

*Appellate Court Performance Standards Commission  
and the National Center for State Courts*

New Mexico Supreme Court  
Santa Fe, New Mexico

Robert N. Baldwin  
State Court Administrator  
Supreme Court of Virginia  
Richmond, Virginia

The Honorable Wallace P. Carson, Jr.  
Chief Justice  
Supreme Court of Oregon  
Salem, Oregon

The Honorable Martha Craig Daughtrey  
U.S. Circuit Judge  
U.S. Court of Appeals, Sixth Circuit  
Nashville, Tennessee

The Honorable Martin M. Doctoroff  
Judge  
Michigan Court of Appeals  
Southfield, Michigan

The Honorable Sarah D. Grant  
Judge, Arizona Court of Appeals  
Division One  
Phoenix, Arizona

John E. Mueller  
Nielsen, Merksamer, Parrinello,  
Mueller & Naylor  
Mill Valley, California

Larry L. Sipes  
President Emeritus  
National Center for State Courts  
Williamsburg, Virginia

Ella M. Williams  
Retired Chief Clerk  
Michigan Court of Appeals  
Lansing, Michigan

Catherine O'Hagan Wolfe,  
Clerk of the Court  
New York Supreme Court  
Appellate Division  
New York, New York

Appellate Court Performance  
Standards Commission

**ROGER A. HANSON**  
*Project Director*

June 1999

This report was developed under a grant from the State Justice Institute, grant numbers SJI-93-091-B-261 and SJI-93-091-B-261-P96-1. The opinions and points of view expressed in this report are those of the authors. The opinions expressed do not necessarily represent the official position or policies of the State Justice Institute.

Standard 1.1 Opportunity for Multi-Judge Review.....	1
Standard 1.2 Develop, Clarify, and Unify the Law.....	2
Standard 1.3 Error Correction.....	3
Standard 1.4 Extraordinary Functions of Appellate Court System.....	4
<b>II. Promoting the Rule of Law.....</b>	<b>5</b>
Standard 2.1 Quality of the Judicial Process.....	5
Standard 2.2 Clarity of Decisions .....	6
Standard 2.3 Designation of Precedential Authority.....	7
Standard 2.4 Timeliness.....	8
<b>III. Preserving the Public Trust.....</b>	<b>10</b>
Standard 3.1 Accessibility .....	10
Standard 3.2 Public Access to Decisions.....	11
Standard 3.3 Public Education and Information .....	11
Standard 3.4 Regulation of the Bench and Bar .....	12
<b>IV. Using Public Resources Efficiently .....</b>	<b>13</b>
Standard 4.1 Resources.....	13
Standard 4.2 Case Management, Efficiency, and Productivity.....	15
Standard 4.3 Assistance to Trial Courts.....	16
<b>Summary .....</b>	<b>17</b>

**II. Promoting The Rule of Law..... 40**

Guidepost 2.1.1 Rendering Quality in All Cases ..... 41

Guidepost 2.2.1 Written Decisions ..... 46

Guidepost 2.3.1 Publication Rates ..... 48

Guidepost 2.3.2 Focus Group Examination of Precedential Authority49

Guidepost 2.4.1 Time to Resolution ..... 51

Guidepost 2.4.2 Time Required for Steps in the Process..... 53

Guidepost 2.4.3 Size and Age of the Court Backlog ..... 55

Guidepost 2.4.4 Caseload Composition and Timeliness..... 56

**III. Preserving The Public Trust ..... 60**

Guidepost 3.1.1 Responsiveness to Individuals with Special Needs .. 60

Guidepost 3.1.2 Minimizing Court Costs ..... 63

Guidepost 3.1.3 Comprehension of the Legal Process and Dismissals65

Guidepost 3.2.1 Retrieval of Decisions ..... 66

Guidepost 3.3.1 Survey of the Public’s Beliefs about the Court..... 68

Guidepost 3.4.1 Survey of the Bench and Bar ..... 70

**IV. Using Public Resources Efficiently ..... 73**

Guidepost 4.1.1 The Quantitative Analysis ..... 76

Guidepost 4.1.2 The Qualitative Analysis ..... 80

Guidepost 4.1.3 Updating and Adjusting Case Weights..... 81

Gudiepost 4.2.1 Clearance Rates ..... 82

Guidepost 4.2.2 Screening and Case Differentiation ..... 83

Guidepost 4.3.1 Facilitating the Work of Trial Courts ..... 86



Let me tell you what we have tried to do and what I believe is our unique contribution. We have tried to put the position of state appellate courts into the structure of state government as a whole and to suggest the special role of state appellate courts in that context. Hence, the mission of appellate state court systems is described neither in the abstract, nor in isolation, but instead it is defined in terms of the realities of the state governmental process.

From that perspective, we suggest that the central goals of state appellate court systems can be divided into four performance areas: (1) protecting the rule of law, (2) promoting the rule of law, (3) preserving the public trust, and (4) using public resources efficiently. In our opinion, all state appellate courts should strive to do well in these four areas. As a way of illustrating what good performance means, we have gone further and have formulated 15 standards of performance pertaining to the four performance areas. Certainly, a textbook could be written on the meaning of each area, if not on each standard. Our contribution is that we have tried to highlight the essential aspects of these areas and standards to facilitate their application in real-world, decision-making situations.

There is a common focus to the substance of the standards. We have attempted to emphasize standards for what appellate

procedures, caseload management, administrative services and facilities, technology). However, the *Appellate Court Performance Standards* focus primarily on basic functions of appellate courts that are linked to overarching goals of what appellate courts should be doing to serve the rights and interests of litigants, the public, the bar, and policy makers. Our audience certainly includes appellate courts, but we have tried to formulate standards that ask courts to look outward rather than inward and to consider how their operations can best contribute to just decisions. In addition, we consulted the literature on court administration, although we found it to be less substantial on appellate courts than we would have liked. Hence, in a real sense, we relied primarily on our own experience and understanding in producing the following product for consideration.

Finally, we have tried to offer our audience some concrete ways of measuring efficiency, timeliness, quality, clarity and other important components of appellate justice. Systematic information is needed to determine how closely an appellate court system surpasses, approximates, or falls short of standards of performance. We call our suggestions “Guideposts” because they are intended to be flexible enough that every appellate court can tailor them to meet their own particular circumstances. Hence, we hope that appellate courts view the 27 proposed Guideposts as useful tools and use them to begin to develop



legislative, and judicial branches acting within the basic framework of separate and equal branches of government.

The legislature formulates public policy through the enactment of laws consistent with the constitution. The executive branch implements and enforces the laws by proclamation and administrative action. The judiciary applies and interprets constitutional provisions, legislative enactments, and executive activities. Working together within a constitutional system of checks and balances, the three branches govern.

Changing social, economic, and political conditions in which governments operate make the task of governing complex and demanding. Moreover, governments must protect and promote the rule of law within the limits of available public resources.

