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# MINNESOTA DOES NOT NEED AN INTERMEDIATE APPELLATE COURT

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*Members of both houses of the Minnesota Legislature have recently proposed the establishment of an intermediate appellate court. In this Article, Mr. Halladay discusses the reasons why an intermediate appellate court is unnecessary and suggests alternatives to ease the conditions that many cite to justify its existence. Mr. Halladay concludes that the creation of an intermediate court will increase the judicial bureaucracy of Minnesota and add only more work, delay, and expense to the process of judicial review.*

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## I. INTRODUCTION

At the end of the nineteenth century, the people of Kansas experimented with an intermediate court of appeals to help their “overburdened” supreme court with its administration of justice. The appellate court’s mandate was temporary, and in 1901 it was allowed to expire because the year before the size of the state’s supreme court had been expanded by constitutional amendment

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†† Gratitude is expressed to Michael J. Wahoske, Esq., until recently law clerk to the Hon. Warren E. Burger, Chief Justice of the United States, and now an associate at the firm of Dorsey, Windhorst, Hannaford, Whitney & Halladay, for making sure my statements have some basis in the authority cited.

from three to seven justices.<sup>1</sup> Ninety-five percent of the Kansas bar supported that amendment; they were dissatisfied with the intermediate appellate court because they thought a properly organized and adequately staffed supreme court could do a more effective job.<sup>2</sup>

Kansas recently reestablished an intermediate appellate court,<sup>3</sup> but I agree with those early Kansas lawyers. Their concerns, though voiced at the turn of the century, remain valid today. An intermediate appellate court adds another level of judicial bureaucracy, which means another level of government and expense for litigants and taxpayers.<sup>4</sup> It is a level of bureaucratic muddle and expense that makes me shudder and should not be assumed, at least not until all other options have been fully and fairly tried.<sup>5</sup> I am not against the idea of changes in the present appellate system, but I am totally opposed to the creation of an additional layer of courts that is not absolutely necessary.

## II. SIDE EFFECTS OF AN INTERMEDIATE COURT MAKE ITS CREATION UNDESIRABLE

Supporters of an intermediate court of appeals in Minnesota propose to amend article VI of the Minnesota Constitution, which establishes our judicial system.<sup>6</sup> This article was last amended in 1956,<sup>7</sup> and was incorporated in the ministerial revision of 1974.<sup>8</sup>

Section one of article VI provides that "[t]he judicial power of

1. Comment, *The Kansas Courts of Appeals*, 12 WASHBURN L.J. 378, 382 (1973).

2. *Id.*

3. "On January 10, 1977, there shall be and is hereby established a court of record which shall be known as the court of appeals." Act of July 1, 1975, ch. 178, § 1, 1975 Kan. Sess. Laws 519, 520 (codified at KAN. STAT. ANN. § 20-3001 (Cum. Supp. 1979)).

4. See R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 66 (1976).

5. See *id.* at 67.

6. MINN. CONST. art. VI.

7. See 1957 Minn. Laws 5-8 (proclamation of adoption of amendment to article VI of Minnesota Constitution).

8. See 1975 Minn. Laws XIII-XIV. It is somewhat ironic that from 1857 until 1956, no constitutional amendment would have been necessary to empower the legislature to create an intermediate court of appeals. The language of article VI, section 1 formerly provided for the creation of "such other courts, inferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote." MINN. CONST. of 1857 art. VI, § 1 (amended 1957). The change in phrasing may well have occurred inadvertently when the article was amended to provide for an appointed rather than an elected clerk of the supreme court. See Wolfram, *Notes from a Study of the Caseload of the Minnesota Supreme Court: Some Comments and Statistics on Pressures and Responses*, 53 MINN. L. REV. 939, 943 n.15 (1969).

the state is vested in a supreme court, a district court and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish.”<sup>9</sup> Section two gives the supreme court jurisdiction in remedial cases as “prescribed by law” and “appellate jurisdiction in all cases.”<sup>10</sup>

The proposed amendment<sup>11</sup> would add “court of appeals” to the list of courts in section one of article VI and describe its jurisdiction in a revised section two.<sup>12</sup> The amendment would not change the number of justices serving on the supreme court, but it would allow for an unlimited number of judges on the intermediate appellate bench.<sup>13</sup> Under the proposed amendment, the supreme court would still have “remedial case” jurisdiction as prescribed by the legislature and appellate jurisdiction in all cases, but there would be added a new and populous court of appeals with appellate jurisdiction over all lower courts and other appellate jurisdiction as prescribed by law.<sup>14</sup>

