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THE APPELLATE PROCESS IN CIVIL CASES: A PROPOSED MODEL

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I. INTRODUCTION

The appellate process — that process by which an action of a trial court is reviewed in an appellate court¹ — was consistently ignored as a subject of scrutiny by those concerned with the legal process. Notwithstanding the number of appeals which have involved issues relating to the appellate process, little attention was given it by the academic community. For a long time only Roscoe Pound of Harvard,² Edson R. Sunderland of Michigan³ and Lester Orfield of Nebraska,⁴ devoted any substantial attention to the appellate process, except as it related to the United States Supreme Court.⁵ In the past decade, however, the appellate process has been a major focus of those concerned with the courts and their role in the legal system. There are several reasons for this change, most

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1. D. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 1-2* (1974) [hereinafter cited as MEADOR].

2. R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1940).

3. Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651 (1943); Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3 (1940); Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126 (1926); Sunderland, *The Proper Function of an Appellate Court*, 5 IND. L. J. 483 (1930). Professor Sunderland also served as chairman of the Committee on Simplification and Improvement of Appellate Practice, Section of Judicial Administration, American Bar Association, in the late 1930's.

4. L. ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939); Orfield, *Appellate Procedure in Equity Cases: A Guide for Appeals at Law*, 90 U. PA. L. REV. 563 (1942).

5. For a brief resume of efforts to improve the appellate process prior to 1960 see MEADOR, *supra* note 1, at 4-7.

of which are applicable to the increased interest in judicial administration in general. The litigation explosion, the expanding role of courts in our society, the increased number of lawyers, and the enlargement of constitutional and legal rights have all contributed to the number of cases filed in the courts and the number of appeals taken from decisions at the trial court level.⁶ The increase in the number of appeals has caused substantial backlogs in appellate courts and delays in the appellate process, with resulting concern over the structure of the appellate court system, appealability, the cost of taking an appeal, practice and procedure before appellate courts, internal operating procedures of appellate courts, and the publication of opinions.

In recent years an outpouring of books, articles, studies, reports, standards and proposals have addressed one or more of these problems, all designed to improve some aspect of the appellate process. There has not been, however, any single effort to develop a comprehensive approach to the appellate process so that the effect of one step in the process can be weighed against the others.⁷ A systems analysis of the appellate process would permit it to be viewed as a single, unitary system from beginning to end, with each step examined both individually and as part of the whole.⁸ The purpose of this article is to provide such an analysis. Each aspect of the appellate process will be viewed, the various alternatives discussed, and a recommendation made. The sum of all the recommendations will offer a model for studying existing appellate systems and analyzing proposed changes in them.

II. THE NATURE AND FUNCTION OF APPELLATE COURTS

The first question in a study of the appellate process is

6. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* chs. 5-6 (1976) [hereinafter cited as *JUSTICE ON APPEAL*]; Hopkins, *The Winds of Change: New Styles in the Appellate Process*, 3 HOFSTRA L. REV. 649-50 (1975).

7. The closest to a comprehensive effort has been by the American Bar Association's Commission on Standards of Judicial Administration Relating to Appellate Courts in 1977. This work does not, however, cover those matters usually dealt with in rules of appellate procedure.

8. D. CLELAND & W. KING, *SYSTEMS ANALYSIS AND PROJECT MANAGEMENT* 10-14 (1968); P. DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 592-98 (1974). See generally, R. JOHNSON, R. KAST & J. ROSENZWEIG, *THE THEORY AND MANAGEMENT OF SYSTEMS* (2d ed. 1967).

whether a system of appellate review is necessary. For most persons that question is almost rhetorical, there being no doubt that appellate review is essential to the proper functioning of a judicial system. Chief Judge John Parker has stated:

The judicial function in its essence is the application of the rules and standards of organized society to the settlement of controversies, and for there to be any proper administration of justice these rules and standards must be applied, not only impartially, but also objectively and uniformly throughout the territory of the state. This requires that decisions of trial courts be subjected to review by a panel of judges who are removed from the heat engendered by the trial and are consequently in a position to take a more objective view of the questions there raised to maintain uniformity of decision throughout the territory.⁹

Under this view, appellate review is necessary to obtain uniformity, and uniformity is necessary for the proper functioning of a judicial system. Appellate review has never been held essential to due process, as all encompassing as that doctrine has otherwise become.¹⁰ In the American experience there was only one period in one state in which there was no appellate review, and the principal reason for the abandonment of that experiment was the lack of uniformity in trial court decisions.¹¹ Even countries outside of the common-law tradition have provided for some type of appellate review, often more extensive than our own.¹²

A reasoned argument has been made, however, for the abolition of appeals in civil cases.¹³ According to this argument, appellate courts are no more likely than trial courts to produce decisions which are just, correct or consonant with the law or more helpful in its development. Uniformity of decision

9. Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1 (1950) [hereinafter cited as Parker].

10. *Ross v. Moffitt*, 417 U.S. 600 (1974) (criminal case); *National Union of Marine Cooks v. Arnold*, 348 U.S. 37 (1954) (civil case).

11. Lamar, *A Unique and Unfamiliar Chapter in Our American Legal History*, 10 A.B.A. J. 513 (1924).

12. Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 8-9 (1940).

13. Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?* 56 GEO. L.J. 417 (1968).

is also no more certain with appellate courts than without because of the unreviewability of most fact determinations, which can have a greater effect upon the outcome of a case than any ruling of law. A final criticism of appellate courts concerns their role in making law. This function, it is argued, is ill-served by the case-by-case method; it would be better to have all substantive law made by legislators, thus eliminating the needs of the immediate parties from the development of legal principles which will bind all others. This argument recognizes the principle that hard cases do make bad law and rejects the process from which that principle emerged.

This analysis, while thought-provoking and original, appears to go too far. There may be good reason to doubt the ability of three appellate judges to render a more correct or more just decision than one trial judge, but the universality of appellate review in the legal systems of the world has significant implications. A recognized need exists to test the decision of a judge at a higher level, without statistical evidence that a second decision is any better than the first. This need is satisfied by our appellate system, and there appears to be little prospect of eliminating or even modifying it.

The notion that all lawmaking should be done in a nonadversary process has even less merit. Aside from the historical fact that our legal system has been built upon a different premise, it is unrealistic to think that all law can be developed in an exclusively legislative setting, with the adjudicative process designed solely to apply the law made by the legislative body. Courts must still interpret and apply the law and must fill in the many gaps left by the legislature, both in the statutes themselves and in areas not covered by statute. The legislature is free at any time, of course, to enact statutes replacing the common law developed by judicial decision. But courts will continue to make law, whether or not there is any statute covering the field.

Although there is little disagreement on the need for appellate review, there is more dispute as to its purposes. It is common practice now to list two principal functions of the appellate process: (1) error correction and (2) law development.¹⁴

14. C. JOINER, *THE FUNCTION OF THE APPELLATE SYSTEM IN JUSTICE IN THE STATES* 97, 102 (1971); AMERICAN BAR ASSOCIATION COMMISSION ON STANDARDS OF JUDICIAL

There are some authors who add one or more functions, usually subdivisions or refinements of the two principal ones.¹⁵ There is more disagreement on the extent to which appellate courts should attempt to do justice between the parties in the individual case.

It is, of course, the ultimate objective of any legal system to do justice. But doing justice in the individual case is not necessarily the same as justice viewed from the wider perspective of society.¹⁶ The issue arises in the context of both the

ADMINISTRATION RELATING TO APPELLATE COURTS, § 3.00 (Commentary) (1977) [hereinafter cited as ABA STANDARDS]; JUSTICE ON APPEAL, *supra*, note 6, at chs. 2-4.

15. R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 3 (1940):

(1) review of the process of ascertaining facts, (2) review of the finding of the applicable law, (3) review of the application of the law to the found facts, and (4) in the common-law system, authoritative ascertainment and declaration of a legal precept for such cases as the one in hand, where none has been clearly promulgated.

Hufstедler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 587 (1969): "Appellate courts exist to formulate policy and precedent, to assure uniformity in the administration of justice, to provide executive direction and assistance to the trial courts, and only incidentally, to see that justice is done in any particular case."

Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?* 59 CORNELL L. REV. 616, 618 (1974):

Any appellate court has at least three distinct functions to perform. The first is that of correcting erroneous decisions rendered by judicial tribunals inferior to it in the judicial hierarchy. The second is to maintain a consistency among the decisions of those lower courts subordinate to it, so that the law is evenhandedly applied within the system. The third is the lawmaking function of creating and amending rules of law, not only so that they may be followed by the lower courts within the system, but also to provide guidance to lawyers and their clients as to the propriety of their behavior, their obligations, their duties, their rights, and their remedies.

Parker, *supra* note 9, at 1. "The function of the reviewing court is: (1) to see that justice is done according to law in the cases that are brought before it, (2) to see that justice is administered uniformly throughout the state, and (3) to give authoritative expression to the developing body of law."

16. Justice Tate of the Louisiana Supreme Court has stated:

The result that seems "just" for the present case must be a principled one that will afford just results in similar conflicts of interest. This judge has an initial human concern that the litigants receive common sense justice, but he also realizes that the discipline of legal doctrine governs his determination of the cause.

Tate, *The Art of Brief Writing: What a Judge Wants to Read*, 4 LITIGATION, Winter, 1978, at 11.

To the same effect is Heffernan, *Briefs, Oral Arguments, and the Judicial Process in the Wisconsin Supreme Court*, in 4 W. HARVEY, *WISCONSIN PRACTICE — CIVIL PROCEDURE FORMS* § 0.52 (1976).

error correcting and law development functions. In cases involving alleged errors by the trial court, the issue of justice arises when the party complaining of error has failed to raise the matter in accordance with the procedural rules of the jurisdiction. The appellate court is then faced with the decision of whether to do justice in the case or adhere to its procedural requirements. Different results are reached in different cases, depending upon a variety of factors,¹⁷ but there does not appear to be any basis for predicting when a court will choose one course over another. The issue of justice between the parties arises in law development cases when a new legal principle is adopted to achieve a particular result, or when a new legal principle is adopted and the question is whether it should be made applicable to the case before the court or prospectively only.¹⁸

In some jurisdictions the appellate court is mandated by statutory provision to do justice between the parties.¹⁹ These provisions are significant primarily because of their disuse. It is unlikely that the actions of appellate courts in states with such provisions are substantially different than in states without them. Such a provision may, however, cause the appellate judges to read the entire record rather than only those portions of the record contained in the appendix or to which attention is called by the parties.

The role of the appellate judge in "doing justice" has been debated for centuries. It is a question of jurisprudence and of judicial philosophy, and is far beyond the scope of this article. While doing justice between the parties may not be among the stated purposes of appellate courts, few judges are so removed that they ignore the effect of their judgment upon the parties. Often they will adopt a legal or factual interpretation that will produce a "just" result in the particular case, while preserving the integrity of the legal doctrine, statute or rule of procedure

17. The proper resolution of this question is discussed in section IV *infra*.

18. See, e.g., *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631 (1967).

19. 28 U.S.C. § 2106 (1976); 17 CAL. CIV. PROC. CODE § 909 (West 1977); 5 LA. CODE CIV. PRO. ANN. art. 2164 (West 1976); N.Y. CIV. PRAC. LAW § 5522 (McKinney 1977); WIS. STAT. § 752.35 (1977).

involved.²⁰ Here, as in so many areas of the law, there is constant balancing between the needs of the system with the needs of the individual litigants.

III. STRUCTURE OF APPELLATE COURT SYSTEM

With two notable exceptions,²¹ American jurisdictions have a single court at the peak of the appellate court structure. A single supreme court is consistent with the notion of a unitary judicial system and with the purposes of appellate courts, particularly uniformity. There is also a consensus that when the caseload of the supreme court reaches a certain point, it is necessary for an intermediate appellate court to be established.²² There is less agreement, however, on when a supreme court has reached its maximum productivity, and whether the creation of an intermediate appellate court will add to rather than reduce delay in the appellate process.²³ Even when agreement is reached on the necessity for an intermediate appellate court, there are differing views on what the jurisdiction of the new court should be, how many judges it should have and how the court should be organized. There is even disagreement on whether the court should be a single court composed of panels sitting at one or more locations in the jurisdiction or separate courts with separate geographical jurisdictions. A subsidiary problem is the effect of the decision of one panel of the court on other panels of the same court.²⁴

A. *Effect of Caseload*

At the heart of these questions is the more basic one of how many cases an appellate judge can be expected to partici-

20. See note 16 *supra*.

21. Texas and Oklahoma each have a separate court of criminal appeals over which the state supreme court has no jurisdiction.

22. ABA STANDARDS, *supra* note 14, at § 3.00 (Commentary); Hufstедler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 595 (1969).