### **The Role of the Judicial Branch of Government**

The primary role of the judiciary within this framework of shared governmental responsibilities is to provide an accessible forum for the just resolution of disputes in accordance with applicable civil and criminal laws. In contrast to private dispute resolution processes, courts are responsible for protecting both the interests of the immediate parties to the dispute and the interests of society in the fair, timely, and consistent rendering of

The judicial branch is divided into the trial and appellate court systems within the constitution. Trial courts have initial responsibility for adjudicating the nearly 100 million civil and criminal cases filed annually.<sup>2</sup> To carry out its functions while handling this substantial volume of litigation, trial courts have established standards for assessing their performance.<sup>3</sup>

The role of appellate court systems is to provide review of decisions of lower tribunals and, as the final arbiter of disputes, to shape and define the law. Both intermediate appellate courts and courts of last resort are responsible for ensuring that divergent decisions of trial courts are reconciled.

State appellate court systems vary considerably in structure, jurisdiction, and method of judicial selection. Forty states have a court of last resort and an intermediate appellate court. The District of Columbia, Puerto Rico, and ten states have only a court of last resort (Delaware, Maine, Montana, Nevada, New

---

<sup>1</sup> Stephen L. Carter, “Is Democracy a Threat to Judicial Independence?” *1993 Forum for State Court Judges*, sponsored by The Roscoe Pound Foundation, 1993.

<sup>2</sup> Brian J. Ostrom and Neal B. Kauder, *Examining the Work of State Courts*, 1993. Williamsburg: National Center for State Courts, 1995.

<sup>3</sup> *Trial Court Performance Standards*. Williamsburg: National Center for State Courts, 1990.

and retains some, while transferring others to the intermediate appellate court (Hawaii, Idaho, Iowa, Mississippi, Oklahoma, South Carolina).<sup>4</sup>

Each state's substantive law also has an impact on the route cases take. For example, appeals in death-penalty cases are taken directly from the trial courts to courts of last resort in almost all states, although in Alabama, Ohio, and Tennessee, death-penalty cases are appealed directly to their respective intermediate appellate courts. Additionally, state legislatures and executives often designate appellate courts as the forum for the determination of some original proceedings, including the validation of election ballots. Administrative responsibilities relating to attorney conduct also are assigned usually to the

---

<sup>4</sup> The geographic jurisdiction of intermediate appellate courts is also an important element of the landscape. Some state intermediate appellate courts have statewide jurisdiction (Alabama, Alaska, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee Court of Criminal Appeals, Utah, Virginia), while others have formal regional district jurisdictions (Arizona, California, Florida, Illinois, Louisiana, Missouri, New York, Ohio, Texas, Washington) and some have statewide jurisdiction, but multiple sites (Oklahoma, Tennessee Court of Appeals, Wisconsin).

tent, fair, and timely to litigants, attorneys, judges, and the public. Standards of performance that clarify the role of appellate court systems and the ways that they should perform their responsibilities help promote confidence in these courts. Appellate court systems can foster the trust and confidence of their constituents by striving to meet the following suggested standards.

## Commentary

Our judicial system recognizes that decisions made by lower tribunals may require modification. American jurisprudence generally requires the litigants to be afforded a reasonable opportunity to have such decisions reviewed by an appellate court. Appellate court systems, through the process of multi-judge review, achieves justice by: (1) correcting prejudicial errors, (2) developing, clarifying, and unifying the law in a sound and coherent manner, and (3) furnishing guidance to judges, attorneys, and the public in the application of constitutional and statutory provisions and common law, thus reducing errors and litigation costs.

Multi-judge review has been adopted as the most effective means for accomplishing these functions. Studies suggest that multi-judge review allows a “degree of detachment, perspective, and opportunity for reflection by a group of judges, beyond that which a single trial judge can provide, thereby enhancing the likelihood of a sound resolution.”<sup>1</sup>

Multi-judge review is essential to the appellate process and is not dependent on a particular court organization or set of procedures. The fundamental imperative is the opportunity for multi-judge review, not the structure of the court system through

---

<sup>1</sup> Daniel J. Meador, *Appellate Courts: Staff and Process in the Crisis of Volume*. St. Paul: West Publishing Co., 1974.

Appellate court systems should contribute to the development and unification of the law by resolving conflicts between various bodies of law and addressing apparent ambiguities in the law.

Our complex society turns, however, with increasing frequency to the law to resolve disputes left unaddressed by the authors of our previously established legal precepts. Interpretation of legal principles contained in state and federal constitutions, statutory enactments and common law is at the heart of the appellate adjudicative process. Appellate courts clarify the law by reconciling conflicting principles of law and by interpreting constitutional and statutory provisions. That clarifying process is best served by careful attention to precedent.

Nationwide increases in the number of trial and intermediate appellate courts have increased the potential for conflicting interpretations of procedural rules and substantive law. This development of our judicial infrastructure at both the trial and appellate levels underscores the importance of appellate court systems as unifiers of the law. Ideally, the same results should be obtained, regardless of forum (federal or state) or the composition of the appellate panel. With uniform interpretation and application of the law, the public is certain as to the controlling legal standards

for the development of law. For example, some jurisdictions rely on dissents in the intermediate appellate court to refer an appeal automatically to the court of last resort. However, concurring and dissenting opinions suggest that the law on the point in question is unresolved or subject to change. Although at the time they may provide an important cautionary signal, these opinions tend to undercut confidence in the law and fail to promote resolution of disputes. The limited use of concurring and dissenting opinions should be the general practice for appellate court systems.

### **Standard 1.3 Error Correction**

**Appellate court systems should provide review sufficient to correct prejudicial errors made by lower tribunals.**

#### *Commentary*

A key function of appellate courts is the correction of prejudicial errors in fact or law made by lower tribunals. Appellate court systems should have sufficient capacity to provide review to correct these errors.

The error-correcting function for a court of last resort is fundamentally different from the error-correcting function for an intermediate appellate court. A court of last resort is a court of

tests the rule of law and improves the manner in which lower tribunals decide cases and dispense justice. In turn, intermediate appellate and trial courts more ably apply the law. The result is increased confidence in the entire judicial process.

#### **Standard 1.4 Extraordinary Functions of Appellate Court Systems**

**Appellate court systems should determine expeditiously those petitions for which no other adequate or speedy remedy exists, and should determine original proceedings as directed by law.**

##### *Commentary*

Appellate court systems, pursuant to state constitutional provision or legislative enactment, are often the designated forum for the determination of petitions and original proceedings, such as habeas corpus, mandamus, quo warranto, tax review, and examination of election disputes.

These proceedings often pertain to constitutional rights, affect large segments of the population within the court's jurisdiction, or require prompt and authoritative judicial action to avoid irreparable harm. This constitutional or legislative assign-

**consideration of each case and decisions based on legally relevant factors, thereby affording every litigant the full benefit of the judicial process.**

*Commentary*

Appellate court systems should provide the ultimate assurance that the judicial branch fulfills its role in our constitutional scheme of government by ensuring that due process and equal protection of the law, as guaranteed by the federal and state constitutions, have been fully and fairly applied throughout the judicial process. The rendering of justice demands that these fundamental principles be observed, protected, and applied by giving every case sufficient attention and deciding cases solely on legally relevant factors. Quality of the judicial process depends on these principles and the perception that the reviewing court has considered the issues on appeal fairly.

The integrity of appellate court systems rests on their ability to fashion procedures and make decisions that afford each litigant access to justice. Constitutional principles of equal protection and due process should be guideposts for an appellate court system's procedures and decisions. Toward this end, court procedures that are designed with these principles in mind should be fairly and consistently applied in all cases.

