procedural Reform, 78 COLUM. L. REV. 1209, 1238 (1978) [hereinafter cited as Goldman I].

n157. FED. R. App. P. 33.

n158. See infra text accompanying note 176. See also infra note 171.

n159. The District of Columbia, the Sixth and the Ninth Circuits have since adopted stringent docketing conference programs. Survey, supra note 120 at 14, 18, n.18.

n160. The Sixth and the Ninth Circuit's program are similar to CAMP and the Seventh Circuit's program. The District of Columbia program differs slightly in scope: substantially fewer appeals are accorded a conference and the attorney conducting the conference has substantially less authority to resolve disputes about procedural matters. Survey, supra note 120 at 14-16.

n161. J. GOLDMAN, THE SEVENTH CIRCUIT PREAPPEAL PROGRAM: AN EVALUATION (Fed. Jud. Center 1982) [hereinafter cited as Goldman II].

n162. Conference procedures in the Seventh Circuit differ slightly from criminal and civil appeals. Counsel in criminal cases are also nontacted at the time of docketing to insure that counsel are fully informed on special obligations placed upon them in perfecting a criminal appeal. A briefing schedule is established. The Seventh Circuit makes a special effort to dispose of criminal appeals in a timely fashion, concluding that it is incongruous to impose upon the district judges the severe burdens of complying with the Speedy Trial Act and then perhaps permitting the appellate process to take a leisurely course. Civil appeals, on the other hand, follow more precisely the procedures set out in the accompanying text.

n163. The "Information Sheet" contains the caption and number of the case, the names of the parties, the name of the presiding judge, the names, addresses, and telephone numbers of counsel for the parties, a checklist to identify the type of action and any previous or pending appellate litigation in the same or a related case, the number of days of trial (as

an indicator of the length of the record) and a statement as to whether appellant may be entitled to appointed counsel. The "Information Sheet" thus contains virtually all of the information contained on the information statement recommended by the American Bar Association. See ABA Task Force, *supra* note 101, at 43-44. For further discussion of the role of information statements see Standards Relating to Appellate Courts, *supra* note 66 at n.3, section 3.31, 3.32 (1977); Justice on Appeal, *supra* note 1, at 89-90 (1976); R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS, 22-26 (1976).

n164. The Second, Eighth, and Ninth Circuits request that the appellant complete "docketing statements" within a few days of the filing of the notice of appeal. In the docketing statement the appellant provides basic information on, inter alia, the basis of appellate jurisdiction, whether costs and fees have been paid or whether appellant is proceeding in forma pauperis, the main issues to be raised on appeal and citations of authorities which support legal propositions. The docketing statement is used by the conference attorney to prepare for settlement negotiations. In theory, the completion of the docketing statement also forces the lazy lawyer to become familiar with the appeal issues. See Title, New Settlement Techniques for the Trial Judge, 18 JUDGES'J. 42, 45 (Winter 1979). The docketing statement can also become the basis for determining whether the case involves the same issues as another appeal and thus should be assigned to a given oral argument panel or, in a court exercising review on a discretionary basis, whether review should be granted at all. See ABA Task Force, *supra* note 101, at 73.

n165. When conferences first began, parties requesting a conference were asked to state in writing their views on why a conference might be beneficial. Many counsel, however, were hesitant to disclose their interest in settlement. Oral requests for a conference are now acceptable.

n166. There are no sanctions in the Seventh Circuit that apply against attorneys who refuse to appear or to discuss settlement. But if a party is not represented at a conference, the conference does go forward and procedural matters, such as the due dates for briefs, are resolved. It is very rare for a party not to appear for a conference at the prearranged time and place, perhaps because the bar of attorneys practicing before the Seventh Circuit is relatively small. Possible sanctions could include the imposition of costs for frivolous appeals, the imposition of attorneys fees in appropriate cases or even fines.

n167. Survey, *supra* note 120, at 14-16. See also *supra* note 162.

n168. An important part of the docketing conference procedure requires that the conference is not held before the judge who might rule on the merits of the appeal. This same principle applies to pretrial conferences in trial courts.