23. M. OSTHUS & R. SHAPIRO, CONGESTION AND DELAY IN STATE APPELLATE COURTS 42-46 (1974); S. WASBY, T. MARVELL, & A. AIKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES 51-52 (1979) [hereinafter cited as VOLUME AND DELAY].

24. R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 4 (1976) [hereinafter cited as LEFLAR]; JUSTICE ON APPEAL, *supra* note 6, at ch. 6; Hufstедler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 596-604 (1969).

pate in each year. The answer to this question is not the same for a supreme court justice as for a judge of an intermediate appellate court. This is because when an intermediate appellate court is created, the two principal functions of appellate courts, error correction and law development, are divided between the two appellate courts. Usually the supreme court remains primarily responsible for law development and the intermediate court is concerned largely with error correction.²⁵ For example, when Wisconsin created an intermediate appellate court for the first time in 1978, it was concluded that a caseload of approximately seventy cases per justice was too great for a supreme court without an intermediate appellate court, but for the intermediate appellate court approximately one hundred cases per judge decided on the merits was not too high.²⁶ It was also anticipated that the supreme court, which would perform only a law development function and with discretionary jurisdiction only, would decide a total of approximately one hundred fifty cases per year, about the same number of cases in which the United States Supreme Court issues written opinions each year.

In trying to develop the maximum number of appeals any court can decide, the first point to be observed is that theoretically there is no maximum on the number of cases in which an appellate judge can participate. The significant variable is, of course, how much time the judge will devote to each case. Second, there is no maximum or minimum amount of time that must be spent on each case. The time to be devoted to a case depends upon its legal and social significance, its complexity, the helpfulness of the briefs and oral argument, the other demands placed upon the appellate judge, the internal operating procedures of the appellate court and the availability of staff assistance. The statistical evidence on this question is inconclusive. There are wide variations between different courts as to the number of cases decided each year²⁷ and just

25. LEFLAR, *supra* note 24, at 63-64; ABA STANDARDS, *supra* note 14, at § 3.00 (Commentary).

26. Wisconsin Legislative Council Special Committee on Court Reorganization, Working Document No. 3, Organization of the Wisconsin Court of Appeals (Rev. 1977).

27. W. KRAMER, COMPARATIVE OUTLINE OF BASIC APPELLATE COURT STRUCTURE AND PROCEDURE IN THE UNITED STATES, Questions D-3 to D-5 (1978) [hereinafter cited as

as wide variations between the caseloads which compel the creation of additional judgeships or of an intermediate appellate court.

It is not surprising, consequently, that there have been few efforts to establish the optimum caseload per judge for an appellate court of any type.²⁸ Those efforts that have been made are not based on any in-depth empirical research and do not purport to be definitive.²⁹ When a jurisdiction is considering a change of this nature, usually the current judges show how their caseload has increased, examine existing backlogs and compare the situation with that in comparable jurisdictions. At the federal level, a committee of the United States Judicial Conference develops criteria that it applies to each of the circuits to determine whether additional circuit judgeships are needed. An interesting aspect of this process is the constantly increasing number of cases per judge the federal appeals courts have been expected to decide before an increase in the number of judges is found to be justified.³⁰

Despite the lack of general uniformity in criteria, there appears to be a rough consensus that the maximum number of majority opinions that a single justice can write in one year is approximately forty.³¹ This number includes approximately twenty short opinions of an error correcting nature, and approximately twenty opinions the principal purpose of which is law development. Any workload beyond this, the judges believe, does not permit sufficient time to be spent on the major

KRAMER]; VOLUME AND DELAY, *supra* note 23.

28. In the foregoing discussion, the phrase "cases per judge" means cases terminated as a result of judicial action including a full or memorandum opinion or order either on the merits or on a procedural issue after submission on briefs with or without oral argument, on a motion filed by a party, or on the court's own motion. It does not include a voluntary dismissal or a settlement reached with or without the aid of a court officer.

29. Aldisert, *Appellate Justice*, 11 J. L. REF. 317, 320 (1978) (80 cases); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 956-58 (1964) (80 cases); C. JOINER, *THE FUNCTION OF THE APPELLATE SYSTEM IN JUSTICE IN THE STATES*, 97, 112-13 (1971) (60 cases); JUSTICE ON APPEAL, *supra* note 6, at 142-46 (100 cases).

30. See, e.g., Reports of the Proceedings of the Judicial Conference of the United States 81, 106 (1971); Reports of the Proceedings of the Judicial Conference of the United States 6, 168 (1977).

31. This estimate is based upon discussions of the author with members of various state supreme courts over the past 10 years and not upon any published reports.

opinions and on the opinions written by the other members of the court. When the court is performing only the law development function, the maximum number of opinions per judge is still approximately twenty, with the balance of the judge's time spent on deciding which cases to hear. At the intermediate appellate court level, the best experience would indicate that one hundred cases per judge workload is a realistic maximum, even though there are many courts which dispose of substantially more cases.³²

B. Location of Courts: Unitary or Multiple Courts?

Traditions vary as to whether the appellate court sits only in one location or at several locations throughout the jurisdiction.³³ This applies to supreme courts as well as to intermediate appellate courts. Clearly the efficiency of a court suffers when its members and staff must travel to several sites to hear cases. Given that the greatest problem of the appellate system is the overwhelming caseload, it appears that the public is best served by an appellate court which devotes the maximum amount of time to deciding cases, and thus travel is to be avoided.³⁴

The conflict between the needs of the court system and the interests of individual litigants is clearly demonstrated by the question of whether a jurisdiction should have a single intermediate appellate court or a number of appellate courts located throughout the jurisdiction. Here again the jurisdictions offer a variety of responses.³⁵ Favoring a single court sitting in a single location are the demands of efficiency and the avoidance of conflicts between separate courts sitting in different districts. On the other hand, the interests of the individual litigants are enhanced by having separate courts sitting at one or more locations throughout the jurisdiction. Wisconsin, in an effort to compromise these conflicting interests, established a single intermediate appellate court but divided it into four geographical districts with one panel elected in and sitting in each district. Decisional uniformity is achieved by having any

32. VOLUME AND DELAY, *supra* note 23, at 7-22.

33. *Id.* at 55-66.

34. Swiggert, *Bench and Bar Work Together in the Seventh Circuit*, 61 A.B.A. J. 613 (1975).

35. JUSTICE ON APPEAL, *supra* note 6, at 153-56; LEFLAR, *supra* note 24, at 68-69.

published decision of one panel binding upon all others, but with the decision on publication made by a panel composed of the chief judge of the court and one judge from each of the four districts.³⁶ Efficiency and doctrinal uniformity will be better served, however, with all of the judges sitting in a single location.

IV. RELATIONSHIP BETWEEN THE SUPREME COURT AND THE INTERMEDIATE APPELLATE COURT

A majority of states and the federal system have found it necessary to establish an intermediate appellate court between the trial courts and the supreme court.³⁷ As noted above in section III, there have been many different organizational frameworks for the intermediate appellate courts, with no two exactly the same. There has been almost as much variety in the jurisdictional relationship between the intermediate appellate and the supreme courts.³⁸ The usual pattern is an intermediate appellate court with jurisdiction over some types of appeals; other appeals are taken directly to the supreme court. Sometimes included is a right of appeal from the intermediate appellate court to the supreme court. With the passage of time, the increased number of appeals, and the growing importance of the law development function of the supreme court, all appeals are heard initially by the intermediate appellate court. Review by the supreme court is increasingly, if not exclusively, discretionary with the supreme court, a development that has met with some opposition. Objections include a belief that some cases, such as those involving constitutional issues or lengthy criminal sentences, have sufficient intrinsic importance to require consideration by the supreme court. In addition, the burden of having a double appeal is considered too great, and many contend that each litigant is entitled to have his appeal heard by the highest court in the jurisdiction. These objections have had to give way, however, to the overwhelming pressure of the caseload and the logic of having a court concerned principally with law development

36. WIS. STAT. § 752.41(3) (1977). The Wisconsin Supreme Court emphasized the unity of the court of appeals in providing for its centralized administration. *In re Court of Appeals*, 82 Wis. 2d 369, 263 N.W.2d 149 (1978).

37. COUNCIL OF STATE GOVERNMENTS, STATE COURT SYSTEMS 2 (1978).

38. VOLUME AND DELAY, *supra* note 23, at 51-57.

free from cases that do not involve such issues.

Wisconsin, the state which most recently has created an intermediate appellate court, carried these ideas through to their logical conclusion in establishing its court of appeals. Although under the Wisconsin Constitution the legislature could have imposed some mandatory jurisdiction upon the supreme court,³⁹ it decided to make all appeals of right to the court of appeals, and any review of a court of appeals decision was made discretionary in the supreme court.⁴⁰ The decision of the court of appeals is final, consequently, unless the supreme court agrees to hear an appeal from that court. Enormous flexibility is built into the system by virtue of another provision which allows but does not require the supreme court to take jurisdiction over an appeal pending in the court of appeals, either on the motion of a party, on the supreme court's own motion or on certification by the court of appeals.⁴¹ This permits the circumstances of the individual case, rather than any arbitrary classification made in advance, to be the determining factor in which cases the supreme court will hear. This procedure eliminates any possibility of an appeal being taken to the wrong court — all appeals must go to the court of appeals — but the court of appeals can be bypassed when appropriate. This system appears to be the most logical and practical approach of any state which has established an intermediate appellate court.

V. PRESERVING ISSUES FOR APPEAL

The appellate process begins long before the notice of appeal is filed.⁴² Most appellate courts insist that an issue raised on appeal must have first been presented in the trial court.⁴³ It may not be enough, however, to raise a matter only once.

39. WIS. CONST., art. VII, § 3.

40. WIS. STAT. § 808.03(1) (1977).

41. WIS. STAT. § 808.05 (1977).

42. Horvitz, *Protecting Your Record on Appeal*, 4 LITIGATION, Winter, 1978, at 34.

43. Campbell, *Extent to Which Courts of Review Will Consider Questions not Properly Raised and Preserved — Part III*, 8 WIS. L. REV. 147 (1933); Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 490-93 (1959) [hereinafter cited as Vestal]; Note, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652 (1951); Annot., *What Issues Will the Supreme Court Consider, Though Not, or Not Properly, Raised By the Parties*, 42 L. Ed. 2d 946 (1976).

An exception to the original ruling⁴⁴ or a post-trial motion⁴⁵ may be required. In the appellate court the appellant is required to state the grounds for appeal in his brief,⁴⁶ and there may be additional formalities such as assignments of error, bills of exception or inclusion of the relevant items from the trial record in the appellate record, appendix or abstract of record.

The requirement that an issue be presented first in the trial court before it can be raised in the appellate court is as old as appellate review, probably having its genesis in the original writ of error which began as a new suit against the trial judge alleging that he committed a wrongful act in rendering a false judgment.⁴⁷ Today there are, of course, substantially different justifications for the same requirement. They are (1) the trial court may not have committed the error if it had been called to its attention;⁴⁸ and (2) the review of the appellate court is limited to correcting errors made by the trial court.

The first justification incorporates several variations of the same theme — it is unfair to the trial court to reverse on a ground that it never had the opportunity to consider; a litigant should not be able to build in error for a successful appeal by failing to make timely objection; the requirement conserves the energies of both trial court and appellate court and prevents reward to the unprepared attorney. The second justification, that of the appellate court being limited to reviewing error, raises the same question as noted in section II above as to the nature and function of appellate review and whether its primary function is to do justice between the parties without regard to procedural requirements.

There are exceptions to the rule that an issue must be raised in the trial court before it can be raised in the appellate

44. M. GREEN, *BASIC CIVIL PROCEDURE* 254-55 (2d ed. 1979).

45. *P-M Gas & Wash Co. v. Smith*, 375 N.E.2d 592 (Ind. 1978). In Indiana it was for a time necessary to file not one, but two, successive post-trial motions in some circumstances. Grove, *The Requirement of a Second Motion to Correct Errors as a Prerequisite to Appeal*, 10 IND. L. REV. 462 (1977).

46. Vestal, *supra* note 43, at 494-95.

47. Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7-8 (1940).

48. *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974).

court. Questions of subject matter jurisdiction can of course be raised at any time in any court either by a party or the court.⁴⁹ Other exceptions vary from jurisdiction to jurisdiction.⁵⁰ Most often utilized is the plain error — sometimes called basic or fundamental error — doctrine. Under this exception an appellate court can review an error of the trial court even though the appellant did not raise the issue in the trial court.⁵¹ The Pennsylvania Supreme Court in a recent case⁵² eliminated a long standing adherence to the plain error rule. A number of reasons were given for the change, including the potential of an increased number of appeals, the higher educational standards imposed upon attorneys now as contrasted with when the rule was originally adopted, and the ad hoc nature of the application of the rule.

