1981

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Recommended Citation
SYMPOSIUM ON AN INTERMEDIATE APPELLATE COURT IN MINNESOTA

THE PROBLEMS OF CASELOAD AND DELAY IN THE MINNESOTA SUPREME COURT—AN INTRODUCTION TO A SYMPOSIUM

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As a newcomer to Minnesota, I would be presumptuous if I suggested that I have the “answer” to the dual problems of excessive caseload and delay in the Minnesota Supreme Court. Nevertheless, my experience with other states leads me to conclude that the problems being encountered in Minnesota are not unique. One writer has described the problem as follows: “Appellate courts throughout the country suffer from the same malady: mild to acute congestion, accompanied by delay and dissatisfaction. . . . The common symptom of congestion is backlog. Backlogs, like middle-aged waistlines, tend to bulge despite the most devout resolutions to reduce them.”

This Introduction briefly discusses how various scholars address the problems of excessive caseload and delay and how they view the range of solutions proposed or attempted in several states. The history and dimension of the problem in Minnesota and various solutions that have been discussed or proposed are set out in a thorough review by Laurence Harmon and Gregory Lang. In a well-documented discussion of some of the problems of intermediate appellate courts, Carl Norberg writes that other alternatives should be tried before an intermediate court of appeals is established. Concluding the Symposium, Henry Halladay makes an

† Mr. Peters, former Deputy Director of the National Center for State Courts, currently is Dean of William Mitchell College of Law.
unusual and forceful argument that the creation of an intermediate court of appeals in Minnesota would be more costly, bureaucratic, and inefficient than any of the other alternatives. 4

In 1957, 213 cases were filed with the Minnesota Supreme Court. In that same year, the court issued 178 opinions; thus, opinions were written in 84% of the cases filed. 5 Ten years later, in 1967, this percentage had dropped to 75%, based upon 372 filings and 280 opinions. 6 In 1977, the percentage had dropped to 40%. In that year there were 1,065 filings and 424 opinions, 7 an enormous workload for a nine-judge court. One year later, the percentage dropped to 30%; 1,207 cases were filed and the court issued 361 opinions. 8 Thus, filings have increased dramatically over the last twenty years, while the number of opinions issued has risen only slightly, averaging 358 per year over the past ten years. 9

The excessive caseload has arisen during a period when the states' highest courts have had additional administrative burdens imposed upon them. There is increased pressure on state supreme courts to provide leadership and supervision over the bench and bar as part of their judicial responsibilities. These administrative burdens include the establishment of forms of pleading and rules of procedure and evidence, regulation of bar admissions, regulation of bar discipline and adjudication of discipline cases, regulation of the bar in other respects (advertising, specialization, continuing legal education), and administration of the justice system (including state court financing, liaison with other branches of government, administrative rulemaking, and judicial discipline and removal). Because of the dual burden of caseloads and administrative duties, and because of the lack of other alternatives, many courts have decided to limit the number of oral arguments and to increase significantly the responsibility of professional staff. 10

7. Harmon & Lang, supra note 2, at 88 app., table 3.
8. Id.
9. The growth of filings in Minnesota has been especially sharp in the last two years, with an 18% increase in 1977 and a 13% increase in 1978. These figures lead one to suppose that the problem of excessive caseload and resultant delay will likely increase rather than decrease and that filings will double approximately every five years.

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Increasing caseloads generally lead to several responses: adding judicial manpower, adopting more efficient case management methods, and permitting increased backlog. Although backlog is not the sole cause of delay, it is probably a contributing factor and may well be related to the quality of the judicial work product. Because delay reduces the ability of the judicial system to respond adequately to litigants' needs, it is the responsibility of government not to permit an increase in backlog. Therefore, two feasible responses to large caseloads are the addition of judges and greater efficiency in case processing.