The principal problem for which this amendment is the putative panacea is the supposedly excessive workload that litigants and their appeals have created for our supreme court, resulting in delays or injustice in appellate decisions. In 1976, for example,

9. MINN. CONST. art. VI, § 1.

10. *Id.* § 2. Section two of article VI provides:

The supreme court consists of one chief judge and not less than six nor more than eight associate judges as the legislature may establish. It shall have original jurisdiction in such remedial cases as are prescribed by law, and appellate jurisdiction in all cases, but there shall be no trial by jury in the supreme court.

As provided by law, judges of the district court may be assigned temporarily to act as judges of the supreme court upon its request.

*Id.*

11. H.F. 842, 72d Minn. Legis., 1981 Sess. (provisions of this proposal are virtually identical to those of H.F. 632, 71st Minn. Legis., 1979 Sess.).

12. The proposed amendment would add the following provision to section two of article VI:

The legislature may establish a court of appeals and provide by law for the number of its judges, who shall not be judges of any other court, and its organization and for the manner of review of its decisions by the supreme court. The court of appeals shall have appellate jurisdiction over all courts, except the supreme court, and other appellate jurisdiction as prescribed by law.

H.F. 842, 72d Minn. Legis., 1981 Sess. § 1, subd. 2.

13. *See id.* My discussion is confined to provisions of the proposed constitutional amendment itself. I do note, however, that H.F. 842 also contains certain proposed statutory changes. One of these would reduce the size of the supreme court from nine to seven judges, *see id.* § 14, and another would set the initial size of the intermediate appellate bench at 21 judges and thereafter tie the number of judges to the number of appeals filed.

*See id.* § 3.

14. *See id.*

911 cases were filed with the supreme court.<sup>15</sup> Not counting cases dismissed without decision, the court decided 483 cases on the merits that year, an average of fifty-four per judge.<sup>16</sup> The average time from notice of appeal to decision was fifteen months.<sup>17</sup> Moreover, the general trend has been a yearly increase in the number of filings,<sup>18</sup> which forbodes yet more delay, even if all other factors remain equal.

Proponents of an intermediate court of appeals, of course, think that the way to avoid increasing delays in the appellate process is to interpose another level of judges and their staffs between the trial courts and the supreme court. Although not fully articulated in the proposed amendment,<sup>19</sup> creation of an appellate court is undoubtedly to be coupled with discretionary review of that court's work product by the supreme court. Otherwise, if litigants losing in the intermediate court could appeal as of right to the supreme court, an additional tier of review would only add more work, delay, and expense without economizing on anything.

We should be aware at the outset of some of the side effects of a high degree of discretionary review. Presuming the high court exercises this discretion, it will have fewer cases to review. Among those fewer cases will be a higher percentage of so-called "important" ones. This will mean greater prestige for the court and its members,<sup>20</sup> but increasing prestige is hardly a good reason to add a tier of bureaucracy.

Another related effect is a possible change in the court's perception of its role. Requiring litigants to petition for high court review encourages the development of a more policy-oriented judiciary.<sup>21</sup> Litigants attempting to cajole the court into hearing their cases will emphasize not only that the intermediate court missed the point, but also that the case presents opportunities for

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15. See Marvell & Kuykendall, *Appellate Courts—Facts and Figures*, STATE COURT J., Spring 1980, at 11. "Filings" as here defined amount to notices of appeal. See *id.* at 34 n.8.

16. See *id.* at 11.

17. See *id.* at 14.

18. From 1971 to 1976, filings increased on an average of nine percent per year. *Id.* at 10. There is some indication, however, that the rate of increase may be slowing. See *id.*

19. The proposed amendment states that "[t]he legislature may establish a court of appeals and provide by law . . . for the manner of review of its decisions by the supreme court." H.F. 842, 72d Minn. Legis., 1981 Sess. § 1, subd. 2. Note that H.F. 842 contemplates the enactment of a statutory provision for discretionary review by the supreme court of the intermediate court's decisions. See *id.* § 12.