n169. The practice of the Seventh Circuit is to stay the disposition of the appeal pending the determination of the dispositive Supreme Court or appellate court case. Counsel are asked to file periodic status reports informing the court of the status of collateral proceedings. In the Second Circuit, the practice is to dismiss the Second Circuit case without prejudice to its reinstatement within an absolute specified time period. A dismissal order "clears the docket" unless counsel takes an affirmative step without the need for any prompting by the court. The advantage to the Second Circuit's procedure, then, is that it prevents clogging of the docket with appeals that may never require the court's attention.

n170. Due dates for the filing of documents may be different from the times prescribed in the appellate rules. See FED. R. App. P. 11 and 12; FED. R. Civ. P. 73(a); 7th Circuit Rule 4; (time for filing the record and transcript); FED. R. App. P. 31; 7th Circuit Rule 4 (time for filing the briefs on appeal).

n171. Goldman II, *supra* note 16. A related, important question concerns the standards to apply in judging the effectiveness of an experimental social program. See Goldman I, *supra* note 156 at 1211, n.12, 14 and at 1212 for a discussion of competing experimental models. For example, the first study made of the Second Circuit's CAMP procedures showed small differences between control and experimental cases, with some weakly positive evidence in favor of CAMP. J. GOLDMAN, INEFFECTIVE JUSTICE: EVALUATING THE PREAPPEAL CONFERENCE, (1980). The findings cast doubt on whether CAMP was "cost-justified." The study was much criticized within the Second Circuit where court officials believed that conferences were more effective in assisting the parties to reach settlement and that

experimental studies could measure only imperfectly the benefits achieved by early involvement in the appeals process. The Second Circuit eventually commissioned a second study of their conference program which substantiated the beneficial effect of conferences in encouraging settlement and streamlining appeals. REPORT OF THE SECOND CIRCUIT RESEARCH ADVISORY COMMITTEE: EVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN, Sept. 30, 1981. This second study of CAMP again attempted to quantify the costs of establishing the program and to translate the benefits of settlement and appeal simplification into projected figures of saved judicial salaries. See *infra* note 183.

n172. Goldman II, *supra* note 161, at 17-20.

n173. The data disclosed a 47 to 67 day reduction. Goldman II, *supra* note 161, at 28.

n174. Goldman II, *supra* note 161, at 22-25.

n175. The study also did not disclose a significant reduction in the page length of briefs. But the emphasis in the Seventh Circuit is not to allocate to the parties a number of pages less than 50 they are permitted under Federal Rule of Appellate Procedure 28(g), but rather to discourage the parties from requesting or receiving pages in excess of the presumptive guideline. Thus, a more appropriate test variable might have been a measure of motions to file oversize briefs. *Id.*

n176. Goldman's study of the Second Circuit program reached the same conclusion. Goldman I, *supra* note 156, at 1238. The primary emphasis of the Seventh Circuit program, versus the Second Circuit program, was procedural simplification and not settlement. Thus, the Goldman study did not cause the Seventh Circuit to question the overall effectiveness of the program.

n177. Goldman II, *supra* note 161, at 21-22.

n178. Goldman II, *supra* note 161, at 22.

n179. Neither Goldman II nor the participants in recent debates about the competency of the federal trial bar have not discussed the possible positive effect that prehearing conferences have had on the quality of the performance of the federal appellate bar. Generally the proposals for peer review of trial advocates vacillate on the point of whether continuing education programs ought to be remedial or deterrent in nature. See, e.g., Carter, Improving the Quality of Trial Advocacy in Civil Litigation in the Federal Courts, 28 FED. BAR NEWS J. 291 (Dec. 1981).

n180. The first evaluation was conducted by Jerry Goldman and reached inconclusive results on the effect of CAMP on settlement rates. Goldman I, *supra* note 156. The Second Circuit immediately commenced an in-house study which showed striking effects on rates of settlement. REPORT ON THE SECOND CIRCUIT RESEARCH ADVISORY COMMITTEE: EVALUATION OF THE CAMP, (Second Circuit Court of Appeals, Oct. 5, 1981) [hereinafter cited as Rosenberg Report]. A third study was undertaken by the Federal Judicial Center to reevaluate CAMP by using a new model that corrected for what were considered to be inadequacies in the statistical model used in Goldman I. A. PARTRIDGE, A. LIND, A REEVALUATION OF THE CAMP (Fed. Jud. Center 1983) [hereinafter cited as Reevaluation]. The Reevaluation results confirmed the in-house Rosenberg Report that CAMP induced settlements to a statistically significant level.