It is expected that an appellate court system's rules and procedures will be available and open to the public. In contrast,

rather that each case is managed—from beginning to end—in a manner consistent with the principles of fairness and justice.

## **Standard 2.2 Clarity of Decisions**

**All appellate court decisions should be clear, and written opinions should address the dispositive issues, state the holding, and articulate the reasons for the decision in each case.**

### *Commentary*

Clarity is essential in rendering all appellate court decisions. An appellate court should issue a written opinion when it completely adjudicates the controversy before it. Ending the controversy necessarily requires that the dispositive issues be addressed and resolved. A fuller understanding of the resolution of the dispositive issues occurs when an appellate court explains the reasoning that supports its decision.

Written opinions should set forth the dispositive issues, the holding, and the reasoning that supports the holding. At a minimum, the parties to the case and others interested in the area of law in question expect, and are due, an explicit rationale for an appellate court's decision. In some instances, however, a limited

## **Standard 2.3 Designation of Precedential Authority**

**Appellate court systems should designate as authority, which may be cited, those written decisions that develop, clarify, or unify the law.**

### *Commentary*

The designation of judicial opinions as precedential authority is essential to achieving clarity and uniformity in the development of the law. The publication of these opinions as binding authority provides an easily accessible means for interested persons to ascertain the holdings of the court and the rationale for those findings, thereby promoting understanding of the law and reducing confusion regarding that law. Therefore, appellate court systems should ensure that their rules for designating judicial opinions as precedential authority are clear and consistently applied.

Decisions should be published or otherwise designated as authority when they (1) establish a new rule of law, alter or modify an existing rule, or apply an established rule to a novel fact situation, (2) decide a legal issue of public interest, (3) criticize existing laws, or (4) resolve an apparent conflict of authority. Decisions not designated as authority should not be cited in any judicial proceeding.

dissemination of that opinion. Historically, “publication” of an opinion determined whether it could be cited as authority; however, modern communication techniques such as electronic transmission and unofficial publications have blurred this line. Regardless of how an opinion is disseminated, appellate courts should specifically determine and indicate whether the opinion has precedential authority.

## **Standard 2.4 Timeliness**

**Appellate court systems should resolve cases expeditiously.**

### *Commentary*

Once an appellate court acquires jurisdiction of a matter, the validity of a lower tribunal’s decision remains in doubt until the appellate court rules. Delay adversely affects litigants. Therefore, an appellate court should assume responsibility for a petition, motion, writ, application, or appeal from the moment it is filed. The appellate court should adopt a comprehensive delay reduction program. This program should be designed to eliminate delay in each of the three stages of the appellate process: record preparation, briefing, and decision making.<sup>2</sup>

---

<sup>2</sup> Rita M. Novak and Douglas K. Somerlot, *Delay on Appeal*. Chicago: American Bar Association, 1990, is an excellent blueprint for assisting

processing appeals, have an effect on the time that it takes to resolve cases. These factors must be considered in developing realistic delay-reduction goals for any particular court. Each court should reach consensus concerning guidelines establishing the appropriate number of days that a given percentage of the caseload should take to complete each stage of the appellate process.<sup>3</sup>

---

appellate courts in developing and implementing an effective delay reduction program.

<sup>3</sup> For example, in the American Bar Association's *Standards Relating to Appellate Courts*, Standard 3.52 suggests a Reference Model for courts of last resort whereby they should resolve 90% of all appeals within one year from the filing of a petition for review or the notice of appeal. Intermediate appellate courts should resolve 95% of all appeals within one year of the filing of the notice of appeal.

appellate process is open to those who seek or are affected by this review or wish to observe it. Appellate court systems should identify and remedy court procedures, costs, courthouse characteristics, and other barriers that may limit participation in the appellate process.

An appellate court's procedural rules should ensure that the integrity of the judicial process is maintained, that all litigants are treated fairly and equally, and that the court maintains control of its operations. To facilitate these goals, the rules should be straightforward and clear, and should be developed with the advice of those affected by the rules. Courteous court staff and multi-lingual capabilities are important elements in the effort to educate litigants, attorneys, and the public regarding court practices to facilitate their access to the court. Service should be offered regardless of race, cultural, ethnic, or religious background, age, gender, disability, or national origin. Asserting frivolous or spurious claims should be penalized because they prolong litigation inappropriately, cause unnecessary expense, may be used to harass or intimidate, and waste valuable court resources.

The ever-escalating cost of litigation, particularly at the appellate level, can limit access to the judicial process. When a party lacks sufficient financial resources to pursue a good-faith

**Appellate court systems should facilitate access to their decisions.**

*Commentary*

Decisions of appellate courts should be a matter of public record. Making appellate court decisions available to all is a logical extension of the courts' responsibilities to review, develop, clarify, and unify the law. Appellate courts should develop internal procedures that ensure decisions are made available promptly to litigants, judges, attorneys, and the public, whether in printed or electronic form. Access to appellate court decisions reduces errors in other courts due to misconceptions regarding the position of the appellate court.

**Standard 3.3 Public Education and Information**

**Appellate court systems should inform the public of their operations and activities.**

*Commentary*

Affirmative disclosure of court activities increases the appellate court system's influence on the development of the law, which, in turn, affects public policy and the activities of other governmental institutions. Appellate court systems should strive to increase public awareness of and confidence in court operations by engaging in a variety of outreach efforts to describe

appellate courts and the appellate process. Surveys among users of the court and suggestion boxes can provide appellate courts with important insights into how they are perceived and how they might perform these functions better.

Litigants, attorneys, and the public should be able to determine what cases are before the court and their stage in the legal process. Automated docketing systems operated by the courts should be available through computer terminals at the courthouse or through electronic bulletin boards. Finally, appellate court systems can enhance knowledge by tailoring reports on caseload trends and analyses to suit specific audiences, such as attorneys, community organizations, and the public.

### **Standard 3.4 Regulation of the Bench and Bar**

**Appellate court systems should ensure the highest professional conduct of both the bench and the bar.**

#### *Commentary*

By virtue of the public trust placed in the bench and bar, those engaged in the practice of law must adhere to the highest standards of ethical conduct. Ethical conduct by attorneys and judges heightens confidence in the legal and judicial systems.

Regulation of the bench and bar fosters public confidence, particularly when it is open to public scrutiny. A disciplinary process which evaluates expeditiously, diligently, and fairly the merits of each complaint to determine whether standards of conduct have been breached is an essential component of the regulation infrastructure. Appellate court systems can and should play an important role in this disciplinary process.

#### **IV. Using Public Resources Efficiently**

##### **Standard 4.1 Resources**

**Appellate court systems should seek and must obtain sufficient resources from the legislative and executive branches to fulfill their responsibilities.**

##### *Commentary*

As an equal and essential branch of our constitutional government, the judiciary requires sufficient financial resources to fulfill its responsibilities. Just as appellate court systems should be held accountable for their performance, it is the obligation of the legislative and executive branches of our constitutional

---

<sup>4</sup> Establishing the initial competency for being a lawyer or judge is beyond the scope of this standard.

represented. Such requests may necessitate a long-term budgetary strategy. At the same time, because unanticipated events may invalidate forecasts, sufficient flexibility should be built into the court's budget to allow the court to respond to unanticipated events.