20. See Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 979 (1978).

21. See *id.* at 983-84.

the court to "make new law" through pronouncements that will have an impact beyond the legal confines of that particular case. The upper chamber will respond to this importuning. Courts that exercise a high degree of discretion over the cases they review tend to write longer opinions that cite more cases and law review articles,<sup>22</sup> and have more separate concurrences and dissents.<sup>23</sup> These courts also more often reverse lower court decisions,<sup>24</sup> and they tend, in general, toward a philosophy of judicial activism.<sup>25</sup> Do we want to encourage this in Minnesota?

These changes wrought by discretionary review are only part of the pragmatic pig in the judicial poke that we would be buying in the creation of an intermediate appellate court. An intermediate court would not necessarily reduce the time from trial court decision to final disposition. Some of the slowest courts in the nation are intermediate appellate courts.<sup>26</sup> For the many litigants who seek supreme court review of an intermediate decision, the time and certainly the expense from trial to final disposition will increase with the addition of another step in the judicial process. Moreover, there is always Parkinson's Law<sup>27</sup> to contend with. Parkinson's Law states:

Work expands so as to fill the time available for its completion. General recognition of this fact is shown in the proverbial phrase "It is the busiest man who has time to spare." Thus, an elderly lady of leisure can spend the entire day in writing and dispatching a postcard to her niece at . . . [Mankato or Little Falls]. An hour will be spent in finding the postcard, another in hunting for spectacles, half an hour in a search for the address, an hour and a quarter in composition, and twenty minutes in deciding whether or not to take an umbrella when going to the mailbox in the next street. The total effort that would occupy a busy man for three minutes all told may in this fashion leave another person prostrate after a day of doubt, anxiety and toil.

Granted that work (and especially paperwork) is thus elastic in its demands on time, it is manifest that there need be little or

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22. *See id.* at 991-93, 997.

23. *See id.* at 997.

24. *See id.* at 995.

25. *See id.* at 1001.

26. *See generally* Martin & Prescott, *State Appellate Courts: The Problems of Delay*, STATE COURT J., Summer 1980, at 9-14, 44-45. The Illinois Appellate Court, First District and the Indiana Court of Appeals, for example, take more than two years to complete nearly one-third of their cases. *See id.* at 10.

27. *See* C. PARKINSON, *PARKINSON'S LAW* (1957).

no relationship between the work to be done and the size of the staff to which it may be assigned. A lack of real activity does not, of necessity, result in leisure. A lack of occupation is not necessarily revealed by a manifest idleness. The thing to be done swells in importance and complexity in a direct ratio with the time to be spent.<sup>28</sup>

There is statistical proof of the validity of Parkinson's Law with respect to judicial time. The Appellate Justice Improvement Project conducted by the National Center for State Courts discovered that appellate courts with more filings per judge process cases more quickly than courts with relatively fewer cases per judge.<sup>29</sup>

There is another aspect of Parkinson's Law with which we ought to be concerned, which is the Law of the Rising Pyramid.<sup>30</sup> Imagine an appellate court consisting of a single judge, whom we may call ABLE, who finds himself overworked. Whether this overwork is real or imaginary is irrelevant; we may know that ABLE's problem only results from his own decreasing energy—perhaps a normal symptom of age. There are only three remedies for this real or imaginary overwork: (1) ABLE may resign; (2) ABLE may divide the work with a colleague called BRAVO; or (3) he may enlist the aid of two assistant judges, whom we may call CITE and DATA. There is probably no instance in history of ABLE choosing any but the third alternative. By resignation, all pension rights and perquisites of office would be lost. The appointment of BRAVO on the same level would bring in a rival. So ABLE will elect to have CITE and DATA as his inferiors, thereby adding to his stature. Further, by dividing the work into two categories as between CITE and DATA, ABLE will have the merit of being the only one who comprehends them both. To have CITE as a single assistant would have been impossible because this would divide the work with ABLE, and CITE would assume status almost equal to that which had been refused in the first instance to BRAVO. This status is emphasized even more if CITE is ABLE's only successor.

Subordinates must *always* number two or more. Then, when CITE complains in turn of being overworked, as he certainly will, ABLE can, with the wholehearted concurrence of CITE, procure the appointment of two assistants to him. But ABLE can then avert internal friction only by advising the appointment of two

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28. *Id.* at 2.