A further question is whether the appellate court can on its own motion consider an issue raised neither in the trial court nor in the appellate court.⁵³ The most dramatic example is found in *Erie Railroad v. Tompkins*⁵⁴ where the Supreme Court reconsidered the question of whether federal courts in diversity actions should apply federal common law rather than state law. The question was never raised in the trial court, the briefs or at oral argument in the Supreme Court.

The solution to the question lies in recognizing that while appellate courts exist for the ultimate purpose of doing justice, justice is best served by requiring the parties to comply with the various procedural requirements established by statutes and rules. Without adherence to these rules, by judges as well as litigants, only chaos will result. The United States Court of Appeals for the District of Columbia has discussed this principle:

[R]ules of procedure such as the one here pertinent are not mere naked technicalities. As we recently had occasion

49. See note 113 *infra*.

50. See note 43 *supra*.

51. Vestal, *supra* note 43, at 503-06; Annot., *What Issues Will the Supreme Court Consider, Though Not, or Not Properly, Raised By the Parties*, 42 L. Ed. 2d 946, 971 (1976).

52. *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974).

53. Tate, *Sua Sponte Consideration on Appeal*, 9 TRIAL JUDGES J. 68 (1970) [hereinafter cited as Tate]; Vestal, *supra* note 43.

54. 304 U.S. 64 (1938).

to observe, reasonable adherence to clear, reasonable and known rules of procedure is essential to the administration of justice. Justice cannot be administered in chaos. Moreover, the administration of justice involves not only meticulous disposition of the conflicts in one particular case but the expeditious disposition of hundreds of cases. If the courts must stop to inquire where substantial justice on the merits lies every time a litigant refuses or fails to abide by the reasonable and known rules of procedure, there will be no administration of justice. Litigants must be required to cooperate in the efficient disposition of their cases.

We are told that in substance no injustice would result from ignoring the rules in this case. That may be, but it cannot justify the departure. Just as soon as rules of procedure are ignored in order to do substantial justice on the merits in a particular case, there are no rules. What is done in one case must be done in all.⁵⁵

It is particularly difficult to ascertain whether raising an issue after trial proceedings are concluded will cause more or less justice. In most cases it will be impossible for the appellate court to know what would have occurred at the trial had an issue been raised or an objection made at the appropriate time. Different trial tactics may have been used, different evidence introduced or even settlements made. Absent a showing of fraud, mistake or other irregularity which would authorize the trial court to reconsider a judgment, the winning party should be entitled to defend the judgment on the basis of the record and not be faced with a hypothetical situation.

The dangers of injustice are heightened by appellate court decisions on issues not raised by the parties. Such a procedure cannot further justice, since the parties are denied basic due process rights of notice and opportunity to be heard on the issue on which the case will be decided.

This rigid rule should not, however, be applied to law development issues, because this may prevent reconsideration of a legal question that was considered foreclosed by prior decisions. An appellate court contemplating such reconsideration should notify the parties and request their views on the issue,

55. *United States v. Seigel*, 168 F.2d 143, 146 (1948). Judge Charles E. Clark, who was the principal draftsman of the Federal Rules of Civil Procedure, takes an opposing view in *Handmaid of Justice*, 23 WASH. U.L.Q. 297 (1938).

either in the original briefs or in supplemental briefs. This will permit the appellate court to perform its law development function and at the same time preserve the right to be heard.⁵⁶

While the parties should be held strictly to the mandate that they must first present an issue to the trial court, there is no need for the additional burden of insisting that they make an exception to an adverse ruling or file a motion for a new trial. The exception requirement has been abolished under the Federal Rules of Civil Procedure⁵⁷ and in most other jurisdictions. It has little merit and its historical justification is found in the long abandoned bill of exceptions.⁵⁸ The mandatory new trial motion has more currency, however, and is still necessary in some states.⁵⁹ While the new trial motion serves a useful function and is often appropriate, there appears to be little justification for making it a prerequisite to an appeal. The arguments in support of presenting an issue at least once to the trial court⁶⁰ have no applicability to presenting it for a second time, nor do there appear to be any independent reasons for doing so except to permit the trial judge to look at a question decided during the heat of trial in a cooler, more relaxed atmosphere. There is no evidence that suggests that the requirement reduces the number of appeals, so it cannot be justified on an efficiency basis. Whether a post-trial motion should be filed should, consequently, be at the discretion of counsel and not mandatory.

The extent to which issues intended to be raised on appeal must be included in the record, appendix, abstract of record or appellate brief, is discussed below in the sections dealing with the record, briefs and appendices.

VI. APPEALABILITY

No area of appellate practice and procedure has produced

56. *Contra*, Tate, *supra* note 53.

57. FED. R. CIV. P. 46.

58. M. GREEN, BASIC CIVIL PROCEDURE 254-55 (2d ed. 1979).

59. For example, Indiana. See note 45 *supra*. Wisconsin had the requirement until 1978. *Wells v. Dairyland Mut. Ins. Co.*, 274 Wis. 505, 80 N.W.2d 380 (1957). Its new appellate rules were intended to eliminate it. R. MARTINEAU & R. MALMGREN, WISCONSIN APPELLATE PRACTICE 44 (1978).

60. See text accompanying notes 41-53 *supra*.

such extensive commentary and so many conflicting decisions as that of finality and appealability. This perennial problem has been noted over the years. In 1892, the United States Supreme Court commented that "probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees."⁶¹ In 1974 the Court stated "no verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."⁶² The same situation has been true in the states.⁶³

As a general rule an appeal can be taken only from a final judgment.⁶⁴ The historical, conceptual and practical bases for this rule have been developed elsewhere and need not be repeated here.⁶⁵ The necessities of doing justice between the parties and of judicial administration have been thought to require some exceptions to the general rule. These occur in such areas as practical finality, multiple parties or claims, collateral orders, stays and injunctive orders, and certain clearly interlocutory orders,⁶⁶ and have been created by statute, rule or judicial decision.

Proposed resolutions of this problem include: (1) Making every appeal discretionary with the appellate court and nothing appealable as of right;⁶⁷ (2) Applying a balancing test to determine appealability;⁶⁸ (3) Liberalizing the use of the extraordinary writs to review nonfinal judgments;⁶⁹ and (4) Limiting appeals as of right to final judgments but permitting cer-

61. *McGourkey v. Toledo & O. Cent. Ry.*, 146 U.S. 536, 544 (1892).

62. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

63. "The finality of judgments for appealability has been a recurring and nagging problem throughout the judicial history of this State." *North East Independent School Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966).

64. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932) [hereinafter cited as Crick]. The term final judgment is generally used to include final orders and will be so used in this section.

65. Crick, *supra* note 64; Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975) [hereinafter cited as Redish]; Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961).

66. Crick, *supra* note 64; Redish, *supra* note 65; Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961).

67. Crick, *supra* note 64, at 563-65.

68. Redish, *supra* note 65, at 97-101.

69. Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102 (1950).

tain appeals from nonfinal judgments.⁷⁰

The third of these solutions represents a misapplication of one form of the limited original jurisdiction accorded most appellate courts by constitution or statute — the supervisory power.⁷¹ Usually providing for prerogative writs such as mandamus or prohibition, the supervisory power permits review of an action by a trial court not otherwise appealable. The use of these writs was originally carefully circumscribed and should still be limited to such situations as inaction by the trial court or when the respondent is an officer, such as a sheriff, who is carrying out an order of a trial court.

Unfortunately, appellate courts began using the supervisory power as a means of allowing an interlocutory appeal when statutes restricting appeals to final judgments did not permit immediate review of a nonfinal action of the trial court. This development was particularly evident in the federal courts, but was not limited to them.⁷² Such perversion of the supervisory jurisdiction can be eliminated if the proposal is adopted to limit appeals as of right to final judgments, but to allow a discretionary appeal from any nonfinal action.

The first step is to recognize the distinction between appeal as of right and appeal in the discretion of the court. Many discussions of appealability do not recognize the crucial difference between the two or that arguments for and against the final judgment rule are not applicable to discretionary appeals. Even the most common statement of the final judgment

70. ABA STANDARDS, *supra* note 14, at § 3.12. A similar proposal is contained in a bill now pending in Congress. Kennedy, *The Federal Courts Improvement Act: A First Step for Congress to Take*, 63 JUD. 8, 12 (1979). An earlier effort along the same lines met with no success. Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 610 (1975).

71. Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973). The second form of original jurisdiction is more truly original in that it will involve a dispute between private parties or an individual and a government agency or officer which would ordinarily be filed in a trial court. This type of jurisdiction is limited to the supreme court. The sole basis for asking the supreme court to take original jurisdiction is that the case involves issues of such general importance to the state or the people that an immediate taking of jurisdiction by the supreme court is appropriate. *See, e.g.*, *Petition of Heil*, 230 Wis. 428, 284 N.W. 42 (1934).

72. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 771-78 (1957); Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102 (1950).

rule does not indicate whether it applies to all appeals or only appeals as of right.⁷³ This is due in part to the fact that historically all appeals were of right⁷⁴ and most statutes dealing with appeals do not make the distinction.⁷⁵ Nonetheless, it is the distinction between the two which offers the best basis for solution to this problem.

Limiting appeals as of right to final judgments has the principal purpose of protecting both the courts and litigants from the costs of multiple appeals.⁷⁶ When a litigant can appeal as of right a nonfinal judgment, control over the pace of the litigation and the decision as to the expense and delay of an appeal is placed on the litigant and not the courts. The courts must hear the appeal, even though it may have no merit. The opposing party must participate in the appeal in order to protect his interests. Such an appeal can be taken without regard to whether the issue would be reviewable on appeal of the final judgment or the need to resolve the matter prior to an appeal of the final judgment. An alternative solution is propounded by the American Bar Association's Standards of Judicial Administration for Appellate Courts. It is suggested that there be a right of appeal only from final judgments, and that all nonfinal judgments be reviewable only in the discretion of the appellate court and only if they meet a general standard for reviewability.⁷⁷ This proposal appears to satisfy the objectives of the final judgment rule, while at the same time provides sufficient flexibility to avoid the complica-

73. Crick, *supra* note 64.

74. *E.g.*, Act of September 24, 1789, ch. XX § 21, 1 Stat. 73 at 83.

75. KRAMER, *supra* note 27, at Question D-1.

76. ABA STANDARDS, *supra* note 14, at § 3.12 (Commentary).

77. *Id.* at 3.12.

Appealable Judgments and Orders

(a) Final Judgment. Appellate review ordinarily should be available only upon the rendition of final judgment in the court from which appeal or application for review is taken.

(b) Interlocutory Review. Orders other than final judgments ordinarily should be subject to immediate appellate review only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will:

- (1) Materially advance the termination of the litigation or clarify further proceedings therein;
- (2) Protect a party from substantial and irreparable injury; or
- (3) Clarify an issue of general importance in the administration of justice.

tions which have developed under that rule.

The ABA proposal incorporates the concept that there should be the right to at least one appeal. Although the right to appeal has not yet been incorporated into due process standards under the fifth and fourteenth amendments,⁷⁸ the right to at least one appeal is recognized by constitution or statute in every American jurisdiction except Virginia and West Virginia.⁷⁹ Thus, there seems little point to argue for a restricted right to appeal from final judgments. It would be almost as fruitless to argue for strict adherence to the final judgment rule. Experience has shown that neither legislative bodies nor courts are willing to adhere to the rule if it means that in some cases there will be no effective review of a nonfinal judgment which for some reason should be reviewed. Experience has also demonstrated that any legislative effort to provide for appeal of some nonfinal judgments will fail because the legislature cannot foresee all of the circumstances in which an appeal of a nonfinal judgment is necessary or desirable.

The general standards contained in the ABA proposal cannot prevent an appellate court from hearing any nonfinal appeal. The proposal recognizes that courts do create legally justifiable bases for hearing nonfinal appeals, and any effort to prohibit them from doing so is doomed to failure. The better strategy is to give courts the authority to hear any nonfinal appeal, but to state in general terms those types of issues which the court should hear.

The ABA proposal places the responsibility for determining which nonfinal orders may be appealed solely in the appellate court and not in the trial court. This is somewhat different from 28 U.S.C. section 1292(b), which permits interlocutory appeals when both the trial and appellate courts rule in their discretion that the appeal is appropriate under the statutory tests.⁸⁰ Also different is Federal Rule of Civil

78. See note 10 *supra*.

79. Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?* 57 VA. L. REV. 3, 12-13 (1971).