Appellate court systems should apply the public funds they receive to employ a sufficient number of judges and court staff to process and resolve the increasing number of cases that are filed in appellate courts each year. Appellate court systems also should use public resources to maintain and improve court facilities and automated management information systems. Appellate court systems should invest their public funds in automated docketing and case-tracking systems to help handle the growth in volume and complexity of cases. Finally, funding for automated legal research systems will help provide better access to the appellate court systems.

Sufficient resources are also required and should be obtained to meet the increasing demands of pro se litigants on appellate court systems. To make the legal process available and understandable to pro se litigants, appellate court systems should have resources and personnel to consider and implement creative procedures to facilitate pro se litigants' access to the appellate court system.

effectively and use available resources efficiently and productively.

### *Commentary*

Appellate court systems should manage their caseload in a cost-effective, efficient, and productive manner that does not sacrifice the rights or interests of litigants. As institutions consuming public resources, appellate court systems have the responsibility to ensure that their resources are used prudently and that cases are processed and resolved in an efficient and productive manner.

Appellate court systems that manage themselves efficiently and cost-effectively can better process and resolve the large number of petitions, motions, writs, and appeals that are filed in appellate courts each year and justify their budgetary requests for resources. Resources should be distributed according to case complexity with more complex cases receiving greater resources. Cases should be monitored throughout their processing to ensure the efficient use of resources assigned to them. Screening procedures should be developed to identify routine cases that can be processed and resolved expeditiously so that court staff and judges can spend more time on complex appeals. Efficient and cost-effective case-management procedures allow judges to consider and to resolve a greater number of cases and allow court clerks to process more filings within a specified period of time.

**Appellate court systems should develop methods for improving aspects of trial court performance that affect the appellate judicial process.**

### *Commentary*

The efficiency and workload of appellate court systems are, to some extent, contingent upon trial court performance. If appellate courts do not properly advise the trial courts of the decisional and administrative errors they are making, appellate court systems waste valuable resources in repeatedly correcting or modifying the same or similar trial court errors.

Appellate courts can contribute to a reduction in trial court error by identifying patterns of error and by collecting information concerning the nature of errors and the conditions under which they occur. This information can help appellate courts ascertain the reasons for error and thereby better advise trial courts regarding avoidance of future error. In contrast, trial court judges become aware of mistakes only when their individual decisions are modified and usually lack access to system-wide analysis of all cases. Accordingly, given appropriate resources, appellate court systems should collect and disseminate these data, which will enhance trial court performance, and ultimately

determining the fiscal resources necessary for the judiciary to fulfill its obligations.

(1) Protecting the Rule of Law, (2) Promoting the Rule of Law, (3) Preserving the Public Trust, and (4) Using Public Resources Efficiently.

The Standards are broad statements of what objectives appellate courts should pursue to render just decisions clearly and efficiently. These Standards are important reminders to appellate courts that they are responsible for both the development of society's fundamental values and the correct resolution of disputes in individual cases. Appellate courts are charged with more than the processing of cases. They are expected to contribute to the fulfillment and refinement of the concept of justice. Yet, the Standards by themselves do not inform judges, litigants, attorneys, court staff, policymakers, or the public on how well the courts are doing in discharging their obligations.

---

<sup>5</sup> Appellate Court Performance Standards Commission and the National Center for State Courts, *Appellate Court Performance Standards*. (Williamsburg: National Center for State Courts, 1995).

provide a common set of guidelines for the collection of evidence to measure positive performance. Judges and others in a state appellate court system are free to select data that they perceive demonstrates solid performance and eschew data that might indicate inadequate performance. Those who analyze appellate court system performance can make subjective judgments that may lead to the conclusion, however erroneous, that a system is operating in accordance with the Standards' tenets. Because the Standards neither interpret the data that analysts cite in support of their conclusions nor address these subjective judgments in a uniform way, judges and others need more assistance to assess whether appellate court systems are fulfilling their mandate.

In response, the Commission has developed 27 Guideposts to assist state appellate court systems in measuring performance in an objective manner. The Guideposts are intended to translate the goals articulated by the Standards into observable aspects of appellate court structure, process, and case decisions that can be measured and examined by the collection of pertinent data. The Guideposts also suggest how data can be analyzed and what interpretations can be made concerning how closely a particular Standard is approximated. In some instances, the Guideposts provide numerical measures and corresponding concrete benchmarks. However, some of the evidence is measurable in a more qualitative manner and only

The Guideposts are neither definitive nor perfect because scholars and practitioners do not agree on how to measure timeliness, clarity, quality, efficiency, or other important goals. Because the field of court administration is still in the early stages of development, there has been limited experience in the use of data to conclude whether courts are fulfilling their functions satisfactorily. However, the Guideposts have the benefit of being developed, critiqued, and refined by the Appellate Court Performance Standards Commission, the leadership of the Oregon Court of Appeals and the Oregon State Court Administrator's Office, and the Performance and Accountability Committee of Florida District Courts of Appeal.

In Oregon, the Chief Judge of the Court of Appeals and the State Court Administrator's Office reviewed an initial draft of the Guideposts for their feasibility and desirability. Could the Oregon Court of Appeals put its hands on the sort of data called for by the Guideposts? What sorts of adjustments did the Court think were needed to improve their utility?

In Florida, the Guideposts were subjected to an even more stringent test because that state's five district courts of appeal have formed a special committee to produce a regular, ongoing method of performance review to be useful to the Courts and one that they could share in periodic reports to the bar, policymakers, and the public. Whereas the Oregon Court of

1. A few good measures are needed to maintain focus and to facilitate the application of the Standards. Concentrating the measures on the essential aspects of appellate court performance should encourage many courts to apply the Standards. Multiple applications will provide a rich foundation on which future refinements of the Standards and Guideposts can be based.
2. Several of the Guideposts rely on a common set of 24 data elements, although different standards are based on different combinations of these data. A list of these elements is found at Appendix 1. The data concern individual appellate case characteristics and generally are stored within a court's docketing and information management system. This feature of the Guideposts should ease their application. *Additionally, because the National Center for State Courts' Court Statistics Project encourages the gathering of these same core data, a comparative database should be available to assist a court in the development of benchmarks.* However, other data, including surveys and focus groups, are necessary for some of the Guideposts. Finally, the complexity of the data collection and the data analysis associated with the three Guideposts to Standard 4.1

Appellate Court Performance Standards have been designed to fit within the framework of state government as a whole, the Guideposts are likewise oriented to inform a broad audience of judges, litigants, attorneys, policymakers, and members of the public on how well a court is operating.

Hence, the Guideposts are designed to be workable in the time and effort required to apply them. Moreover, it is hoped that the Guideposts' dual uses as an internal management tool and as a vehicle for educating others outside a court will make them desirable to apply.

assignments. Appellate courts recognize the need for collegiality in achieving meaningful multi-judge review and give it high priority at educational and training sessions. Yet, apart from the structural design of appellate courts as multi-judge entities, two basic questions need to be addressed to understand more fully what is meant by this concept. What cases are, in fact, subject to the appellate process? What is the mandatory versus discretionary jurisdiction of a court? Guideposts 1.1.1 and 1.1.2 are proposed to address these questions.