29. See Martin & Prescott, *supra* note 26, at 13.

30. See C. PARKINSON, *supra* note 27, at 4-7.

more assistants to help DATA, whose position is quite similar to that of CITE. With the recruitment of E, F, G and H, the tenure of ABLE is made certain. Seven judges are doing what one did before. Seven judges now make so much work for each other that all are fully occupied, and each needs two more assistants.

According to the National Center for State Courts, the Law of the Rising Pyramid is already manifesting itself in those states that have intermediate court judges.<sup>31</sup> In 1966 the National Center counted 265 intermediate court judges. Even excluding from the tally judges named to courts created after 1966, the number of intermediate appellate judges rose to 341 in 1974 and 443 in 1979.<sup>32</sup> Adding in the judges of appellate courts created after 1966, the total number of intermediate appellate judges increased to 415 in 1974 and 583 in 1979.<sup>33</sup> Substantial staffs of para-judges—law clerks and staff attorneys—have accompanied the new judges and new courts.<sup>34</sup>

Creation of an intermediate appellate court undoubtedly will also result in the making of much more judicial law. Proponents of an intermediate court divide the appellate task into two functions: the reviewing of individual cases for compliance with legal norms,<sup>35</sup> and the development of the law for general system-wide application.<sup>36</sup> Intermediate courts are readily relegated to performance of the former function.<sup>37</sup> Sooner or later, however, the intermediate court will begin "to assist the highest court and legislature in making needed changes in common law doctrine and statutory provisions."<sup>38</sup> Our present supreme court makes no apology for departing from a doctrine of long standing in the guise of the "coordination of legal philosophy with . . . new and commanding facts . . . in order to satisfy the imperative demand for realistic judicial treatment of issues in their own actual environment rather than a synthetic one made from the materials of dis-

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31. See Marvell & Kuykendall, *supra* note 15, at 35.

32. See *id.*

33. See *id.*

34. See *id.* at 37.

35. See ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 4 (1977) (Approved Draft) [hereinafter cited as ABA COMM'N ON STANDARDS]; Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459, 460 (1975).

36. See ABA COMM'N ON STANDARDS, *supra* note 35, at 4.

37. See *id.*

38. Hopkins, *supra* note 35, at 478.

carded doctrine."<sup>39</sup> If this philosophy is implemented by panels of an intermediate appellate court sitting in uncoordinated divisions without help from the supreme court, conflicts will abound and litigation will proliferate, as in the federal system.

### III. ALTERNATIVES TO AN INTERMEDIATE COURT MAKE ITS CREATION UNDESIRABLE

The attempt to reduce the caseload of the supreme court by creating an intermediate court of appeals and allowing for discretionary review rests upon the premise that not all cases deserve a decision on the merits rendered by the full supreme court. I have no quarrel with this basic assumption. No unqualified right of appeal has ever been held to fall within the due process clause of the United States Constitution,<sup>40</sup> nor does our state constitution confer an individual right of appeal.<sup>41</sup> The vast majority of cases in which the alleged error asserted on appeal turns on a credibility determination or on the substantiality of the evidence do not merit much, if any, appellate consideration beyond a motion for a new trial or judgment n.o.v. directed to the trial court.<sup>42</sup> Proponents of an intermediate court of appeals, however, leap from this premise to the conclusion that an intermediate court is the proper remedy. This conclusion ignores a more efficient solution: focusing on the structure and procedure of the appellate court that we already have.

In 1973, the National Center for State Courts conducted a study of the appellate system in Minnesota at the invitation of Chief Justice Oscar R. Knutson.<sup>43</sup> The study did not consider the creation of an intermediate appellate court,<sup>44</sup> but instead concentrated on the changes that could be made in the supreme court to improve appellate justice in the state. One of its major recommendations was that the court sit in three-judge, rotating panels<sup>45</sup> for all but the most significant cases.<sup>46</sup> This has never been fully tried or im-

39. *Park Constr. Co. v. Independent School Dist. No. 32*, 209 Minn. 182, 187, 296 N.W. 475, 478 (1941).

40. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

41. *See In re O'Rourke*, 300 Minn. 158, 220 N.W.2d 811 (1974).

42. *See id.* at 167 n.7, 220 N.W.2d at 817 n.7.

43. *See NATIONAL CENTER FOR STATE COURTS, STUDY OF THE APPELLATE SYSTEM IN MINNESOTA* (1974) [hereinafter cited as NCSC STUDY].

44. *See id.* at 44.

45. *See id.* at 41.