80. 28 U.S.C. § 1292(b) (1970):

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially

Procedure 54(b), which permits piecemeal appeals following partial "final" judgments,⁸¹ and which creates an immediate right of appeal as to those matters. The justification for trial court involvement in this process is that the trial court knows the most about the case and the issues involved in it and can best determine whether immediate appeal is either necessary or desirable for the further processing of the case in the trial court.⁸²

However, policies behind the ABA proposal placing the decision solely in the appellate court are most persuasive. First, the parties can and should inform the appellate court of the impact of the appeal upon their interests and the relationship between an immediate appeal and trial court proceedings. The appellate court can take this into consideration. Second, and more important, is the impact of an immediate appeal upon the appellate court and the other cases pending in it.⁸³ The trial court should not have control over the caseload of the appellate court. Moreover, to the extent the trial court has a role in determining appealability, additional delay is built into the process. The ABA proposal has been adopted almost verbatim by Wisconsin as part of its revision of its appellate process in 1978.⁸⁴ Wisconsin had, prior to that revision, ex-

advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeal or a judge thereof shall so order.

81. FED. R. CIV. P. 54(b):

(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

82. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956).

83. Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 635 (1975).

84. WIS. STAT. § 808.03 (1977).

tremely complicated statutes on appeals of final and nonfinal judgments⁸⁵ plus an enormous body of case law interpreting and applying those provisions. The result was increased difficulty in determining what was appealable until after the supreme court decided the particular case. The legislature chose to make a clean break with the past and start anew with the ABA proposal. It is too early to determine whether the effort has been successful, but it offers the best hope for the solution to a problem that for over one hundred years defied solution.⁸⁶

VII. PARTIES

Questions often arise concerning who can appeal, which parties have a right to participate in the appeal, who must be served with appeal papers and whether parties should be designated as appellants or appellees.

It is usually stated that only a party aggrieved by a decision⁸⁷ can appeal from it.⁸⁸ As with most general statements of rules, it is simple in expression but more difficult in implementation, particularly in some of its corollaries. The aggrieved party rule is often based upon statute, but the rule also exists independently of statute.⁸⁹ The rule is, in actuality, nothing more than the concept of standing as applied to the appellate process. In the same way that a person whose interests are not adversely affected by an action lacks standing to challenge that action in court, a person whose interests are not adversely affected by a judgment lacks standing to contest the judgment in an appellate court.

This rule is applied without much difficulty to the parties to the trial court action, but problems arise when a nonparty seeks to appeal a judgment claiming he is affected adversely

85. WIS. STAT. ch. 817 (1975).

86. The decision of the Wisconsin Court of Appeals in *Northridge Bank v. Community Eye Care Center, Inc.*, 91 Wis. 2d 298, 282 N.W.2d 632 (Ct. App. 1979), *review granted per curiam*, 94 Wis. 2d 201, 287 N.W.2d 810 (1980) (noted in 52 WIS. BAR BULL. 56 (1979)), suggests the difficulties in resolving the finality question.

87. A decision is the disposition or the judgment of a court, not its opinion. *Neely v. State*, 89 Wis. 2d 755, 279 N.W.2d 255 (1979).

88. *In re Fidelity Assurance Ass'n*, 247 Wis. 619, 624, 20 N.W.2d 638, 641 (1945); Note, *Administrative Law — Right of Persons Aggrieved by Orders to Review by Appellate Courts*, 42 MICH. L. REV. 157 (1943).

89. *In re Fidelity Assurance Ass'n*, 247 Wis. at 624, 20 N.W.2d at 641.

by it. For example, cases involving estates or funds justifiably allow claimants to participate in the trial court without becoming a formal party to the proceeding.⁹⁰ Nonetheless, there is no justification for permitting a person to initiate an appeal or participate in the appellate court without first becoming a formal party. The status of such a person is always in doubt, causing confusion in the effectiveness of the notice of appeal, titling of the appeal, service of papers and notices, and ultimately the binding effect of the judgment upon the person. The appellate rules should provide, consequently, that a person who desires to participate in an appeal must become a formal party by filing a motion to intervene. The rules will also have to establish some standards for intervention; these can be taken from the intervention rule applicable to the trial courts.⁹¹ The motion should be filed in the court in which the record is located and acted upon by the court which has possession of the records.⁹²

There can be confusion in the appellate court as to whether a party is an appellant or appellee. Those who attack the judgment of the lower court should be appellants, and those who support it should be appellees. To ensure clarity, a party who wants to join with the appellant in challenging the judgment should be required to file a notice of appeal. Thus if there is a joint notice of appeal both parties would be known as appellants, while if there is a separate notice of appeal the second appellant should be designated as co-appellant. If a party does not file a notice of appeal, he should not be able to participate in the appeal except as an appellee in support of the judgment. Thus an appellee must file a cross-appeal to be able to challenge an action of the trial court.⁹³

90. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621 (2d Cir. 1934); *Pearman v. Schlook*, 575 S.W.2d 462 (Ky. 1978); *Annot.*, 118 A.L.R. 743 (1939).

91. *See, e.g.*, FED. R. CIV. P. 24.

92. Thus if the motion is filed when the record is in the trial court and the record is forwarded to the appellate court before the trial court acts on the motion, the appellate court rather than the trial court should decide whether to grant the motion. This is done not because of any notion that the trial court loses jurisdiction over the case, but because it avoids the confusion that may result from one court acting on matters involving the status of parties in a case pending in another court.

93. *Littlefield v. Littlefield*, 292 A.2d 204 (Me. 1972), noted in 25 ME. L. REV. 105 (1973); Stern, *When to Cross-Appeal or Cross-Petition — Certainty or Confusion?* 87

VIII. INITIATION AND PERFECTION OF THE APPEAL

The procedure for the initiation of an appeal has been simplified and refined to the extent that in many jurisdictions all that is required is to file a notice of appeal in the trial court in order to confer jurisdiction over the appeal on the appellate court.⁹⁴ There are, however, a number of areas which still create problems for both litigants and the courts.

The first difficulty encountered is with the time requirement for filing the notice of appeal. Most jurisdictions have adopted a thirty-day time requirement.⁹⁵ This is a marked reduction from previous appeal time periods that often extended up to one year. Such long periods for initiating an appeal are undesirable from the standpoint of the litigants as well as that of the judicial system.⁹⁶ The thirty-day period appears to work well in practice and is not burdensome upon litigants.⁹⁷ Exceptions to the thirty-day limit appear to be unjustified, and destroy the uniformity and certainty which should accompany procedural requirements. In most jurisdictions there are special appeal periods for special types of cases.⁹⁸ These may be longer or shorter than the general appeal period, reflecting an intent either to speed up the appellate process or to give additional time to litigants. Deviations are enacted by the legislature, not by the courts, and it is usually impossible to find any stated reason for the deviation.

Whatever the rationales for special appeal time periods in certain types of cases, the necessity for uniformity should be given paramount consideration. The principal reason for this is the significance that the filing of a timely notice of appeal

HARV. L. REV. 763 (1974).

94. *E.g.*, FED. R. APP. P. 3(a). "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."

95. KRAMER, *supra* note 27, at Question F-1.

96. R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 340-42 (1940); UNITED STATES ADVISORY COMMITTEE ON AMENDMENTS TO RULES OF CIVIL PROCEDURE 2-4, 94-95 (1946).

97. Evidence in support of this statement can only be negative, that is, the lack of any published support of enlargement of the time period.

98. *E.g.*, WIS. STAT. § 808.04(2) (1977) lists 28 statutory exceptions to the general time period. The Wisconsin Judicial Council Committee on Appellate Practice and Procedure when it drafted chapter 808 expressly decided not to change any of the special time periods established by other statutory provisions.

has in the appellate process. It is generally agreed that an appellate court obtains jurisdiction over an appeal only if a notice of appeal is timely filed.⁹⁹ It is also the general, but not universal, rule that an appellate court has no authority to waive or extend the time period absent a specific grant of authority by statute.¹⁰⁰ The rigid enforcement of this rule raises the same considerations as any enforcement of a procedural rule which prevents the court from reaching the merits of a case and doing justice between the parties. As discussed in section II, this approach to procedural rules is self-defeating, and substantial justice is usually not ascertainable by an appellate court. The timely filing requirement rule should, consequently, be enforced without exception or reluctance. Such being the case, the desirability of having only one appeal time period becomes even more pronounced.¹⁰¹ The simpler and more uniform the procedural requirements connected with an appeal, the easier it is to comply, and the easier it is to insist upon compliance.

Particularly unfortunate is an exception to the normal thirty-day period found in rule 4 of the Federal Rules of Appellate Procedure. Section (a)(1) of that rule provides that in a civil case in which the United States or an officer or agency thereof is a party, a party has sixty days in which to appeal. The only justification for granting this longer appeal time is the inability of the federal bureaucracy to make decisions within thirty days. This argument is unpersuasive. In criminal cases the federal government has only thirty days in which to appeal.¹⁰² There may be other special classes of litigants deserving of longer periods of time in which to take an appeal. They are not recognized, however, because the need for uniformity is thought to be the higher objective. The same should apply to the federal government.

Another provision found almost solely in the Federal Rules of Appellate Procedure is for an extension by the district court of up to thirty days upon a showing of excusable neg-

99. Comment, *Ad Hoc Relief for Untimely Appeals*, 65 COLUM. L. REV. 97 (1965).

100. *Id.* at 104-05; *contra*, *Costanzi v. Ryan*, 368 N.E.2d 12, 16 (Ind. App. 1977).

101. The Wisconsin Court of Appeals in *Nelson v. Department of Natural Resources*, 90 Wis. 2d 574, 280 N.W.2d 334 (1979), called for the elimination of the separate appeal time periods in Wisconsin.

102. FED. R. APP. P. 4(b).

lect.¹⁰³ The request may be made or granted before or after the initial appeal time period has expired. This means that until the sixty-day period has expired, execution or enforcement of the judgment or order entered is very likely to be delayed.

Whatever appeal time period is chosen, it appears most undesirable to build into the system a means for extending that time. The uncertainties and possible unequal treatment between litigants far outweigh the benefits of allowing an occasional litigant to file a late appeal. If thirty days is sufficient time for most litigants to decide whether to appeal, then that limit should govern all litigants.

Defects in the notice of appeal such as failing to name the court to which the appeal is taken¹⁰⁴ or incorrectly identifying the court to which the appeal is taken¹⁰⁵ or the judgment appealed from are usually held not to affect the validity of the appeal. The courts and the parties must, however, have some basis to ascertain what is being appealed and to which court. The federal courts have even held that filing of the notice of appeal in the court of appeals rather than in the district court is sufficient to confer jurisdiction on the appellate court.¹⁰⁶ The theory adopted was that the sole requirement of informing the courts and the parties that the appeal was being taken was satisfied. This rationale is consistent with the view that all courts should be viewed as part of a single court of justice and that courts should decide cases on the merits rather than on procedural technicalities.¹⁰⁷ Courts at different levels are not, however, merely branches of a single court absent a constitutional statement to that effect,¹⁰⁸ and the necessity for filing is not treated so lightly in other court proceedings. This application of the filing requirement converts it into nothing more than an actual notice requirement, which can cause ma-

103. FED. R. APP. P. (4)(a)(5). Excusable neglect is defined in *Winchell v. Lortscher*, 377 F.2d 247 (8th Cir. 1967).

104. *Cutting v. Bullerick*, 178 F.2d 774 (9th Cir. 1949).

105. *Graves v. General Ins. Corp.*, 381 F.2d 517 (10th Cir. 1967).

106. *Richey v. Wilkins*, 335 F.2d 1 (2d Cir. 1964). FED. R. APP. P. 4(2)(1) as amended in 1979 now expressly so provides.

107. 5 R. POUND, *JURISPRUDENCE* 407-16 (1959); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

108. KY. CONST. § 109 creates a Court of Justice composed of the Supreme Court, the Court of Appeals and trial courts.

for problems. Filing is, after all, not solely for the benefit of the courts and the parties. Filing of certain legal papers is required because persons affected by, but not connected with, the litigation are entitled to rely on the public records of the court.

Service of the notice of appeal on other parties is usually required, but the significance of the service varies among jurisdictions. One view is that service of the notice of appeal has the same significance as its filing, *i.e.*, service on all parties is necessary to confer jurisdiction over the appeal on the appellate court and the failure to serve a party requires dismissal of the appeal as to all parties.¹⁰⁹ Under another view, failure of service affects only jurisdiction of the appellate court over the party not served, but does not affect the validity of the appeal as to other parties.¹¹⁰ A third approach treats service as not affecting jurisdiction over the appeal or jurisdiction over a party, but simply as a notice requirement, noncompliance with which may result in the imposition of one of a range of penalties including dismissal of the appeal as to the party not served. This is the rule in the federal courts even though it is the duty of the clerk of the district court, and not the appellant, to serve the notice.¹¹¹

The first two approaches appear to treat the filing of the notice of appeal as the initiation of a new lawsuit, and thus service of the notice of appeal is considered as significant as service of the complaint in the trial court. There is an historical basis for this view because the writ of error was originally a lawsuit against the judge, and thus it had to be initiated in a manner similar to other lawsuits.¹¹² An appeal is not, of course, the initiation of a new lawsuit, but the transfer of jurisdiction over a case from a lower court to higher court. When jurisdiction over the case is transferred from the trial court to the appellate court, jurisdiction over the parties nec-

109. *National Reserve Life Ins. Co. v. Hand*, 188 Kan. 521, 363 P.2d 447 (1961). This used to be the law in Wisconsin. *Falk v. Industrial Comm'n*, 258 Wis. 109, 45 N.W.2d 161 (1950).