Further expansion of the Minnesota Supreme Court could take place by adding permanent judicial positions, or by increasing the use of judges sitting by designation. In many states, retired or senior judges and active general jurisdiction judges serve in this manner. The addition of manpower, however, would have to be combined with a procedure of sitting in panels or divisions before caseloads would be reduced significantly. The Judicial Counsel of Michigan has commented that "where the service is an individual one, a saving in time can be effected by increasing the number of judges, but where the service is collective no such gain is possible."

Appellate courts throughout the country have sought to manage burgeoning caseloads by allowing a panel of judges, less than a full court, to hear a case. The use of panels is nearly uniform in intermediate appellate courts. Where panels are used, they typically consist of three judges. While Mr. Halladay advocates adding more judges to the supreme court and having them sit in panels, this argument has not been accepted widely as a means to reduce the caseload of other states' highest courts. Indeed, only twelve state supreme courts currently use panels when deciding a case on

Law Review office) (Minnesota Supreme Court intends to implement both of these procedures).

11. See Flango & Blair, Creating an intermediate appellate court: does it reduce the caseload of a state's highest court?, 64 JUDICATURE 74, 83 & n.29 (1980).

12. See Harmon & Lang, supra note 2, at 56-58. In 1973 the Minnesota Supreme Court was expanded from seven to nine judges by the creation of two additional vacancies. Id.

13. See MINN. STAT. § 2.724(1) (1980) ("When public convenience and necessity require it, the chief justice of the supreme court may assign any judge of any court to serve and discharge the duties of judge of any court.").


Furthermore, many of these courts use panels of more than three judges, since a majority of the full court must decide a case. This requirement reduces the impact panels have in increasing court efficiency by limiting the number of panels that a court could employ.

A variety of procedural efficiencies may help alleviate a backlog problem. Several are already in effect in Minnesota and are discussed in the articles that follow. Some of the solutions used in Minnesota and elsewhere include the reduction of the mandatory jurisdiction of the state's highest court, the use of settlement techniques and case screening, the limitation of materials filed with an appeal, the modification of policies relating to opinion writing and publication, the addition of nonjudicial staff, and the elimination of oral arguments.

An appeal as of right is permitted most often in capital and constitutional cases. In about half of the states, however, appeals as of right are available in most, or all, cases. Presumably, the workload of the state's highest court is reduced by granting the court greater discretion over the cases it will hear. This procedural device obviously has limits, because a certain amount of judicial manpower and energy is expended in determining whether a case should be heard.

Prehearing settlement conferences and case screening conferences are techniques used to limit the scope of the appeal and matters to be reviewed. Far too often, lawyers certify an entire transcript and "shotgun" the appeal. A prehearing settlement conference can facilitate agreement on a narrowed statement of the issues, limit review of the transcript to those portions directly relevant to the agreed-upon issues, and limit the briefs to the stated issues. This procedure can substantially reduce the amount of time spent by the appellate court in each case and may well improve the quality of decisionmaking on the narrowed set of is-

16. See id.
17. See id.
Minnesota already is a pioneer in prehearing settlement conferences, a form of case screening. Throughout the United States, screening and settlement conferences are used more typically at the intermediate appellate court level than by supreme courts. Some appellate courts screen cases and hold settlement conferences in all instances, while others only do so upon request of the parties. Settlement conferences seem to be particularly successful when used in cases that are appealed after a denial or award of monetary damages. Although the evidence is not conclusive, settlement conferences may reduce the number of fully adjudicated appeals heard by an appellate court.

A variety of other experiments have been tried, or are underway, in appellate courts throughout the country. In some instances, courts are permitting expedited appeals when the lawyers agree to limit the issues, to forego oral arguments, to prepare letter briefs, and to file either limited transcripts or no transcripts at all. Modification of policies concerning whether opinions are written or published also can be altered, and may have an impact on judicial workload. New procedures may permit the court to dispose of cases by unpublished opinion, or oral opinion from the bench. These procedures, however, tend to be adopted more at the intermediate appellate court level than by the states' highest courts. Few supreme courts decide a significant number of appeals without written opinions or memorandum opinions, and they tend to be those courts that are most overburdened.