46. *See id.* at 32.

plemented.

There are several advantages to a properly instituted panel system. The use of panels reduces the number of times each justice must sit during the term, thereby freeing up additional days for thinking, writing opinions, or involvement in other matters.<sup>47</sup> It also may mean that each justice will have fewer cases to consider. While the number of majority opinions each justice would write would remain approximately the same as if all cases were heard en banc,<sup>48</sup> a justice would have much more time to work on each opinion because there would be fewer opinions of others to review. Continuing the practice of having retired justices or appointed district court judges sit as visiting members would further alleviate the burden on full-time members of the court.<sup>49</sup>

The court's use of the panel system to date has been far from complete. Sitting in panels for argument but delivering opinions ostensibly en banc does not take full advantage of the economics of the use of panels.<sup>50</sup> In the average case, in which no new trails are blazed through legal thickets, there is no need to circulate an opinion for the approval of each active member of the court. Such en banc approval need only be sought in cases in which a screening device smokes out those panel decisions that affect the holding of a prior decision or make new law.<sup>51</sup>

The objection is occasionally made that supreme courts should

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47. The 1973 study estimated that, based on the then seven-member court, sitting in panels of three would provide up to 48 additional workdays per justice per year. *Id.* at 29. Leflar states that "[i]f a seven-judge court sat in two panels instead of one . . . experience has proved that it can increase [its] output at least by half." R. LEFLAR, *supra* note 4, at 67.

48. This is presuming that opinion assignments are made to the extent possible with an eye toward having each justice responsible for about the same number of majority opinions.

49. Under the Minnesota Constitution, district court judges "may be assigned temporarily to act as judges of the supreme court upon its request." MINN. CONST. art. VI, § 2. The legislature also has provided that the supreme court "may by rule assign temporarily any retired justice of the supreme court or one district court judge at a time to act as a justice of the supreme court." MINN. STAT. § 2.724(2) (1980). The court may also appoint any resigned justice to act as a commissioner of the supreme court to assist the court in any of its duties. *See* MINN. STAT. §§ 480.21(1), 490.025(5) (1980).

50. I recognize that there is some question whether a panel of three will meet the statement in *State ex rel. R.R. & Warehouse Comm'n v. Chicago, M. & St. P. Ry.*, 38 Minn. 281, 37 N.W. 782 (1888), *rev'd on other grounds*, 134 U.S. 418 (1890): "The supreme court . . . can exercise its judicial functions only when a quorum is present." 38 Minn. at 294, 37 N.W. at 784. A constitutional amendment providing for three-judge panels may be required. At worst, panels of five could sit, but this would not achieve the same efficiency of operation.

51. The United States Court of Appeals for the Seventh Circuit, to cite one example,

sit only en banc,<sup>52</sup> but former Justice Leflar's response to that criticism is sound:

If it be objected that cases serious enough to be appealed should be tried by the whole court, the alternative of appeal to an intermediate court ought to be kept in mind. In the intermediate courts of nearly all the states that have them, the bulk of the cases are heard by three-judge panels. In the federal courts, of course, there are en banc hearings at the intermediate level. This could happen in state intermediate courts too, but it seldom does. In any event, only a limited number of cases will reach the highest court. In general, these will be the same cases that, because of their importance, would be reserved for en banc consideration by the entire court if there were no intermediate court and the top court sat in divisions. The point is this: cases that would be decided by divisions of the top court are the same ones that would be heard by an equally small or smaller number of judges in an intermediate court; cases that would be left for en banc hearing in the top court would be the ones sent up to the top court if there were an intermediate court.<sup>53</sup>

Using panels in this fashion allows the benefits of an intermediate court of appeals without the burdens of its creation. There would still be, for example, a method for screening cases before they were heard by the entire supreme court. Decisions of panels could be appealed by petition for rehearing with a suggestion for a rehearing en banc; a suggestion that the en banc court would be free to reject if sufficient members saw no merit to it. Conflicts

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regularly sits in panels and utilizes this system of referral to the active members of the court:

A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule of procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or a majority did not favor) a rehearing in banc on the question of (e.g., overruling *Doe v. Roe*).

7TH CIR. R. 16(e). I note further, as an aside, that reference to federal appellate courts is not inapposite. The Minnesota Supreme Court Advisory Committee had as its "object . . . that procedure in the Minnesota Supreme Court may come as near to that prescribed for the U.S. Court of Appeals as is feasible." MINN. R. CIV. APP. P., Preliminary Comment.