110. Wisconsin also followed this rule for a period of time. *Walford v. Bartsch*, 65 Wis. 2d 254, 222 N.W.2d 633 (1974).

111. *Caspar v. Devine*, 257 F.2d 197 (D.C. Cir. 1958).

112. *Sunderland, Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7 (1940).

essarily follows. It should not be necessary for the appellate court to establish jurisdiction anew. If a copy of the notice of appeal is not served on a party in the trial court, then that party is entitled to file a motion to be dismissed from the appeal, not because the appellate court does not have jurisdiction over him, but because he is prejudiced by not receiving notice of the appeal.¹¹³

Problems also arise over who should be served with the notice of appeal. In some jurisdictions the appellant serves only those parties in the trial court he thinks will be adverse to him.¹¹⁴ It is not always possible, of course, to know who will be adverse to whom and who may want to join in an appeal. The only safe course is to require service on all parties in the trial court,¹¹⁵ and allow each party to ascertain how to proceed.

Perfection of the appeal, as distinguished from its initiation, involves a variety of steps including payment of the appellate court's filing fee, posting of the appeal bond, ordering the transcript and docketing in the appellate court. Failure to take any one of these steps does not usually render the appeal defective, although it may be grounds for dismissal if the act is not performed within a reasonable time.¹¹⁶ Nonetheless, the appellate rules should make perfecting the appeal as simple as possible, and not impose upon the parties responsibilities which properly belong to court officials.

The first requirement should be that the filing fee for the appeal accompany the notice of appeal. As soon as the notice and filing fee are received by the trial court clerk, they should be forwarded, along with the docket entries, to the appellate

113. The Wisconsin Supreme Court has adopted a curious definition of subject matter jurisdiction. It treats subject matter jurisdiction not as the class of matters over which it has appellate jurisdiction, but as jurisdiction over the particular appealable judgment. *State v. Van Duyse*, 66 Wis. 2d 286, 224 N.W.2d 603 (1975). According to that opinion, the supreme court obtains subject matter jurisdiction over an appealable judgment when the judgment is entered in the trial court. It then must obtain personal jurisdiction over the appellee through timely service of the notice of appeal. When that occurs, it can hear the appeal. This approach is not only inconsistent with the traditional view of subject matter jurisdiction, it also ignores the definition of subject matter jurisdiction in Wis. STAT. § 801.04(1) (1977).

114. *National Reserve Life Ins. Co. v. Hand*, 188 Kan. 521, 363 P. 2d 447 (1961).

115. FED. R. APP. P. 3(d).

116. FED. R. APP. P. 3(a); Karlen, *Civil Appeals: English and American Approaches Compared*, 21 WM. & MARY L. REV. 121, 131-41 (1979).

court for immediate docketing. At this point full control over the appeal is vested in the appellate court. In most jurisdictions the appellate court is not apprised of the appeal until the record is filed with the appellate court. This may not occur until months after the notice of appeal was filed, thereby causing a substantial delay in processing. This delay often results because, between the time of filing of the notice of appeal and docketing in the appellate court, neither the trial court nor the appellate court feels responsible for processing the appeal, and thus things are not done which should be done.¹¹⁷

IX. RECORD AND TRANSCRIPT

The preparation of the record and transcript and their filing in the appellate court have been two major roadblocks in attempting to expedite the appellate process.¹¹⁸ Part of the reason has been referred to above — the lack of control by either the trial court or the appellate court over their preparation. Even the placement of this control in the appellate court is not enough, however, to guarantee that the record and transcript will be quickly and timely filed.

The appellate rules must first define what is to be included in the record. This can be either a short general statement as in the Federal Rules of Appellate Procedure¹¹⁹ or a more comprehensive listing as in Wisconsin.¹²⁰ The short description is better from the standpoint of brevity, while the listing of the specific items has the advantage of being more complete and avoiding mistakes. The former can be used in a jurisdiction with experienced and capable trial court clerks, but the latter may be necessary where trial court clerks are elected and there are often wholesale changeovers in a clerk's office personnel.

A major defect in many appellate rules is that they place

117. LEFLAR, *supra* note 24, at 13.

118: *Id.* at 19; NATIONAL CENTER FOR STATE COURTS, MANAGEMENT OF COURT REPORTING SERVICES 1 (1976) [hereinafter cited as NATIONAL CENTER FOR STATE COURTS]; ABA STANDARDS, *supra* note 14, at § 3.13(d) (Commentary); Erickson, *The Trial Transcript — An Unnecessary Roadblock to Expeditious Appellate Review*, 11 J.L. REF. 344 (1978).

119. FED. R. APP. P. 10(a).

120. WIS. STAT. § 809.15(1)(a) (1977).

the responsibility for the preparation of the record and the transcript upon the appellant although the record is in the custody of the trial court clerk, and the transcript in the notes of the court reporter.¹²¹ It makes far more sense to place, as do the federal and Wisconsin rules, the responsibility for ordering the record and the transcript on the appellant, and then place on the clerk and the reporter the duty to file them with the appellate court.¹²²

No special notice should be necessary to order the record; the notice of appeal serves that function. The clerk should then be charged with assembling the record, numbering the pages and notifying the attorneys when it is ready for transmittal to the appellate court. The attorneys should have a brief opportunity to review the record to make sure it contains everything necessary. The attorneys will not usually have to visit the courthouse to examine the record if the clerk is required to send to the attorneys a list of all the items to be included. This list merely duplicates the table of contents of the record the clerk sends to the appellate court. If for any reason the record is not timely filed in the appellate court, then the appellate court clerk can deal directly with the trial court clerk and not with the appellant, who can do nothing more than contact the trial court clerk.

Whatever the problems with having the record filed in the appellate court, they pale in significance in comparison to the difficulties in ordering, preparing and filing the transcript. It has been stated that "slow preparation of trial transcripts has been a major cause of delayed appellate decisions."¹²³ The reasons for this are many: (1) Failure of the attorney to order immediately the transcript or to make satisfactory arrangements for payment; (2) Failure of the attorney to order only essential parts of the transcript; (3) Heavy demands upon the court reporter to record additional court proceedings; (4) Lack of supervision of the preparation of the transcript by the appellate court or the trial court; (5) The willingness of the trial court to grant the reporter extensions of time for preparing

121. KRAMER, *supra* note 27, at Question F-7.

122. FED. R. APP. P. 11; WIS. STAT. §§ 809.15-.16 (1977).

123. LEFLAR, *supra* note 24, at 19; *see also* VOLUME AND DELAY, *supra* note 23, at

the transcript; (6) Failure on the part of reporters to use modern equipment or support personnel to aid them; (7) The exclusive assignment of one court reporter to one judge; (8) The fee system for paying for transcripts; (9) The independent contractor status of reporters; and (10) Poorly trained and unqualified reporters.¹²⁴ Some jurisdictions have solved these problems, but many have not. There have been a substantial number of experiments with using tape recordings as a substitute for a court reporter, and even the use of a computer to produce a transcript from a recording.¹²⁵

Eventually technology may permit the replacement of court reporters, but this is not likely to happen for some time and the existing problems must be dealt with to the extent possible. Experience has shown that most, if not all, of the delays in preparation of the transcript can be eliminated if attorneys are compelled to order the transcript shortly after the notice of appeal is filed, extensions of time come only from the appellate court, and court reporters are the only persons to request the extension. Most importantly, the appellate court must monitor the preparation of the transcript so that any potential problems can be anticipated and avoided.¹²⁶ To keep the appellate court advised of the status of the transcript, the appellant should be required to file with the appellate court, within ten days of the filing of the notice of appeal with the trial court, a statement signed by the court reporter that all or designated portions of the transcript have been ordered, satisfactory arrangements have been made for payment and a date given for completion of the transcript.¹²⁷ This statement notifies the appellate court that the attorney has done his job and that the court reporter knows what his obligations are and when they must be completed. The appellate court is, consequently, in the position of knowing the status of the preparation of the transcript and who is responsible if it is not filed within the required time.

The placement of the responsibility for granting extensions for preparation of the transcript in the appellate court rather

124. LEFLAR, *supra* note 24, at 19; NATIONAL CENTER FOR STATE COURTS, *supra* note 118, at 2.

125. NATIONAL CENTER FOR STATE COURTS, *supra* note 118, at 29-33.

126. *Id.* at 35-38.

127. WIS. STAT. § 809.16(1).

than the trial court is a return to the practice that had once been common. Assignment of the extension granting authority to the trial court, the current system, was thought preferable because it would be more efficient to have it done locally, would save the time of the appellate court and the trial court would be in a better position to know the competing demands upon the court reporter. The system does not work because the trial court will always grant the extension either because of the close working relationship between the judge and the court reporter or because the judge does not want the work on the transcript to interfere with the reporter's courtroom responsibilities. The result is that preparation of the transcript, without which the appeal cannot proceed, is hindered for reasons unrelated to the appellate court or the particular case. The appellate court under this system is unable to control the flow of appeals taken to it and thus is unable to control its own workload.

The relationship between appellate court control over appeals taken to it and the efficiency of the court has only recently been recognized but is now accepted without any serious dispute.¹²⁸ Control over the transcript is particularly important because of the central role it plays in appellate review and because its preparation is dependant upon a person who is the employee of the trial court. The working relationship between the trial court and the reporter has obscured the fact that the principal purpose for having a court reporter record the proceedings is to have a transcript available in the event of an appeal. When the trial court has control over the preparation of the transcript, however, the recording of daily courtroom testimony is given precedence over transcript preparation. Ideally, the court reporters should be in the employ of the appellate court rather than the trial court, but it is sufficient to have the appellate court control the preparation of the transcript.

The appellate court probably has adequate power, either inherent or statutory, to take the steps necessary to force a

128. VOLUME AND DELAY, *supra* note 23, at 84; ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS 12-15 (1977) [hereinafter cited as ABA TASK FORCE]; BURGER, *The State of the Federal Judiciary*, 57 A.B.A. J. 855, 858 (1971).

reporter to produce a transcript in a timely manner. It would be useful, however, to have the appellate rules specifically provide for the steps that can be taken by the appellate court. These steps should include withholding the reporter's paycheck, prohibiting him from doing any outside work such as depositions, prohibiting him from serving as an official court reporter, contempt and, if necessary, discharge. These may be drastic steps, but courts have recognized their authority to take them.¹²⁹ It would be preferable, however, to state them expressly in the rules so that the reporters are on notice as to the potential penalties for failure to produce the transcript in a timely manner.

X. BRIEFS AND APPENDICES

In the American appellate process the role and relative importance of the written brief and oral argument have been reversed from that in England. In the latter the brief was just that — a written summary of a lengthy oral argument. In the former, oral argument, to the extent there is any, is an oral summary of the principal points of the brief.¹³⁰ Whatever are the relative merits of the two different methods, courts in this country for many years to come will rely principally upon the written brief as the means of communication from the parties to the court. It is essential, consequently, that the briefs be structured in such a way as to make it as easy as possible for the parties to present their arguments to the court and for the court to understand what those arguments are.

Briefs in various jurisdictions have followed common patterns over the years. The initial pattern included the following:

1. A statement of the case, including a statement of the issues in the trial court, how they were decided and the questions presented by the appeal.
2. A statement of the facts in narrative form with references to pages of the printed record, with references unnec-

129. *Youker v. Guley*, 536 F.2d 184 (7th Cir. 1976). See also WIS. STAT. § 809.16(5) (1977).

130. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895 (1940); Wiener, *English and American Appeals Compared*, 50 A.B.A. J. 635 (1964). For a complete description of the difference between the appellate process in England and this country, see generally D. KARLEN, *APPELLATE COURTS IN THE UNITED STATES AND ENGLAND* (1963).

essary if supplied in the argument portion of the brief.

3. A separate statement of errors (in a law case) or propositions (in an equity case) relied on by the trial court.

4. In separately numbered divisions for each error or proposition:

(a) a statement of the error or proposition relied on in the division, with reference to pages and lines of printed record to show how the error arose and the ruling of the trial court,

(b) separately numbered brief points, conforming to the statement of errors or propositions, stating without argument the grounds of complaint and citing authorities supporting each point, and

(c) the argument on the particular issue.¹³¹

This format was confusing and repetitive. There was no need for a statement of issues in the trial court if they were not presented in appeal. The statement of facts could not be checked against the record without a cross reference to the argument portion of the brief. Repetition of the statements of error was not helpful, and the listing of authorities at the beginning of the argument, as well as in the argument itself, was of no aid to the court.