### **Guidepost 1.1.1 Determining What Cases Are Subject to Appellate Review**

A basic measure of appellate court performance is the ability of a court to describe the work that it handles. This description is relevant to clarifying what the job of multi-judge review is all about.<sup>6</sup> Additionally, information on the cases that come before a court is the foundation for other measures of court performance. The capacity of a court to describe its work based

---

<sup>6</sup> The connection between the work of appellate courts and the nature and significance of appellate review has been pointed out elsewhere. See Robert A. Kagan et al., “The Evolution of State Supreme Courts,” 76 *Michigan Law Review* 1978; Bliss Cartwright et al., “The Business of State Supreme Courts” 30 *Stanford Law Review* 1977; and Joy A. Chapper and Roger A. Hanson, *Intermediate Appellate Courts*. (Williamsburg: National Center for State Courts, 1990).

flexible to take into account particular features of individual courts is as follows:

1. Civil, including tort, contract/commercial, real property, family, and probate.
2. Criminal, including juvenile, non-death penalty, and death penalty.
3. Administrative agency, including workers' compensation/industrial commission, tax/revenue, and economic security.
4. Application for writs, including habeas corpus and all other writs, such as mandamus, prohibition, and quo warranto.
5. All other matters, including certified questions, advisory opinions, attorney and judicial discipline.

These five types of cases are consistent with the categories used by the NCSC's Court Statistics Project to gather comparable data each year from the nation's state appellate courts. Using this classification, a court has the ability to draw on a comparative database available through the Court Statistics Project if it wants to see how its caseload composition stands in relation to others. Intermediate appellate courts with regional districts that function independently of each other need to agree to a common case typology to measure performance statewide.

the next one, Guidepost 1.1.2. A suggested format for presenting information on subject matter jurisdiction appears below.<sup>7</sup>

---

<sup>7</sup> This format follows a general approach to presenting a variety of case management data that has been recommended to appellate courts. See Roger A. Hanson, *Handbook for Appellate Judges: Management Information and Court Performance*. (Williamsburg: National Center for State Courts, 1995). The handbook should be a useful resource for several of the Guideposts.

<b>Administrative Agency</b>				
Appeals				
Petitions				
<b>Applications for Writs</b>				
Habeas Corpus				
All Other Applications				
<b>Other Matters</b>				

The needed data are available in a court’s docketing system either as entries in an automated database or as paper entries in hard-bound ledgers. The raison d’être of the Guidepost is to see how capable a court is in accessing the needed data and in presenting them, as suggested above. It is hoped that a court will see the virtue of making any necessary adjustments to its automated system or acquiring such a system so that it can gather and organize the needed data.

The answer to the basic question behind Guidepost 1.1.1 is whether a court can classify its caseload composition in the proposed scheme outlined above. There is no exact set of benchmarks that demarcates solid performance. However, some qualitative judgments can be made. Is a court capable of distinguishing appeals from petitions or applications for writs? Can a court separate civil from agency cases? In states with

is whether the work of a court, as revealed in Guidepost 1.1.1, is almost exclusively or primarily subject to mandatory review. Do litigants have the right to have their appeals decided? Or can a court first decide whether it believes the appeal warrants full review, and, in some instances, decide not to grant further review? Guidepost 1.1.2 suggests a series of steps to address these questions.

One of the considerations in examining the jurisdiction of a court is the structure of other appellate systems. The most common institutional framework is a two-tiered appellate system in which virtually all appeals are filed first, as a matter of right, with an intermediate appellate court. A court of last resort is available to hear appeals primarily on a discretionary basis from the intermediate appellate court, but the court of last resort also exercises mandatory jurisdiction over some civil and criminal cases. Hence, most appellate court systems use a combination of the two methods of review. (A helpful article that describes the organization of each state's appellate court system is found in Appendix 2.

A court can see itself in perspective by comparing its structure to the most common institutional arrangement found in other state appellate systems, as described in Pattern IV in Appendix 2. If a court is an intermediate appellate court, is its jurisdiction primarily mandatory? If a court is a court of last

For courts of last resort, the number of discretionary petitions granted full review relates to the opportunity for multi-judge review. If a court of last resort lacks an intermediate appellate court or if an intermediate appellate court itself exercises discretionary jurisdiction, the percentage of petitions granted full review should be quite high. Certainly, the rate should be higher than it is for courts of last resort with an intermediate appellate court with mandatory jurisdiction.

The number of discretionary petitions granted by a court of last resort in a two-tiered system is more difficult to evaluate. As the number of petitions filed in a court of last resort increases each year and the number of judges remains constant pressures are placed on a court to grant a smaller percentage of petitions each year because of the simultaneous desire to achieve timely resolution. Moreover, even if the caseload does not increase in number, there may be an unusual number of extremely difficult and time consuming cases that pressure a court of last resort to grant a smaller percentage than it did the previous year. Nevertheless, the percentage of discretionary petitions granted full review should be measured and monitored each year. What are past and current trends? Is the observed pattern consistent with what a court believes to be the pattern and with what it considers to be desirable? A well-performing court will know what it is doing and will be able to account for change or

agreement patterns among the judges. How frequently are concurring opinions and dissenting opinions written? Guidepost 1.2.1 suggests an approach to addressing this question.<sup>8</sup>

### **Guidepost 1.2.1 Agreement Patterns**

The needed data on agreement patterns should be available in a court's automated docketing system or its closed case files. For intermediate appellate courts, either a random sample of at least 500 cases decided on the merits or an entire year's worth of resolutions should be chosen, depending on which set is most convenient for the court to access. For courts of last resort, the database should include all decided mandatory appeals and discretionary petitions for a given year. Data elements pertinent to both types of courts include the following:

---

<sup>8</sup> The importance of consensus and the negative aspects of dissensus is discussed elsewhere in the context of a state court of last resort. The discussion also provides ideas on how to measure dissensus and how to interpret it. See Charles H. Sheldon, "The Incidences and Structure of Dissensus on a State Supreme Court," eds., Cornwell W. Clayton and Howard Gillman, *Supreme Court Decision Making*. (Chicago: University of Chicago Press, 1999).

9. Number of judges dissenting.
10. Identity of concurring justices by designated numbers.
11. Identity of dissenting judges by designated numbers.

The analysis can focus on several questions. What is the expected percentage of non-unanimous decisions? Is the observed percentage of non-unanimous decisions more, less, or about the same as expected? Do non-unanimous decisions tend to be concentrated among particular types of cases? Do some judges tend to write concurring or dissenting opinions more frequently than other judges?

One possible performance benchmark is the comparison between a court's expectations and the actual rate of non-unanimous decisions. If the actual rate is less than the expected rate, this is a positive sign. If the actual rate is greater, a court should consider a review of its writing and circulation practices to determine whether some practices inadvertently are contributing to non-unanimous decisions.<sup>9</sup>

---

<sup>9</sup> The incidence of non-unanimous decisions has implications for other Standards. Specifically, non-unanimous decisions take longer to resolve than unanimous decisions. See Roger A. Hanson, *Time on Appeal*. (Williamsburg; National Center for State Courts, 1996). As a

the rank-ordered position of a court's rate compared to the rates of other courts (e.g., a court's non-unanimous decision rate of five percent ranks lower than respective rates of seven, nine, and eleven percent for three other comparable states).

### **Standard 1.3 Error Correction**

#### **Appellate court systems should provide review sufficient to correct prejudicial errors made by lower tribunals.**

Error correcting is a central function of appellate court systems. There is some literature on this topic, although most studies have focused on criminal appeals and the work of state intermediate appellate courts.<sup>10</sup> The few studies of courts of last

---

result, poor performance on Standard 1.2 is likely to inhibit positive performance on Standard 2.4 Timeliness.