An increasing reliance upon nonjudicial staff seems to be a fact of life for most state supreme courts. Although the traditional arguments regarding the use of central legal staff as opposed to individual law clerks do not apply in Minnesota, where the supreme court uses both, Chief Justice Sheran recently announced that increased reliance on staff will be necessary to meet the problems of burgeoning caseloads. This use of supreme court staff, however, generates concern because too much authority is delegated to personnel who are not politically accountable as are elected or appointed judiciary.

20. S. Wasby, T. Marvell & A. Aikman, supra note 18, at 74-82.
21. Id. at 74.
22. Id. at 82.
Also as a result of its excessive caseload, the Minnesota Supreme Court apparently intends to reduce the number of oral arguments. Nationally, however, more intermediate appellate courts are willing to eliminate some oral arguments than are state supreme courts. A 1976 survey revealed only six state supreme courts that disposed of a substantial minority of cases without oral argument.

Although these efficiencies have been widely adopted, questions remain regarding their efficacy. One commentator has noted:

Procedural reforms have been adopted in many states so that the high court can handle more cases. For example, eliminating the need for oral argument in certain types of cases; decreasing appeals that may be taken to the high court as of right; introducing the use of per curiam, memorandum and unpublished opinions; and instituting pre-hearing units, have all increased judicial efficiency. None of these reforms, however, are as potentially effective as the introduction of an intermediate appellate court into a state's appellate structure. 26

More intermediate appellate courts are being created 27 to solve the states' appellate caseload problems. Of the twenty-nine states with one or more intermediate appellate courts in 1979 28 all but two had either created or expanded those courts since 1966. 29 Nationally, the number of intermediate appellate court judges doubled between 1966 and 1979. 30 Of the ten supreme courts adding judges between 1966 and 1979, nine were in states without intermediate appellate courts. 31

Proposals to establish intermediate appellate courts are supported or opposed for a variety of reasons. A 1969 survey suggests the positive and negative features of such courts. In states that have intermediate appellate courts, the judges of the highest court of those states identified the following benefits of intermediate courts, in order of importance: (1) these courts constitute the best available method for dealing with large backlogs; (2) they can significantly decrease the number of appeals going to the highest courts; (3) they make appeal available for more cases; (4) they pro-

27. An intermediate appellate court can be formed either by the creation of a appellate division of the general jurisdiction trial court, as in New Jersey, New York, and proposed in California, or by the creation of a separate intermediate court. See S. Wasby, T. Marvell & A. Aikman, supra note 18, at 51-57.
29. See id. at 12.
30. See id.
31. See id.
vide a means of appeal at less expense to the litigant; and (5) local districts for appellate divisions reduce the inconvenience to litigants (and usually to their counsel) of traveling long distances to the site of a single central court.

In order of importance, the same judges viewed the drawbacks of intermediate courts to be as follows: (1) they increase the cost to litigants by making an extra appeal necessary in many cases; (2) they increase the length of time between initiation of litigation and its final disposition; (3) maintenance of the three-tier system of courts is more costly to the taxpayers; (4) the system undermines the certainty of precedent as law; and (5) the added court machinery and judicial personnel tend to lower the quality of the appellate judiciary of the state. 32

Although the articles that follow discuss numerous drawbacks of intermediate appellate courts, a recent survey concerning the "problem" of double appeals indicates that the problem is less severe than commonly believed. Approximately 40% of cases heard by intermediate appellate courts in nineteen states are appealed to those states' supreme courts. Only a small minority of those cases, however, are accepted for review by the highest courts of those states. About 15% of those cases in which review is requested are accepted as a matter of discretion. The survey also showed that the highest courts of sixteen states reviewed between 2% and 12% of the cases heard in intermediate appellate courts—the median percentage being 4%. 33 The author of the survey pointed out that the severity of the double appeals problem may have been overstated:

Problems of delay and expense due to a second appellate level are substantial only in cases granted review by the high court. The extra expense is slight when requests for review are denied, as they are in most cases. Counsel can usually submit the same briefs, or slightly revised versions, as those filed earlier in the intermediate court. Oral arguments are rare at the request-for-appeal stage.