A substantial revision of this format was included in the Federal Rules of Appellate Procedure when they were adopted in 1968. Under the new format the brief was to include:

1. A table of contents.
2. A statement of issues presented for review.
3. A statement of the case, including a statement of facts.
4. An argument treating each issue identified, with an optional summary of the argument at the beginning of each argument.
5. A conclusion.¹³²

This format has been found to be simple and easy to understand by both attorneys and judges, and there appears to

131. INSTITUTE OF JUDICIAL ADMINISTRATION, THE SUPREME COURT OF IOWA: A STUDY OF ITS PROCEDURES AND ADMINISTRATION 64-65 (1971); Comment, *Alabama Appellate Court Congestion: Observations and Suggestions from an Empirical Study*, 21 ALA. L. REV. 150, 155 (1968).

132. FED. R. APP. P. 28(a).

be little improvement that can be made in it. There are, however, two items which were unnecessary when the revised format was developed, but which should now be addressed in the briefs. In the early 1960's when the new rules were developed, oral argument and a published opinion were 'almost universal. There was no need, consequently, for the appellate court to seek the views of the parties on whether there should be oral argument or a published opinion in a particular case. When a court found it necessary to curtail one or the other or both, it did so in a particular case without first asking the parties for their views on the questions. Whatever may be the merits or demerits of the limitations on oral argument and publication of opinions,¹³³ and whatever may be the standards for determining whether to have them in an individual case, both decisions may have a substantial impact upon the parties. For this reason the rules should provide that in the briefs the parties state their views on the need for oral argument and whether the opinion should be published.¹³⁴ The parties may not agree with the court's decision on either question, but at least the decision is made only after the parties have had an opportunity to express their views to the court.

The appellee's brief should follow the same format as the appellant's, leaving out only those portions on which there is no conflict with the appellant.¹³⁵ Appellate rules usually permit the appellant to file a reply brief.¹³⁶ Although good brief writing technique suggests that a reply brief should be filed only when the appellee raises new matters not addressed in the appellant's main brief,¹³⁷ many appellate attorneys out of an abundance of caution will file a reply brief and simply reiterate the points made in their first brief. To prevent this it may be helpful for the appellate rules to state expressly the limited circumstances under which a reply brief can be filed.

Appellate rules usually, but not always, place a maximum

133. These issues are discussed in section XII, parts B & C *infra*.

134. WIS. STAT. § 809.19(1)(c) (1977). The 1979 version of FED. R. APP. P. 34 requires circuit rules to permit a party to submit a statement why oral argument should be heard. The Wisconsin system of including the statement in the brief appears simpler.

135. FED. R. APP. P. 28(b).

136. FED. R. APP. P. 28(c).

137. E. RE, BRIEF WRITING AND ORAL ARGUMENT 171-72 (4th ed. 1974).

on the number of pages in a brief.¹³⁸ This type of rule is an example of one of the precepts of effective brief writing being enforced by court rule. Conciseness, or brevity, is universally regarded as an attribute of a good brief,¹³⁹ but many attorneys do not know how to write a good brief, or think that while the general rule is correct the particular brief the attorney is working on is an exception. Verbosity is the hallmark of a poor brief. Even if the page limitation does not improve the quality of what is written, it will at least reduce the quantity of what is poorly written. Whatever may have been the justification for the page limit in the first place, the caseload pressure on appellate courts and the common practice of judges reading briefs in advance of oral argument makes such a limit an imperative.

The page limitation on principal briefs in most jurisdictions is forty to fifty pages.¹⁴⁰ It is an unusual case in which more than forty pages is necessary to set forth the party's position, and thus the rules should limit the briefs to that number of pages. There should be a procedure, of course, for obtaining permission to file a longer brief, but such requests should be granted sparingly, otherwise the limitation will apply only to those who do not bother to request additional pages.

The printed appendix was originally developed as a means of saving the substantial expense involved in printing the entire record, while at the same time avoiding the problems of relying solely on the original record.¹⁴¹ Experience has shown, however, that most attorneys are fearful of leaving something out of the appendix even though the appellate rules may pro-

138. FED. R. APP. P. 28(g). The rules of the United States Supreme Court do not fix a maximum on the number of pages in a brief.

139. R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 720 (5th ed. 1978); Tate, *The Art of Brief Writing: What a Judge Wants to Read*, 4 *LITIGATION*, Winter, 1978, at 11. For an evaluation of the Minnesota experience, see Note, *The Minnesota Supreme Court Prehearing Conference — An Empirical Evaluation*, 63 *MINN. L. REV.* 1221 (1979).

140. The Federal Rules of Appellate Procedure limit main briefs to 50 printed pages, FED. R. APP. P. 28(g); Wisconsin limits them to 40 pages, *WIS. STAT. § 809.19(8)(c)* (1977).

141. Parker, *supra* note 9, at 6-8; Willcox, Karlen & Roemer, *Justice Lost — By What Appellate Papers Cost*, 33 *N.Y.U. L. REV.* 934, 967-69 (1958); Note, *Form of Appellate Records in Iowa*, 48 *IOWA L. REV.* 77, 87-88 (1962).

vide that the court can consider anything in the original record even if not included in the appendix.¹⁴² To counteract this, some courts have returned to the practice of hearing the case only on the original record and eliminating the filing of an appendix.¹⁴³ To avoid the difficulties of having only one record that must be used simultaneously by the judges on the panel hearing the case, the Seventh Circuit has adopted a rule,¹⁴⁴ which provides for the case to be heard on the original record. The rule further requires a short appendix which must contain only the judgment or order under review and the trial court's written or oral opinion, findings and conclusions. Other matters can but are not required to be included. This rule appears to be a realistic compromise between keeping the cost of taking an appeal to the minimum and providing the appellate court with the materials it needs to make a decision without undue delay. Given the manner in which most appellate courts operate, there is no need for each judge to have a full copy of the record or even a complete appendix. One copy of the record for use by the judge who is assigned to write the opinion in the case is sufficient. The other judges only need sufficient information to prepare for oral argument or to make a tentative decision, and the briefs and the short appendix called for by the Seventh Circuit rule should satisfy that need. If a judge desires to look at the whole record, it is, of course, available for that purpose.

Some courts continue to require that the appellant prepare an abstract of the record.¹⁴⁵ This is a narrative describing the contents of the record including the transcript. Other courts have in the past required a narrative of the transcript but not of the entire record.¹⁴⁶ Neither type of narrative is necessary and only involves substantial additional cost to the parties without any equivalent benefit to the appellate court. Those

142. Note, *Practice Before the Fifth Circuit*, 8 TEX. TECH. L. REV. 847, 872 (1977).

143. *Id.* at 878-79.

144. 7TH CIR. R. 12.

145. Smith, *Arkansas Appellate Practice: Abstracting the Record*, 31 ARK. L. REV. 359 (1977). Doing away with the abstract of record was one of the recommendations of the Committee on Simplification and Improvement of Appellate Practice, 63 A.B.A. REP. 602, 606-07 (1938).

146. Note, *Form of Appellate Records in Iowa*, 48 IOWA L. REV. 77 (1962).

courts which persist in requiring them should learn from the experience of the great majority of appellate courts who find themselves perfectly capable of deciding cases expeditiously without them.

XI. TIME LIMITATIONS AND CONTROL OF THE APPELLATE PROCESS

It has been recognized for some time that in order for trial courts to function effectively, they must control the flow of cases through the court. This control is referred to as case management. It was discovered that the adversary system was not a sufficient guarantee for the expeditious disposition of cases and that the court must assume responsibility for imposing time limitations on each successive step in the litigation process, monitoring compliance with the limitations and imposing sanctions for failure to comply with the limitations.¹⁴⁷ Recent studies have shown that of all the possible variables in the litigation process, the only one which had any substantial impact upon pace of the litigation process is the extent to which judges are willing to exercise control over it.¹⁴⁸

Appellate rules have traditionally set time limits on each step of the appellate process. Except for the time limit on filing the notice of appeal, however, compliance with these rules has not been enforced either by the appellate court on its own initiative or on motion of the opposing party. There was, consequently, little or no relationship between the time limits as set forth in the rules and the actual median time spans between the steps in the appellate process. As appellate courts began to develop statistics which demonstrated this fact, they realized that only through the adoption of a case management system could the entire appellate process be speeded up and actual median time spans begin to approximate the time limits as set forth in the rules. The success of those courts that have implemented case management systems clearly proves the desirability of each appellate court

147. VOLUME AND DELAY, *supra* note 23, at 71-74; ABA STANDARDS, *supra* note 14, at §§ 3.50-51; Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255 (1975).

148. Church, Carlson, Lee & Tan, *Justice Delayed: The Pace of Litigation in Urban Trial Courts*, 2 STATE COURTS J. 3 (1978).

adopting a similar plan.¹⁴⁹

Appellate courts cannot, of course, simply set and enforce time limits against the litigants. They must simultaneously adopt and enforce time limits on their internal procedures. This means that standards have to be set for the processing of all petitions and motions, the scheduling of cases for oral argument or briefs only, the circulation of opinions after submission and the opinion conference. These internal time limits cannot, of course, be enforced by any formal sanctions, but the peer pressure resulting from monthly statistics showing the status of all pending cases and of the cases of each judge along with encouragement by the chief judge should in all but extreme cases be sufficient.¹⁵⁰

XII. THE DISPOSITION PROCESS

A. *Prehearing or Summary Disposition*

Not all appeals taken to an appellate court are disposed of on the merits in consecutive order after the briefs have been filed. Many appeals are disposed of at an earlier stage or, even if the briefs have been filed, not in the order in which cases are normally taken. Appeals can be disposed of by voluntary abandonment by the appellant, as a result of a settlement, by virtue of a procedural ruling by the appellate court on a motion, or on the merits, either on a motion by a party or on the court's own motion.

Dismissal by virtue of a settlement between the parties is the most attractive from the court's standpoint because no further action by the court is necessary. The voluntary dismissal by the appellant is almost as attractive but under most appellate rules approval by the court or by the other parties is required.¹⁵¹ The reason for requiring the approval of the court or the other parties is apparently a concern that there may be some disadvantage to the other party if the appellant can dismiss at will. This concern does not appear to be valid. The appellee cannot be prejudiced by the dismissal if he has filed

149. VOLUME AND DELAY, *supra* note 23, at 71-74; ABA STANDARDS, *supra* note 14, at §§ 3.50-51.

150. R. LEFLAR, R. MARTINEAU & M. SOLOMON, PENNSYLVANIA'S APPELLATE COURTS 8, 11, 34-54 (1978); ABA STANDARDS, *supra* note 14, at § 3.52.

151. FED. R. APP. P. 42.

a notice of appeal challenging some action of the trial court, because the dismissal by the appellant cannot affect the appellee's notice of appeal. If the appellee has not filed a notice of appeal, all he can do is support the judgment appealed from, and when there is a voluntary dismissal the appellee has received all he would be entitled to had the judgment been affirmed on the merits.¹⁵² It may be that the appellee would prefer to have a decision of the appellate court for its precedential effect, but he is no more entitled to that than he would be to have taken the appeal. There may also be a question as to whether the appellee is entitled to recover any costs for expenses in the appellate court. If that is a problem, the rules can specifically provide for a motion for costs, even after the voluntary dismissal, but the dismissal should not be held up for the sole purpose of making sure the appellee can recover any costs to which he may be entitled.

Settlement has been a traditional means of disposing of appeals, but until recently settlements had to be reached by the parties themselves without any aid or encouragement on the part of the appellate court. This situation was in contrast to that in the trial courts where the judge often plays a significant role in the settlement process. More recently, following the lead of the United States Court of Appeals for the Second Circuit,¹⁵³ a number of federal and state appellate courts have experimented with having an active or retired member of the court or a court official meet with the parties to ascertain whether there are any possibilities of settlement and, if so, to provide a setting for the settlement to be consummated or, if no settlement is possible, to attempt to narrow the issues on appeal.¹⁵⁴ The evidence to date is not conclusive that the procedure ultimately aids the appellate process by disposing of more cases more quickly with less judicial effort than the traditional hands-off approach.¹⁵⁵ It is necessary, consequently, for more testing and experimentation to occur. While

152. See text accompanying note 92 *supra*.

153. Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974).

154. VOLUME AND DELAY, *supra* note 23, at 74-82; Goldman, *The Appellate Settlement Conference: An Effective Procedural Reform?* 2 STATE COURT J. 3 (1978).