52. See ABA COMM'N ON STANDARDS, *supra* note 35, at 7-9.

53. R. LEFLAR, *supra* note 4, at 67-68.

between panels could be minimized by a rule incorporating some full court reference procedure, as discussed above,<sup>54</sup> and the possibility of an en banc rehearing would provide a safety valve. On those important cases which the court decided to rehear en banc, it would not only have the benefit of an opinion from the panel,<sup>55</sup> it would have the additional benefit of the actual participation, both at oral argument and in conference, of those justices who heard the appeal the first time.

The use of panels also increases the utility of another possible response to the caseload problem: the addition of judges. When a court sits en banc, an additional member may lighten the per-judge opinion load slightly, but his or her presence will not affect the number of cases each judge must sit on and prepare for. Thus, merely adding more judges to an en banc court "without making structural or procedural changes will not automatically guarantee that processing time will be substantially reduced."<sup>56</sup> But in a court that hears many of its cases in rotating, three-judge panels, the addition of judges reduces cases per judge and sittings per judge, as well as the per-judge opinion load. Of course, this same effect is augmented when a judge is appointed on a temporary or visiting basis, and this makes available the effective option of dealing with backlog on a short-term basis by temporarily increasing the membership of the court.<sup>57</sup> If, after the panel system is fully operational, it becomes apparent that more judges are needed, adding them and their staffs to an existing court will be more efficient and less costly than creating a separate court, with its own largely duplicative bureaucracy.<sup>58</sup>

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54. See note 51 *supra* and accompanying text.

55. This benefit alone, however, would not be sufficient to justify creation of another tier of review:

It is true that the intermediate argument and decision that would serve as a preview might be attractive to judges on state supreme courts and induce some of them to encourage the creation of intermediate courts. The fact remains, however, that such a preliminary to the top-court hearing, however helpful, does not justify the delay, the extra expense to the parties of an intervening procedure, and the cost to the taxpayers of maintaining or enlarging an intermediate court to take care of the protracted litigation.

R. LEFLAR, *supra* note 4, at 75.

56. Martin & Prescott, *supra* note 26, at 13.

57. These temporary additional members could serve in the posture of visiting district court judges, sitting on panels but not participating in en banc decisions. In this way, the membership of an en banc court could be kept at nine for more efficient en banc processing, and for the traditionalists who are against a larger court.

58. I would think it possible to add as many as 18 judges to the present court, if such a radical move became necessary, and yet keep the size of the en banc court at nine. For

Efficiency also would be increased by changes more procedural in nature than the above suggestions for internal structural reform. Cases can be more effectively screened and processed. For example, the supreme court need not entertain every appeal that is filed. If the court is overburdened with frivolous appeals or unimportant cases, the justices have the power to correct these problems. Rule 103.04 of the Minnesota Rules of Civil Appellate Procedure states that the supreme court can take any action that the interests of justice may require in an appeal.<sup>59</sup> Under this power, the justices can simply say: "Appeal denied."<sup>60</sup> Although the court has held that a legislative regulation of appeals does not violate the Minnesota Constitution,<sup>61</sup> it has ruled that this is but a matter of "comity," and that nothing prevents it from keeping the exercise of appellate jurisdiction entirely within its own control.<sup>62</sup> If one reason for the overwork is the supposed need to review and decide unimportant matters with little monetary, precedential, or human value, I suggest that the need is self-imposed and can be eliminated.

Of those cases that survive the initial screening for frivolity, many could be disposed of on the briefs alone without oral argument.<sup>63</sup> These could be assigned to panels, as would the vast majority of all argued cases. Those few cases of such significance to merit an en banc decision immediately could be so designated. This Article is not the place to recommend the criteria for selection, but I would think a case would have to be important indeed

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most of its cases, the court would sit in panels of three, with one member of the en banc court sitting with two judges who would sit only on panels. Creation of such an intermediate bench *within* the present court structure may well be the wave of the future. See notes 76-77 *infra* and accompanying text.

59. "The Supreme Court upon an appeal may reverse, affirm, or modify the judgment or order appealed from, or take any other action as the interests of justice may require." MINN. R. CIV. APP. P. 103.04(1).