The additional delay is not great. Supreme courts do not hear arguments or write opinions concerning requests for appeal, and probably dispose of most requests within a few months. Some statistical information supports this point: in

the early 1970s the time from intermediate court final decision to grant or denial of requests for review averaged about two months in Louisiana and about five weeks in Alabama. Assuming the intermediate court is current, the total time to final decision on appeal is less than the time in an overburdened high court when no intermediate court exists. If an intermediate court were to decide a case in 9 months (a typical period for a court with enough judges), and if the request for appeal were denied in the high court, the total time for the appeal should be less than a year.

The extent of the problem [of double appeals] depends largely on the method used to divide initial appeals between the intermediate and supreme courts. Jurisdictional arrangements that offer the supreme court enough flexibility to bypass the intermediate court in important appeals can almost eliminate second appeals.34

There are several methods of distribution of jurisdiction between intermediate appellate courts and supreme courts. In some cases jurisdiction is split. For example, all criminal matters, constitutional issues, and extraordinary writs may be directed to the supreme court, while all other appeals are sent to the intermediate appellate court, with a second appeal within the discretion of the supreme court. A second method of dividing jurisdiction is to require all appeals, with the possible exception of extraordinary writs, to be filed with the appellate court. The jurisdiction of the supreme court then would be entirely discretionary. This system is usually accompanied by a mechanism that allows the supreme court to bypass the intermediate appellate court in cases of unusual importance. In addition, the system generally includes a process that allows certain cases to be certified to the supreme court before the intermediate appellate court has heard them. A third method of dividing jurisdiction allows the supreme court to exercise discretionary jurisdiction. All appeals are initially filed in the supreme court, which then determines which cases to retain and which cases to refer to the intermediate court of appeals. These methods of dividing jurisdiction35 are intended to reduce the frequency of double appeals and thereby conserve judicial resources. Regardless of the manner in which jurisdiction is divided, all liti-

34. Id. at 23-25.
35. For a discussion of these methods, see S. Wasby, T. Marvell & A. Aikman, supra note 18, at 52-53.
gants should have a clear understanding of the proper routing of an appeal. Jurisdiction should be divided so that those cases likely to end up at the supreme court are filed there originally.

The evidence is not conclusive, but a recent study indicates that after the creation of an intermediate appellate court the caseload of the supreme court decreases for several years.\(^{36}\) It then increases slowly until it reaches the same level that it would have reached if no intermediate court had been established.\(^{37}\) The study also indicates that the creation of a new intermediate court leads to an increase in the number of appeals. This study concludes:

Although it may not be effective as a mechanism to relieve the courts of last resort of case volume, the intermediate appellate court does enable many more litigants to obtain at least one appeal from the trial court decision. The increase in total appellate findings after the creation of an intermediate appellate court indicates that there is a demand for another appellate forum. It is thus on this ground of increasing participation in the judicial system, not on the basis of reducing total case volume, that the institution of intermediate appellate courts should be justified.\(^{38}\)

Although the creation of a new court inevitably will cost taxpayers more money, as will most other solutions, the budget of the judicial branch of government is dwarfed by the budget of most administrative agencies, and certainly by the budget of the legislative and executive branches. Court systems traditionally have been underfunded. Judicial reforms that improve the quality of justice are worthwhile even if their remedial effects only temporarily rectify a problem through modest new efficiencies.

As I indicated at the start of this Introduction, I have no “answer” to the problems of excessive caseload and delay. The judges and lawyers of Minnesota currently are facing a host of such complex issues as new codes of professional ethics, specialization, advertising, problems with lawyer competence, and bar discipline. I can only conclude that the legal community is well served by the insights provided by the three Symposium authors. One should note that all three authors agree that the problem exists and that something must be done. These articles seek to help the bar and bench decide on the best course of action.

\(^{36}\) See Flango & Blair, supra note 11, at 84.

\(^{37}\) See id.

\(^{38}\) Id.