155. Goldman, *The Appellate Settlement Conference: An Effective Procedural Reform?* 2 STATE COURT J. 3 (1978).

the stated theory of the settlement conference is only to provide an opportunity for the parties to work out a settlement by themselves with the settlement officer playing no role in encouraging settlement or suggesting terms, the reality is that the settlement officer often plays an active rather than passive role in the settlement process,¹⁵⁶ and it is unrealistic to expect otherwise. Whether the settlement officer should be a judge is debatable, but in at least one court the settlement officer is an active member of the appellate court.¹⁵⁷ This is a questionable practice, not only because it reduces the number of judges available to hear appeals which are not settled, without any clear evidence that an active judge can settle more cases than a retired judge or a nonjudge. Further, and of more importance, any comments by the judge on the state of the law or on the possible outcome of the appeal may be perceived as representing the views of the court. This may destroy one of the essential features of a court-mandated settlement conference — that the parties believe that their discussions are confidential and no member of the court will be aware of what has transpired in it. Participation by an active member of the court may diminish that essential confidence.

Another key feature of the settlement conference is that it should be held as early in the appellate process as possible, preferably before there has been any substantial expenditure of money for the preparation of the transcript or the briefs. Once the parties have a major financial investment in the appeal, the chances of settlement will be reduced. Absent special circumstances, the settlement conference should not, however, be a reason to delay the other steps in the appellate process. Otherwise, the settlement process can be used as nothing more than a delaying tactic by the appellant. Nothing will promote an early settlement better than firm deadlines, after which a large expenditure of the client's funds would be required.

Although appellate rules do not usually provide for a motion to dismiss or a motion for summary disposition, some ap-

156. VOLUME AND DELAY, *supra* note 23, at 74-75.

157. In the Minnesota Supreme Court a justice of the court conducts the settlement conference. Otis, *Prehearing Conferences — A Help or a Hindrance to Appellate Litigation?* 46 HENN. LAW. 18 (1977).

pellate courts receive them and act on them.¹⁵⁸ A motion to dismiss is for the purpose of raising procedural questions such as appealability, timeliness, adequacy of the record or compliance with the appellate rules. A motion for summary disposition will seek affirmance or reversal on the merits and can be filed either before or after the briefs are filed. Such motions are useful in that they permit a case to be disposed of without the full treatment given to appeals taken under submission in the ordinary course. To the extent that this procedure can shorten the time for disposition of appeals with a reduced expenditure of judges' time the procedure is valuable. If the only thing accomplished is double consideration of most appeals, both the time for disposition of appeals and the efficient utilization of judicial time will be adversely affected. The rules should provide for such motions so that attorneys know they can be filed, but the appellate court should stress that the motions are appropriate only in appeals which have little merit to them on one side or the other.¹⁵⁹

The appellate court may also become aware of an appeal that should be affirmed or reversed summarily. In such an event, the court should dispose of the case immediately to avoid further delay and expense for the litigants and to leave more time for appeals that have merit. Again the appellate rules should provide for this type of disposition so that the parties and their attorneys are aware that it can occur.

B. Disposition After Submission on Briefs or Oral Argument

1. Screening for Oral Argument

Once the briefs have been filed, the appeal is ready to be taken under submission. Prior to a consideration of the appeal on the merits, however, many appellate courts now make a preliminary decision on whether to have oral argument, and how long it should be.¹⁶⁰ In establishing a procedure for making this determination, the role of judge and staff must be de-

158. *American Orthodontics Corp. v. G. & H. Ins. Agency Inc.*, 77 Wis. 2d 337, 253 N.W.2d 82 (1977).

159. ABA STANDARDS, *supra* note 14, at § 3.13(f).

160. VOLUME AND DELAY, *supra* note 23, at 88-90; ABA TASK FORCE, *supra* note 128, at part II; ABA STANDARDS, *supra* note 14, at § 3.32.

fined, as must the standard upon which the determination is to be made.

The elimination of oral argument in a substantial number of cases and nonpublication of opinions are the two major disputes concerning the appellate process in this country. The elimination of oral arguments in some cases is apparently based on the assumption that it is necessary to facilitate disposition of a greater number of cases.¹⁶¹ It also reflects an attitude of many appellate judges that oral argument often is neither necessary nor useful in aiding the court in reaching a decision.¹⁶² The defenders of oral argument in all cases contend, however, that decreasing the number of oral arguments does not increase the number of appeals a court can effectively handle, and even if it did, the institutional values in favor of oral argument are so strong that they overcome any advantages that may be gained from its elimination.¹⁶³

It may be that in an ideal world there should be oral argument in every appeal (though the author's own experience suggests strongly to the contrary). This is not, however, a perfect world, and appellate procedures are of necessity a compromise between the ideal and the practical. If it could be demonstrated that, in fact, elimination of oral argument is not effective in increasing the number of appeals that can be handled by a court, then the basis for eliminating it would be very weak. The experience of a number of appellate courts over the past decade in dramatically increasing the number of appeals terminated per judge while at the same time sharply reducing the percentage of appeals in which oral argument is heard suggests that the former may be in part caused by the latter.¹⁶⁴ Many appellate judges share this same view, as evidenced by the many courts which have restricted oral argu-

161. M. OSTHUS & R. SHAPIRO, CONGESTION AND DELAY IN STATE APPELLATE COURTS 21-24 (1974); Haworth, *Screening and Summary Procedures in the United States Court of Appeals*, 1973 WASH. U.L.Q. 257, 283-87 [hereinafter cited as Haworth].

162. JUSTICE ON APPEAL, *supra* note 6, at 19; D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS 80 (1973).

163. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURE: RECOMMENDATIONS FOR CHANGE 46-49 (1975); JUSTICE ON APPEAL, *supra* note 6, at 16-24; ABA STANDARDS, *supra* note 14, at § 3.35. See generally VOLUME AND DELAY, *supra* note 23, at 90-96.

164. Haworth, *supra* note 161, at 283-87.

ment. The contention that the elimination of oral argument in some cases will not save much judicial time because only a small percentage of a judge's time is actually spent on the bench, fails to take into account two things: one, the time spent by the judges preparing for oral argument which is not spent on cases decided on briefs only;¹⁶⁵ and two, the difficulty appellate judges have in completing any other work on the days on which oral argument is held. As a practical matter when an appellate court hears oral arguments in four or five cases a day with thirty minutes allowed each side, the judge on the panel will accomplish little more that day than to hear the oral arguments and to hold a conference on those cases. If the court hears oral arguments one out of every four weeks, then twenty-five percent of its time is devoted to oral argument. If oral argument can be eliminated in any substantial number of cases, judicial time that can be devoted to other cases can be increased by the amount of time saved on oral argument.

One suggestion that is designed to reduce the number of oral arguments but preserve the right to oral argument is for the appellate court to suggest in a particular case which appears to have little merit that oral argument is not necessary, but retaining in either party the option of having oral argument.¹⁶⁶ The weakness in the proposal is that it permits the attorneys to dictate to the court the procedures which are to be followed. We have long since abandoned the concept that the courts exist simply to do the bidding of the parties and that control over the case is in the hands of the parties rather than the court.¹⁶⁷ The court must have control over its own docket and procedures, and this is not achieved if the question of oral argument is to be determined by the parties. There also appears to be little justification for oral argument in a case which the appellate court, after reviewing the briefs, found to be without merit.¹⁶⁸

Appellate courts differ on whether judges or staff should perform the screening for oral argument.¹⁶⁹ To the extent that

165. *Id.*

166. JUSTICE ON APPEAL, *supra* note 6, at 21-24.

167. See authorities cited in note 128 *supra*.

168. The 1979 amendment to FED. R. APP. P. 34 adopts this position.

169. MEADOR, *supra* note 1, at 33-34; VOLUME AND DELAY, *supra* note 23, at 89.

judges are involved in the screening process, the judicial time saved by elimination of oral argument is reduced. To the extent that staff rather than judges make the decision, the role of the judge in the judicial process is reduced.¹⁷⁰ Even though allowing staff to make the decision on oral argument may reduce the role of the judge in the appellate process, the key is that it does not reduce the role of the judge in the decision process. The question of oral argument does not involve the merits of the case, except indirectly, and thus is the type of decision that can best be assigned to staff. If the amount of judicial time devoted to a case is to be reduced, there must be some matters for which staff, rather than the judge, are assigned responsibility. The important thing is for the judge to retain exclusive responsibility for deciding the appeal on the merits. All preliminary matters such as procedural motions and screening can be assigned to staff without reducing judicial responsibility for the ultimate decision.¹⁷¹

It is important that the judges, the staff, and the attorneys know the standards which the court uses for determining whether oral argument is to be held. The standards should, consequently, be included in the appellate rules. There have been several attempts to state the standards for oral argument.¹⁷² Basically, oral argument should be for the purpose of aiding the court in reaching a decision. That is, of course, no meaningful standard itself. Oral argument can be eliminated either because the briefs indicate there is no merit to the appeal and oral argument would be a waste of time, or that the briefs present such a clear picture of the case that oral argument would be superfluous. These standards will be the focus of the section of the brief which addresses the issue of the

170. Bird, *The Hidden Judiciary*, 17 JUDGES J. 4 (1978). For a reply to Chief Justice Bird, see Cooley, *Neutralizing the Threat of the Hidden Judiciary*, 18 JUDGES J. 44 (1979).

171. MEADOR, *supra* note 1, at 175-93; ABA STANDARDS, *supra* note 14, at § 3.62. See also Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807; Reynolds & Richman, *Nonprecedential Precedent — Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978).

172. FED. R. APP. P. 34(a); WIS. STAT. § 809.22 (1977); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 46-49 (1975); JUSTICE ON APPEAL, *supra* note 6, at 19-24; ABA STANDARDS, *supra* note 14, at § 3.35.

need for oral argument.

2. The Decision Process

The internal decision process of appellate courts have only recently been given substantial attention.¹⁷³ The significant relationship between the decision process and the decision itself is now recognized and, of course, the relationship between the process and the productivity of the court is also acknowledged. Notwithstanding the lack of information on the internal decision processes of appellate courts, for many years there were basic patterns to the processes of the various courts. These similarities broke down as different courts began experiencing substantial variations in the number of appeals being heard. Beginning in the late 1930's under the leadership of Arthur Vanderbilt and John J. Parker, a consensus began to develop as to the best internal decision process for an appellate court to follow. In 1976 Robert Lefflar published a book on the internal operating procedures of appellate courts in which procedures used by appellate courts throughout the country were described and examined.¹⁷⁴

There were three basic features of the traditional decision making process which had a substantial adverse impact upon the quality of the work of the appellate court. The first was the conscious decision not to read the briefs or make other preparation for oral argument. The theory was that the judges should enter upon oral argument with no preconceived notions about the case, thus permitting the oral argument of counsel to have the greatest impact.¹⁷⁵ The only exception to the no-preparation practice was the one judge who was assigned the case prior to oral argument. This pre-assignment was the second feature of the former decision making process. Under it, some time prior to oral argument the case would be

173. The most comprehensive treatment of internal operating procedures is found in R. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* (1976). For a listing of other reports and articles see ABA TASK FORCE, *supra* note 128, at 103-04. The Commission on Revision of the Federal Court System has called for appellate courts to appoint advisory bodies on internal operating procedures and to publish the procedures adopted. *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* 44-46 (1975).

174. LEFLAR, *supra* note 24.

175. Parker, *supra* note 9, at 11.

assigned to a single judge and he would receive copies of the briefs and the record. He would have primary responsibility for asking questions of counsel during oral argument and of leading the discussion during the decision conference.¹⁷⁶ The third feature of the old process was that the other members of the court were concerned only with the decision of the court, and the opinion written by the judge to whom the case was assigned was given little if any consideration by the other members of the court.¹⁷⁷ An extreme but common example of this was the fact that in many courts, copies of the draft opinion were not distributed to the members of the court but the opinion was read to them at a conference which provided their only opportunity to suggest changes.¹⁷⁸ The obvious result of these three procedures was a decision that was to some degree collegial, but an opinion that was essentially the product of one person and not of the entire court.

It is now recognized that both the decision and the opinion in a case must be collegial products of the entire court¹⁷⁹ and that advance preparation by the judges is an aid rather than interference with meaningful oral argument.¹⁸⁰ Some judges still do not read the briefs in advance, not so much because of a disagreement with the desirability of doing it, but because of a heavy workload.¹⁸¹ To insure that all judges prepare equally for oral argument, some courts now do not assign cases to individual judges until after a tentative decision is made.¹⁸² This also prevents the members of the court from relying too heavily upon one judge who has read the briefs and had access to the record. The most significant change has been in the greater opportunity for review of opinions written by other judges. Modern photocopying machines have made distribution of copies of opinions a simple matter, and the availability of law clerks has provided the staff support neces-

176. LEFLAR, *supra* note 24, at 40.

177. Parker, *supra* note 1, at 10-11.

178. LEFLAR, *supra* note 24, at 53.

179. JUSTICE ON APPEAL, *supra* note 6, at 29-31; LEFLAR, *supra* note 24, at 36-39; ABA STANDARDS, *supra* note 14, at § 3.36.