<sup>10</sup> For exceptions, see single court studies by Thomas W. Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeals," 82 *American Bar Foundation Research Journal* 1982; Thomas W. Davies, "Gresham's Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources," 6 *Justice System Journal* 1981; David Wasserman, *A Sword of the Accused: Representing Indigent Defendants on Appeal*. (New York: NYU Center for Research in Crime and Justice, 1988); and David Neubauer, "A Polychotomous Measure of Appellate Court Outcomes: The Case of Criminal Appeals," 16

The information needed to address basic questions concerning the nature and extent of modifications includes particular data elements listed below on each individual case, including appeals and petitions, decided on the merits during the past year. For both civil and criminal cases, elements 1-3 and element 9 are essential. For criminal appeals, the value of the Guidepost will be enhanced to the extent that data on elements 4-8 are gathered, although an intensive case examination of the cases that are modified is a possible substitute. For civil appeals, the value of the Guidepost will be enhanced by information on elements 4, 5, 7, and 8.

---

*Justice System Journal* 1992. The only comparative study is by Joy A. Chapper, and Roger A. Hanson, *Understanding Reversible Error in Criminal Appeals*. (Williamsburg: National Center for State Courts, 1989).

<sup>11</sup> Note, "Courting Reversal: The Supervisory Role of State Supreme Courts," 87 *Yale Law Journal* 1978; and James W. Meeker, "Criminal Appeals Over the Last 100 Years," 22 *Criminology* 1984.

<sup>12</sup> The only study of error correction in civil appeals is an examination of three U.S. Courts of Appeal. See J. Woodford Howard, Jr., *Courts of Appeal in the Federal Judicial System: A Study of the Second, Fifth, and the District of Columbia Circuits*. Princeton: Princeton University Press, 1981.

- jury trial, bench trial, motion in civil cases).
6. Type of legal representation for the criminal offender (e.g., public defender, assigned counsel, privately retained counsel, pro se).
  7. Number of issues on appeal.
  8. Types of issues on appeal in criminal cases (admission/exclusion of evidence; instructions; procedural or discretionary ruling; sufficiency of the evidence; merger of offenses, suppression of evidence, statements, or identification; ineffective assistance/waiver of counsel; other constitutional claims, jury selection; statutory interpretation or application; plea voluntariness; prosecutorial misconduct; excessive sentence; other type of sentencing issues). Types of issues on appeal in civil cases (admission/exclusion of evidence; instructions; procedural or discretionary ruling; sufficiency of the evidence; constitutional or statutory interpretation; jury selection).

Civil cases:

- a. Trial court judgment is completely affirmed, although there may be harmless error.
- b. Some modification is made.
- c. The judgment is reversed and the case is remanded for a new trial.

What is the modification rate? What is the reversal rate?

Do the outcomes vary by the type of the underlying trial court proceeding, type of criminal offense (or area of civil law), or type of issue? How frequently is each type of issue raised? Are some issues more likely than are other issues to be associated with some type of error?

Is the pattern of affirmances and modifications consistent with a court's expectations? Past research on criminal appeals suggests that modification rates in first-level appellate courts are approximately 20 percent, although the rates for courts of last resort may be somewhat higher than those of intermediate appellate courts.<sup>13</sup> How does a court compare to this pattern? Reversal rates in criminal appeals are generally two percent or less in first-level appellate courts.<sup>14</sup> How does a court compare

---

<sup>13</sup> Chapper and Hanson, "Understanding Reversible Error in Criminal Appeals," *op. cit.*

<sup>14</sup> *Ibid.*

The importance of the outcome of appeals to litigants, attorneys, policymakers, and the public calls for individual appellate courts to monitor their own performance for feedback purposes and to enhance their role in supervising the trial process. If one in every five criminal appeals is modified, there is room for improving trial court performance. Perhaps not every error can be averted, but there is evidence that an appreciable portion of the error is reducible.<sup>15</sup> An appellate court with the help of the state administrative office of the courts can begin an educational process by identifying where errors occur by type of issue, the surrounding case characteristics, and the jurisdiction where they occur. When a new statute is enacted, do all, some, or only a few trial courts experience appellate court reversals? Answers to these questions can be gained from the data assembled for Guidepost 1.3.1. However, the data need to be packaged for use by the appellate courts, the state administrative office of the courts, and the state's judicial educators in training programs.

---

<sup>15</sup> Observers also have contended that appellate courts should not only engage in error correction but link information on errors to efforts to reduce future errors. See J. Clark Kelso, "A Report on the California Appellate System," 45 *Hastings Law Journal* 1994.

related to the underlying offense in criminal cases or the area of law in civil cases. As a result, there is no obvious scenario to target. Education should focus on the circumstances of the error itself rather than exclusively high-profile cases.

3. Error occurs in new areas of litigation; problems arise until a new law or procedure becomes settled. Because new areas of law are problematical, educational programs need to introduce trial court judges to new laws, discuss how other states have interpreted similar laws, and encourage the prompt preparation of pattern instructions when changes are made to the civil or criminal code.
4. Some error may appear to be the result of a lack of deliberation on the part of a judge. For example, the incidence of instructional error might be reduced by more careful assessment of the sufficiency of the evidence to justify an instruction on the defense theory. Similarly, sentencing errors might be reduced if a judge were to follow a more careful methodology in adhering to sentencing guidelines and law. Educational efforts, thus, should not overlook routine proceedings and the need to reinforce a trial judge's bench skills.

questioning. The judge cannot recess and research an issue. Hence, the appellate courts need to work with trial courts to reduce error while recognizing that not all error is preventable.

### **Guidepost 1.3.3 Assessing Educational Efforts**

Are educational efforts successful in reducing error? Guidepost 1.3.3 is an approach to answering that question.

Basically, the same procedures suggested for Guideposts 1.3.1 and 1.3.2 should be replicated annually. The patterns likely will never be identical over time because new laws are enacted and interpreted every year at the state and federal levels. Nevertheless, many of the same circumstances that give rise to error will occur year after year unless there is some planned approach to alter them. Hence, an appellate court should work with the state administrative office of the courts to conduct consistent and systematic inquiry into the nature of reversible error on an annual basis.

While the overall modification rate may not change every year because of new laws, do areas targeted in the previous year's educational effort indicate reductions in error? Is there more statewide consistency in error patterns, especially in aspects of the trial process such as jury instructions and sentencing? Or do some counties continue to have higher error

proceedings are filed with a court? How expeditiously are they resolved? Does the timeliness of resolution vary by the nature of a court's review? Guidepost 1.4.1 offers an approach to answering these questions.

### **Guidepost 1.4.1 Timely Resolution of Applications for Writs and Other Original Proceedings**

Applications and other original proceedings should be classified in a meaningful way. The following trichotomy should be applicable for many courts: (1) applications for writs of habeas corpus, (2) applications for all other types of writs, and (3) all other original proceedings. A court should collect the following data elements on each case.