60. See *id.* 133.01(1), 136.01(2). Note, however, that extensive use of this power could have some of the same "side effects" discussed earlier. See notes 21-25 *supra* and accompanying text.

61. See *Smith v. Illinois Cent. R.R.*, 224 Minn. 52, 68 N.W.2d 638 (1955); *Holmes v. Campbell*, 12 Minn. 221, 12 Gil. 141 (1867); *Tierney v. Dodge*, 9 Minn. 166, 9 Gil. 153 (1864).

62. See *State v. M.A.P.*, 281 N.W.2d 334 (Minn. 1979) (*per curiam*); *State v. Wingo*, 266 N.W.2d 508 (Minn. 1978); *In re O'Rourke*, 300 Minn. 158, 220 N.W.2d 811 (1974).

63. Cf. MINN. R. CIV. APP. P. 134.07, 135 (providing for "nonoral" consideration of some cases by panels). Note the recent date of the amendment of these rules. Order Promulgating Amendments to the Rules of Civil Appellate Procedure, Finance and Commerce, Dec. 12, 1980, at 12, col. 2.

to bypass the normal panel process. The present rules need only a little fine tuning, not a new court.

Furthermore, our supreme court could well go further than it has in abandoning essay writing. Twelve years ago I recommended that the supreme court ameliorate the difficulty of opinion writing by simply stopping. There was then, and is now, no requirement of written opinions. A statute<sup>64</sup> requires the court to "give its decision in writing,"<sup>65</sup> but nothing in the law obliges the court to write out an opinion or give its reasons, even if the legislature had any business telling it to do so. The supreme court has said many times that it need not detail what the evidence is in any appeal in which the question is principally one of facts and the facts support the decision or verdict below.<sup>66</sup> The court, however, does not always heed its own pronouncements. In *Caroga Realty Co. v. Tapper*,<sup>67</sup> for example, although the court said, after five pages of history, that it was not within its province "to go into an extended discussion of the evidence to prove or demonstrate the correctness of the findings of the trial court,"<sup>68</sup> it went on for ten more pages of exactly such an extended discussion,<sup>69</sup> including two special concurrences.<sup>70</sup>

As long ago as 1865,<sup>71</sup> the supreme court told the Minnesota Senate that the court would not act as the senate's adviser.<sup>72</sup> The supreme court does not have to be the unnecessary adviser of law-

64. MINN. STAT. § 480.06 (1980).

65. The statute provides:

In all cases decided by the court, it shall give its decision in writing, and file the same with the clerk, together with headnotes, briefly stating the points decided. A copy of such headnotes shall be furnished by the clerk, without charge, to such proprietors of daily newspapers as may desire them for free publication. Decisions may be rendered and judgments entered thereon in vacation as well as in term.

*Id.*

66. *See Dempsey v. Meighen*, 251 Minn. 562, 572, 90 N.W.2d 178, 184 (1958). The court stated:

In discussing the question of the weight and sufficiency of the evidence, it is unnecessary to further detail the evidence in order to demonstrate the absolute correctness of the trial court's findings of fact. . . . This court's duty is performed when it has considered all of the evidence in the light most favorable to the trial court's findings and has determined whether the findings are reasonably sustained by the evidence as a whole.

*Id.* (citations omitted).

67. 274 Minn. 164, 143 N.W.2d 215 (1966).

68. *Id.* at 170, 143 N.W.2d at 220.

69. *See id.* at 170-80, 143 N.W.2d at 220-26.

70. *See id.* at 180, 143 N.W.2d at 226.

71. *See In re Application of the Senate*, 10 Minn. 78, 10 Gil. 56 (1865).

72. *See id.* at 81, 10 Gil. at 58.

yers or the public in 1981 or beyond. Where a per curiam opinion will do, there is no need to draft an extended opinion in the grand style. The average length of opinions has increased during the twentieth century,<sup>73</sup> and on the whole, this is regrettable and unnecessary. "If I had more time," the saying goes, "I'd have written a shorter letter." The supreme court should be given more productive hours by having more judges on the same court and by making better use of panels and screening devices.