n181. In interesting counterpoint to the CAMP evaluations is a recent study that suggests that settlement conferences in trial courts actually increase the number of appeals. See Marvell, The Appellate Caseload Deluge, -- JUDGES'J. -- (1985), reported in ABA, Jud. Admin. Div., LAWYERS LETTER, No. 2, at 2 (Aug. 1984). See also Flanders, Case Management in Federal Courts: Some Controversies and Some Results, 4 JUST. SYST. J. 147, 161 (1978) (In six federal district courts studied, those with "strongest, most vigorous settlement role have the fewest civil terminations per judgeship per year."). *Contra* Kritzer, The Judge's Role in Pretrial Case Processing: Assessing the Need For Change, 66 JUDICATURE 28, 35-36 (1982) (evidence to suggest settlement activities speed case disposition).

n182. Rosenberg Report, *supra* note 180, at 1, 5.

n183. Reevaluation, *supra* note 180, at 1.

n184. Goldman I, *supra* note 156, at 1233.

n185. *Id.*

n186. Reevaluation, *supra* note 180, at 1. Goldman I (the CAMP) and Goldman II (the Seventh Circuit) did not attempt to measure the participating attorneys' satisfaction with the program. The Goldman Study of the Seventh Circuit did include surveying participating counsel, but the questions were directed to the mechanics of conference procedures (Goldman II *supra* note 761, at 57-67) and Survey procedures followed were limited (Goldman II *supra* note 161, at 34-35). A report generated by the Seventh Circuit's Ad Hoc Committee to Study the High Cost of Litigation in 1979 did report favorably upon the Seventh Circuit's docketing conference program, noted the approval of the bar and recommended the program's retention. REPORT OF THE AD HOC COMMITTEE TO STUDY THE HIGH COST OF LITIGATION TO THE SEVENTH CIRCUIT JUDICIAL COMMITTEE AND THE BAR ASSOCIATION OF THE SEVENTH FEDERAL CIRCUIT (May 1979) at 32-33.

n187. Brazil, *Settling Civil Cases: What Lawyers Want From Judges*, 23 JUDGES' J. 14, 17 (Summer, 1984).

n188. On a related point, the senior staff attorney may be able to broach the topic of settlement more easily, with less friction and stress, precisely because he or she has less power than a judge. *Id.* at 17.

n189. Goldman II did not test attorney attitudes to and acceptance of the senior staff attorney conducting conferences. Further studies and surveys of attorneys within the circuit of this point thus would be helpful. The Second Circuit's studies of CAMP demonstrate attorney acceptance of the program. See *supra* note 186.

n190. See *supra* text accompanying note 39 for a discussion of Reznick's criticisms of "managerial judges."

n191. The study disclosed that attorneys from rural areas, from large firms which represent defendants and attorneys who were involved in complex cases, oppose an active judicial role in settlement and, presumably, would prefer that any negotiations be held before a staff attorney. On the other hand, attorneys from urban areas, representing plaintiffs and who are involved in a relatively simple case, prefer an aggressive judicial role in settlement. Brazil, *supra* note 187, at 17-20.

n192. Friesen, *Cures for Court Congestion*, 23 JUDGES' J. 4, 6 (Winter 1984).

n193. Derek Bok recently summarized the crisis in the American legal system: The blunt, inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world yet cannot manage to protect the rights of most of its citizens. . . . There is no single solution for our problems. . . . An effective program will require not only multiple efforts but a mixture that involves attempts to simplify rules and procedures as well as measures that give greater access to the poor and middle class. Access without simplification will be wasteful and expensive; simplification without access will be unjust.

D. BOK, ANNUAL REPORT TO HARVARD UNIVERSITY OVERSEERS, reprinted in *THE LITIGATION EXPLOSION*, *supra* note 26, at 44.