1. Docket number.
2. Type of application (petition) or other original proceeding.
3. Date the application for a writ of habeas corpus, the application for any other writ, or any other original proceeding is filed.
4. Date resolved.
5. Nature of court's review.  
Granted full review or per curiam  
Overruled or dismissed

Do applications and other original proceedings take a shorter time to resolve than mandatory appeals or discretionary petitions?<sup>16</sup> Do applications that are granted full review take a shorter time to resolve than mandatory appeals or discretionary petitions decided on a per curiam basis? Do applications that are overruled or dismissed take a shorter time to resolve than discretionary petitions that are denied or dismissed? Standard 1.4 suggests that the answers to these questions should be affirmative. If the time taken to resolve the applications is not substantially less, a court should examine the application or original proceedings that are taking the longest amount of time. What factors appear to be inhibiting expeditious resolution? Finally, a court can set its own time standards for the resolution of applications and original proceedings. Based on the data gathered from this Guidepost, a court may want to aim for resolving all applications and original proceedings within 60 or 90 days after they are filed. However, the exact numerical goal depends on what a court considers to be both realistic and desirable.

---

<sup>16</sup> Information on the timeliness of mandatory appeals and discretionary petitions is available to a court by following the Guideposts associated with Standard 2.4. Timeliness.

the *same* time and the *same* attention. Under the real-world condition of limited resources, courts allocate time and attention in proportion to the amount that each case warrants. More complex cases warrant more time and attention than more routine cases.<sup>18</sup>

In response, virtually every appellate court has modified the traditional appellate process—of a complete record, fully written briefs, oral argument, and a detailed, signed, and published opinion—in some way for some of its cases. Some courts modify a particular step in the process (e.g., court decisions in routine cases might be a very brief opinion of only a paragraph or less). Many courts have taken the approach of either seeking waiver of or denying oral argument in routine cases.

---

<sup>17</sup> The central importance that all cases receive individual attention in appellate courts has its parallel in trial courts. The Trial Court Performance Standards, for example, state that “Trial courts give individual attention to cases, deciding them without undue disparity among like cases and upon legally relevant factors. See Standard 3.3 Court Decisions and Actions, *Trial Court Performance Standards*. (Williamsburg: National Center for State Courts, 1992).

<sup>18</sup> Joy A. Chapper and Roger A. Hanson, “The Attorney Time Savings/Litigant Cost Savings Hypothesis: Does Time Equal Money?” 8 *Justice System Journal* 1983.

## Guidepost 2.1.1 Rendering Quality in All Cases

A first step in assessing the quality of the judicial process is for a court to address four basic questions concerning its work.

---

<sup>19</sup> For examples of special expedited calendars, see Joy A. Chapper and Roger A. Hanson, “Expedited Procedures for Appellate Courts: Evidence from California’s Third District Court of Appeal,” 42 *Maryland Law Review* 1983; Charles Douglas, “Innovative Appellate Court Processing: New Hampshire’s Experience with Summary Affirmance,” 69 *Judicature* 1985; Thomas B. Marvell, “Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar,” 75 *Judicature* 1991; Joy A. Chapper and Roger A. Hanson, “Managing the Criminal Appeals Process,” 12 *State Court Journal* 1998; Roger A. Hanson, *Procedural Innovations for Appellate Courts*. (Williamsburg: National Center for State Courts, 1995).

<sup>20</sup> Stephen Wasby, “The Study of Appellate Court Administration: The State of Enterprise,” 12 *Justice System Journal* 1987.

A second step is a more research-oriented approach to addressing the issue of quality. It supplements the first approach, although it has its own limitations because the quality of the judicial process is a complex phenomenon that defies universal definition and common measurement. Virtually all measures of quality have focused on the nature of the process rather than the quality of the outcome. Moreover, most studies have measured quality of the process from an attitudinal perspective rather than objective indicators.<sup>21</sup> This Guidepost is in this tradition, but relies specifically on previous research on the quality of the process in criminal appeals.<sup>22</sup> When that approach is used in a study of modifications to the criminal appeals process, quality is measured by asking all current members of a court, all available senior judges, and a full range of attorneys who practice before a court the following question:

---

<sup>21</sup> The only other measure of the quality of court processing is a study of nine state criminal trial courts. That study relies on the views of prosecutors and defense attorneys to measure quality. See Brian Ostrom and Roger Hanson, *Efficiency, Timeliness, and Quality*. (Williamsburg: National Center for State Courts, 1999). Other court-related research on quality, such as evaluations of alternative dispute resolution and the literature known as procedural fairness, also relies on subjective measures of quality.

<sup>22</sup> Roger A. Hanson and Joy A. Chapper, “Organizing the Criminal Appeals Process: The Views of Judges, Government Attorneys, and Defense Counsel,” *72 Judicature* 1989.

However, what is it about the modified procedure that shapes the participant's views on the degree of quality? Again, borrowing from past research, the following questions are suggested as possible standards of quality.<sup>23</sup>

1. To what extent do you agree or disagree that a modification or a special expedited calendar allows you to spend more time on complex cases? Please indicate your level of agreement on a scale of 1 to 5, where 1 equals agree strongly and 5 equals disagree strongly.

---

<sup>23</sup> Obviously, there are other possible standards of quality, but in previous research these four items proved to be more valid predictors of where participants stand on the issue of quality than other possible items. That is, if a respondent agrees that the modification or special calendar allows him or her to spend more time on complex cases, he or she is more likely to be satisfied that cases handled under the modification received the same quality of justice as cases that were not handled under the modification. If a respondent disagrees, then he or she is more likely to be dissatisfied with the quality of justice rendered to cases handled under the modification. For a more extensive set of possible standards of quality, see Joy A. Chapper and Roger A. Hanson, "Managing the Criminal Appeals Process," 12 *State Court Journal* 1988.

computed. Are all of the participants satisfied that quality is maintained under the special expedited calendar? That is, is the average score 2.5 or smaller? Do some individuals express greater satisfaction than others?

The scores of each of the potential standards then should be correlated with the scores on the question of quality for each of the subgroups. Do the correlations indicate that the four potential standards are strongly, moderately or weakly related?

If the correlations between quality and each standard are strong, this information indicates that the greater degree to which an individual in a subgroup considers this standard to be met, the greater is his or her satisfaction that all cases receive the same quality of justice. A court can look at the results and see if the following patterns emerge.

1. The greater the extent to which the participants agree that a modification or a special expedited calendar allows a court to spend more time on complex cases, the greater the extent to which they are satisfied that the quality of justice is the same for all cases. If this is the case, there should be a strong, positive correlation between item 1 and the quality measure.

case, there should be a strong negative correlation between item 3 and the quality measure.

4. The greater the extent to which the participants *disagree* that oral argument is the only way for judges to be informed about a case, the greater the extent to which they are satisfied that all cases received the same quality of justice. If this is the case, there should be a strong, negative correlation between item 4 and the quality measure.

Unanimity among all of the participants is not likely. Some participants will be more satisfied with the quality of justice than others. Some participants will share different standards of quality than other participants. Yet, a well-performing court will know where differences lie and will have a more informed sense of what problems it needs to address to raise the level of quality and to form a greater consensus on how best to organize the appellate process.

does a court come to the goal prescribed in Standard 2.2 that there should be a written opinion in every case? Guidepost 2.2.1 offers an approach to addressing that question.

### **Guidepost 2.2.1 Written Decisions**

Based on all cases resolved in a given year, how many cases did a court decide by some type of written opinion? The following is a suggested set of categories to classify the form of court decisions made on the merits.