#### IV. CONCLUSION

In short, if a change in the appellate system is necessary, there are ways to achieve the benefits of an intermediate court of appeals without the burdens of its creation. In the past, Minnesota has been a leader in appellate improvements.<sup>74</sup> Rather than unquestioningly following those states that in recent years have jumped on the intermediate court bandwagon,<sup>75</sup> Minnesota should continue to be the band leader. Reforms that use the present trial/appellate structure, rather than being reactionary, are in fact forward-looking. Back in 1967, the American Judicature Society published an editorial that seemed to me historic.<sup>76</sup> Without assessing cause and effect, the editorial agreed that the number of judges must increase as the volume of judicial work increases. But the editor asked, as I think we must, "Why another *court . . .*?" The editorial contained its own answer. It said:

We predict that one day the Model Judicial Article will be revised to provide for a two-level judicial structure—a single state-wide Court of Justice with a unified trial division which may be referred to in those very words as the Trial Division, and a unified appellate division which may be known as the Supreme Court, the Court of Appeals or simply as the Appellate Division of the Court of Justice. . . . The Appellate Division will be divided into as many three-judge panels as the volume of appellate work requires, and these will sit at such times and places as convenience and efficiency dictate. . . . All appeals will be filed in the one Appellate Division and ad-

73. See Kagan, Cartwright, Friedman & Wheeler, *supra* note 20, at 991 n.71.

74. See NCSC STUDY, *supra* note 43, at 1 (referring to supreme court's use of administrator and commissioners).

75. At present, 33 states have created intermediate courts, most rather recently. In 1911, intermediate courts existed in 13 states, and that number did not change until 1957. Eight such courts were created in the 1970's. See Marvell & Kuykendall, *supra* note 15, at 11.

76. *The Case for a Two-Level State Court System*, 50 JUDICATURE 185 (1967).

ministratively assigned to the individual appellate panel which can most advantageously handle them. The resolving or preventing of conflicting decisions by different panels within the court will be worked out under administrative rules, perhaps by means of a hearing before a seven-man tribunal consisting of two three-man panels and the presiding judge. Selected cases of great public importance might be similarly heard, but no litigant will have a right to a hearing before more than three judges, nor to a second appeal.

Even states that are not working on judicial reorganization are no longer establishing new trial courts to cope with trial court backlogs. They are adding more judges to existing trial courts. Why, then, is this out-moded device still the standard remedy for congestion in our courts of last resort, and whose interests does it serve?

Not the litigants. Details of judicial organization and administration are of no concern to them as long as their cases are heard promptly and decided fairly, and if there is a question about the latter point, they want that question resolved promptly and fairly. This the two-level court system is well equipped to do. There is a psychological benefit in having every appellate decision handed down by and in the name of the court of last resort, so that no litigant need ever be told, "Sorry, your case isn't big or important enough to be heard by the Supreme Court. . . ."

Not the lawyers. They certainly have no professional interest in arguing cases in an intermediate court rather than the court of last resort. They may have a short-range financial interest in the additional practice that double appeals occasionally provide, but in the long run the lawyer's best interest, like the litigant's, is in getting each case heard, decided, closed and paid for, and moving on to the next one. Decisions of an intermediate court are of doubtful value as precedents, and in a two-level court system there would be none.

Not the judges. Some present supreme court judges might, indeed, look askance upon the dilution of their power and prestige that might be thought to follow if they were to be one of a dozen or 15 judges of equal rank rather than one of seven or nine at the top of the heap. This would be offset by the higher status that would be given to those who would otherwise be only intermediate appellate judges. However, considerations of personal prestige and status are really not worthy of very much of anybody's attention or concern, and the important thing is that the judges would benefit as much as anybody from having a simplified and efficient judicial organization.

Certainly least of all the taxpayers. Even though the number of judges is the same, if they work in one court instead of two, there is only one court's administrative and clerical staff, and the second court staff is one the taxpayers will be glad to do without. With the natural trend in government constantly toward increased complexity, more employees and more expense, a move toward simplification, economy and efficiency in one branch of government cannot fail to be welcomed.<sup>77</sup>

The case is made *against* creating a new court of appeals and *for* more efficient and effective use of our present appellate system. That is what those Kansas lawyers voted for at the turn of the century. That is what I would vote for now. The very latest data from the American Judicature Society warns us to beware: "[C]ourt systems are like highways . . . the more we build, the busier they are."<sup>78</sup>

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77. *Id.* at 186-87.

78. Flango & Blair, *Creating an intermediate appellate court: does it reduce the caseload of a state's highest court?*, 64 JUDICATURE 75, 77 (1980) (brackets in original).