180. ABA STANDARDS, *supra* note 14, at § 3.34(c).

181. R. LEFLAR, R. MARTINEAU & M. SOLOMON, PENNSYLVANIA'S APPELLATE COURTS 5 (1978).

182. VOLUME AND DELAY, *supra* note 23, at 102; LEFLAR, *supra* note 24, at 39-41; ABA STANDARDS, *supra* note 14, at § 3.54 (Commentary).

sary for the task.¹⁸³ For some inexplicable reason, there are some courts and judges that still do not recognize that it is the published opinion of the court that is its most important product, and they continue to devote their principal effort to the decision and virtually ignore the content of the opinion. This situation appears, however, to be changing rapidly as more and more attention is given to the decision process.

C. Publication of Opinions

During the past decade many appellate courts began to restrict the number of cases in which full opinions were prepared and to limit the number of opinions which were published either officially or unofficially.¹⁸⁴ Usually the two limitations go together, that is, only full opinions are published and the shorter opinions, usually called memorandum or per curiam opinions, are not published. Various standards have been developed for determining those opinions to be published,¹⁸⁵ but essentially the question is whether the opinion is simply repetitive of earlier published opinions and adds nothing to the body of law, because it neither involves a new legal principle nor applies an established principle to an unusual factual situation.¹⁸⁶

The basic justifications for the two limitations on opinions is that the number of opinions being published is so great that legal research is impaired and the cost of keeping up to date with the flood of opinions is prohibitive.¹⁸⁷ The principal arguments to the contrary are that anything which a common-law court does is part of the body of law, that judicial accountability is reduced when opinions are not written or published, and that courts may attempt to hide their decisions in unwritten and unpublished opinions.¹⁸⁸ The debate has waxed long and hot with neither side convincing the other.¹⁸⁹ Notwithstanding

183. LEFLAR, *supra* note 24, at 29-30, 53-54.

184. Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIB. J. 362 (1974).

185. *Id.*

186. VOLUME AND DELAY, *supra* note 23, at 98.

187. ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 5-8 (1973).

188. JUSTICE ON APPEAL, *supra* note 6, at 35-41.

189. Most of the articles are listed in ABA TASK FORCE, *supra* note 128, at 125-26. See also Smith, *The Selective Publication of Opinions: One Court's Experience*, 32

the objections, however, the courts, who control the situation, have made it clear that they intend to continue to limit the publication of opinions.

As to the desirability of having a statement of reasons in every case decided on the merits, there can be little doubt.¹⁹⁰ The preparation of an opinion, even if not published,

assures some measure of thoughtful review of the facts in a case and of the law's bearing upon them. Snap judgments and lazy preferences for armchair theorizing as against library research and time-consuming cerebral effort are somewhat minimized. The checking of holdings in cases cited, the setting down of reasons in a context of comparison with competing reasons, the answering of arguments seriously urged, and the announcement of a conclusion that purportedly follows from the analysis set out in the opinion are antidotes to casualness and carelessness in decision. They compel thought. It is even necessary that the thought have some quality of rigorousness in it.¹⁹¹

Having a written opinion also assures the parties that the court has given their case a reasonable amount of attention and the case has not been decided by mistake or oversight.

It is quite another matter, however, to say that because an opinion is written it must be published. First, an opinion that is written primarily for the parties and is simply a reasoned explanation of the court's decision is very likely not to be the same type of opinion that is written for publication.¹⁹² Second, the reasons for writing an opinion in every case are completely separate from the reasons for publishing an opinion. An opinion is published because it serves as the means by which the appellate court performs its law development function. Because it is an essential part of law development that the bar and the public be made aware of what the law is or will be, that function can only be served if the opinion is pub-

ARK. L. REV. 26 (1978); Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 MARQ. L. REV. 581 (1978); Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977).

190. JUSTICE ON APPEAL, *supra* note 6, at 31-32; ABA STANDARDS, *supra* note 14, at § 3.36(b). *Contra*, VOLUME AND DELAY, *supra* note 23, at 97.

191. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 810 (1961).

192. VOLUME AND DELAY, *supra* note 23, at 98.

lished. If an opinion does not develop the law but only applies previously developed law to unexceptional circumstances, there does not appear to be any overriding reason to publish it.

The most serious objection to the nonpublication rule is that courts may be tempted to cover up decisions inconsistent with prior published opinions. Some instances of the misuse of nonpublication have been cited,¹⁹³ and no doubt there will be additional instances in the future. The only systematic survey of one state's intermediate appellate court experience with nonpublication has indicated that the rule has not been abused and that there were few opinions that should have been published but were not.¹⁹⁴

One provision that should be included in a rule on publication would authorize anyone at any time to petition the court to publish an opinion. This would allow anyone who thinks that the opinion breaks new ground to point out to the court why he thinks it does and to seek to have the opinion published. It will also allow a person who subsequently wants to cite the opinion to be able to have it published.¹⁹⁵

The principal basis for the objection to the nonpublication of an opinion is the prohibition against citing the unpublished opinion.¹⁹⁶ Part of this objection is eliminated if publication can be requested even after the original nonpublication decision. The ultimate justification of the noncitation rule is, however, that without it the nonpublication rule would be meaningless and unenforceable, and the problems of legal research would be compounded rather than eased. This is because it is inevitable that even if an opinion is not published officially, if it can be cited the opinion will soon be published unofficially. When that occurs anyone doing legal research must then check not only the official reports but also the unofficial reports, thereby complicating and making more expensive his task. The prohibition on the citation of unpublished opinions

193. JUSTICE ON APPEAL, *supra* note 6, at 38; Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?* 61 A.B.A. J. 1224 (1975); Seligson & Warnloff, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37 (1972).

194. Mueller, *Unpublished Opinion Study*, 1 STATE COURT J. 23 (1977).

195. 7th CIR. R. 35(d); WIS. STAT. § 809.23(4) (1977).

196. JUSTICE ON APPEAL, *supra* note 6, at 38-39; Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 MARQ. L. REV. 581 (1978).

must, consequently, be part of any rule limiting publication of opinions.

D. Rehearing

Almost all appellate rules provide for some form of motion for rehearing in an appellate court.¹⁹⁷ Rehearing is thought necessary to give the court an opportunity to correct a mistake it has made. Rehearing is clearly necessary in the jurisdiction's highest court because there is no place else to go. Rehearing in an intermediate appellate court, whether mandatory or permissive, is at best a waste of time, expense, and judicial energy, and at worst another means for a litigant to delay the inevitable. A different result on rehearing is so rare¹⁹⁸ that there can be no justification for it even on a permissive basis. If an intermediate appellate court has made a mistake, let the mistake be corrected in the only court likely to find the mistake, the highest court in the jurisdiction. Permitting or requiring a rehearing motion in the lower court gains nothing and costs much.

A different problem arises when an intermediate appellate court sits in panels of three but is composed of many more judges.¹⁹⁹ Should the court also sit en banc to reconsider decisions made by panels? The only reason to do so would be to eliminate conflicts between decisions of panels. But that function should be performed by the supreme court, not the intermediate appellate court sitting en banc. The latter court should not sit en banc, and thus there is no reason to have a motion for rehearing en banc.²⁰⁰

XIII. CONCLUSION

The model appellate process proposed in this article has two underlying tenets. First, each aspect of the appellate process is interrelated and should not be considered in isolation. Second, the process must be simple to comprehend and comply with, and be uniformly applied.

197. LEFLAR, *supra* note 24, at 60-61.

198. Louisell & Degnan, *Rehearing in American Appellate Courts*, 44 CALIF. L. REV. 627 (1956).

199. JUSTICE ON APPEAL, *supra* note 6, at 161-64.

200. This discussion is probably inapplicable to the federal appellate system because of the volume of cases decided annually by the courts of appeals.

Principally, the model proposed here is intended to provide an example for those concerned with improving or implementing appellate process in a particular jurisdiction. The dual function of error correction and law development should be facilitated by a process which balances the goal of justice with the goal of developing consistent and general legal principles. Specific suggestions for achieving these goals are summarized below.

A. Appellate Court Size

The number of judges needed depends upon caseload. Optimum workload for an intermediate court judge is about one hundred cases annually; for a supreme court justice with only discretionary jurisdiction, twenty written opinions. A supreme court justice working without an intermediate level court should be responsible for about twenty error correcting and twenty law development cases per year.

B. Structure and Location of Intermediate Court

An intermediate court ideally should be a single court for the entire jurisdiction and should sit at only one location. As a compromise to the litigants' economy and convenience, a single court could provide several panels located throughout a jurisdiction, but judges and staff members themselves should not have to travel to different sites to hold court sessions.

C. Right of Appeal and Appealability

One appeal as of right should be available, preferably to an intermediate court. Review by the supreme court should be entirely in the court's own discretion. Appeals of right should extend only to final orders or judgments. Supervisory writs should not be employed as a means of interlocutory appeal.

D. Procedural Requirements to Bring an Appeal

Appellate procedural requirements should be as simple as possible, should not shift burdens onto litigants that properly belong on the trial court staff, and should also be strictly enforced, with few if any exceptions. Parties should not be permitted to raise issues on appeal not raised below by objection. An appellate court should not raise an issue not properly raised by a party, except possibly when it is a relevant law

development issue that appeared foreclosed by precedent.

E. Proper Parties

A nonparticipant or an "informal" participant in the trial court should not be permitted as an appellate party without proper intervention as a proper party. A person attacking any portion of a judgment should file a notice of appeal or cross-appeal, jointly or individually.

F. Initiation of Appeal

There should be a uniform length of time in which a notice of appeal may be filed following the judgement; thirty days is suggested. Defects in notice, such as failing to serve a party with a copy of the notice of appeal, should not result in automatic dismissal of the appeal. But the notice rules should not degenerate into a mere actual notice requirement, although it may result in a dismissal as to one party.

G. Docket and Record

Full control over the appeal should be vested in the appellate court as soon as the notice of appeal is filed. The trial court clerk should be responsible, upon filing of the notice of appeal and payment of the appeal fee, for assembling the record, and answerable to the appellate court for delay in forwarding the fee, notice and the record.

Appellant should order the transcript and should file in the appellate court a statement indicating, (1) that appellant has ordered the transcript, (2) that payment arrangements have been made, and (3) the date for completion. Extensions should be sought directly by the court reporter and granted only by the appellate court.

H. Briefs

A brief should be simply structured to include a table of contents, a statement of the issues, a statement of the case, the argument and a conclusion. A brief should be limited to forty pages in length with few exceptions. A reply brief may be filed by the appellant only to respond to new matters raised in appellee's brief. Appendices should include only the judgment or order under review and the trial court's written or oral opinion, findings and conclusions, and any particular

relevant portion of the record.

I. Time Limitations and Case Management

The appellate court system should adopt a case management system. Time standards should be established for the court's own processing. For each case, the court should schedule times for oral argument, submission and consideration, circulation of opinions and the opinion conference.

J. Voluntary Disposition

Disposition by appellant's voluntary dismissal should not require approval by the court or of the other parties; nor should it be delayed by the court to insure that a party can recover costs. Justices sitting on the court should not be involved in the settlement process, but settlement should be encouraged and should occur as early as possible following trial court resolution.

K. Summary Disposition

Summary disposition may result from consideration of a procedural motion, the court's own screening process or a motion for summary disposition on the merits. A motion for summary disposition should be permitted under the appellate rules only when there is little merit on one side, thereby vitiating double attention to the case.

L. Oral Argument

Oral argument should be severely restricted. It can be totally eliminated when the briefs indicate there is no merit on one side, or when the briefs present such a clear picture that oral argument would be superfluous.

M. Decision Process

A case should not be assigned to a judge until after a tentative decision is made. Judges should prepare for each oral argument by reading the briefs. Opinions should be circulated in draft form and result from collegial effort representing the work of the court.

N. Written Opinions

A written opinion should be produced in every case. How-

ever, an opinion that does not develop law, but merely applies existing law, need not be published. An unpublished decision should not be cited as authority; however, anyone at any time should be able to petition to have an opinion published.

O. Rehearings

The highest court in a jurisdiction should provide a rehearing mechanism. Intermediate courts should not have a rehearing mechanism, either by panel or en banc.

The model proposed in this article is not, except in a few instances, original with the author. It is based to a large degree upon the American Bar Association Standards of Judicial Administration Relating to Appellate Courts, the Federal Rules of Appellate Procedure and other appellate reforms recently adopted in Wisconsin, which in turn find their genesis in the ideas of Pound, Sunderland, Parker and Vanderbilt. There is in the appellate process, as in war and politics, little new or original. There is only the refinement and reassertion of basically sound ideas to deal with the essential problem of providing justice economically and expeditiously to the litigants and to the public.