1. **Published Opinions**—Detailed (i.e., more than one page or one word), signed, and published.
2. **Per Curiam Opinions**—The decisions might be published, but they are per curiam.
3. **Memoranda Decisions**—They provide a discussion of the issues, but are not as detailed as published opinions.
4. **Summary Dispositions**—Approximately one word, paragraph, or one page.<sup>24</sup>

---

<sup>24</sup> A rationale for summary dispositions is that they are an efficient way to resolve a case. They avoid the work that even a short written opinion to resolve a routine case might entail. However, there is an alternative type of opinion that might be just as efficient and provide a more complete explanation for a court's decision than what is available in a summary disposition. For example, the U.S. Court of Appeals for

per curiam, or memoranda? Is this figure consistent for different types of cases?

What is a court's rationale for deciding cases with summary dispositions? Are these decisions reached only in routine cases? Are they only error-correcting cases? How does a court ensure that quality decisions are rendered in these cases? Basically, positive performance lies in a court's ability to answer these sorts of questions clearly and convincingly.

---

the Sixth Circuit renders decisions orally in some routine cases where the correct decision is clear and well understood by the judges. In these cases, the judges have read the briefs and heard oral argument, but they inform the attorneys at oral argument of their decisions and read their opinion into the record. The attorneys benefit by receiving a prompt decision and are given specific reasons for the decision. This type of decision is recommended for consideration in lieu of a summary disposition.

### Guidepost 2.3.1 Publication Rates

How many decisions result in a published opinion? Is the rate changing over time? Are there observable features associated with the publication rate?

The data needed to estimate the publication rate is information on individual appeals and petitions decided during the preceding year. How many decisions resulted in a detailed, signed, and published opinion versus one of the other forms of decisions? Specific data elements include:

1. Docket number.
2. Type of case.
3. Type of jurisdiction.
4. Date of resolution.
5. Group deciding case (en banc v. panel).
6. Author identity can be a designated number.
7. Form of decision:
  - Detailed, signed, and published opinion
  - Per curiam opinion
  - Memoranda decision
  - Summary disposition

widespread agreement on what should and should not be published? This Guidepost offers a four-step approach to answering these questions.

The approach is the use of a focus group. The focus group should consist of approximately ten experienced appellate practitioners, including a law school professor who might be the focus group leader. A court should randomly select 100 published opinions from cases decided in the past year. The authors of the published opinions should be asked to indicate which of the following criteria warranted publication.

1. The decision established a new rule of law, altered or modified an existing rule, or applied an established rule to a novel fact situation.
2. The case decided a legal issue of public interest.
3. The decision criticized existing laws.
4. The decision resolved an apparent conflict of authority.

Prior to the focus group session, the participants should be asked to complete the same exercise that the authors of the published opinions did. The focus group leader should begin the session by summarizing the level of agreement between the results of the two sets of exercises.

The focus group leader should synthesize the themes raised during the focus group and communicate them to a court. What did the group see as the strengths and weaknesses of the criteria? What did they suggest as a future agenda for a court?

A court should be able to take the information flowing from the focus group, as well as the results from Guidepost 2.3.1. What reactions does a court have to the focus group's observations? Do a court's procedures and practices in the circulation of draft opinions appear to warrant review? Is there a need to redefine any of the criteria or to communicate the criteria in a better manner?

## **Standard 2.4 Timeliness**

### **Appellate courts systems should resolve cases expeditiously.**

The pace of appellate review is important because until and unless the process is completed, there is uncertainty concerning the validity of trial court decisions. Additionally, appellate court delay compounds problems that may have arisen as a result of trial court delay. Finally, until the appellate review process is finished, the development, clarity, and unity of the law remain uncertain. Hence, there are four Guideposts that address various facets of Standard 2.4. How timely is a court? How

and the point of final resolution for a random sample of 500 cases or a year's worth of resolutions, depending on whichever alternative is most convenient. Additionally, case characteristics that likely affect the pace of litigation are also important to know in advance. A suggested list appears below.

1. Docket number.
2. Type of case.
3. Type of jurisdiction.
4. Date the notice of appeal or the petition for review is filed.
5. Date the petition for review is granted, denied, or dismissed.
6. Date the record is submitted.
7. Date the last brief is submitted.
8. Date of oral argument/submission.
9. Date of resolution.
10. Method of resolution:
  - Decided on the merits
  - Denied
  - Dismissed

The aim of the analysis is to examine how long it takes a court to resolve appeals from the date of their filing until resolution, by type of case. Possible comparisons based on the suggested data elements are as follows:

<b>Case Processing Time from Filing to Resolution (in days)</b>					
<b>Mandatory Appeals</b>					
Percentiles					
	25th	50th	75th	90th	95th
Civil					
Criminal					
<b>Discretionary Petitions</b>					
Civil					
Criminal					

There are at least four criteria that a court can use to assess case processing time. They include (1) The American Bar Association’s Reference Models for State Intermediate Appellate Courts and for State Courts of Last Resort,<sup>25</sup> (2) the pace of 35 intermediate appellate courts and 23 courts of last resort for

---

<sup>25</sup> American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts*. (Chicago: American Bar Association, 1994).

## Guidepost 2.4.2 Time Required for Steps in the Process

How long does it take to complete the basic steps in the appellate process? Answers to this question may uncover if there is a bottleneck in the process. A four-step approach is offered as a way of gaining these answers.

The same data elements and set of cases used in Guidepost 2.4.1 can be used for Guidepost 2.4.2. Possible analyses based on the available data are as follows:

---

<sup>26</sup> Roger A. Hanson, *Time on Appeal*. Williamsburg: National Center for State Courts, 1996.

Brief Filed to	Argument/
Argument/ Submission	Submission to Resolution
Date of Oral	Date Petition
Argument/ Submission	Filed
to Resolution	to Resolution
NOA to Resolution	

A court can compare itself to at least four criteria (1) the American Bar Association’s suggested time frames for stages in the appellate process,<sup>27</sup> (2) median processing times of steps in the process for the state intermediate courts studied in *Time on Appeal*,<sup>28</sup> (3) a court’s own time requirements and expectations, and (4) a court’s past performance.

Two areas are of potential concern. One involves the question of what stage is taking the longest time to complete. If the decision stage is taking the longest, a court has a responsibility to correct the situation. Improvements in the pace of litigation rest in its own hands. A second concern is whether the record preparation and briefing times exceed a court’s time standards because of the granting of extensions of time. If this situation exists, a court is confronted with the challenge of

---

<sup>27</sup> American Bar Association, op. cit.

<sup>28</sup> Hanson, *Time on Appeal*, op. cit.

clerk of court to produce a list of pending appeals and petitions. Regardless of the volume of the caseload, a court should take three separate monthly samples over an 18 month period.

The essential data are the filing date, the current date, and the type of case for each case in the monthly sample. The objective of the analysis is to see how long the cases have been pending. A display of the results might look as follows:

	<b>Civil Cases</b>	
Age of Pending Cases	Number of Cases	Percentage of Pending Cases
0-3 months		
3-6 months		
6-9 months		
9-12 months		
12-18 months		
18-24 months		
over 24 months		
		100%

---

<sup>29</sup> A helpful guide to delay reduction is found in Rita N. Novak and Douglas K. Somerlot, *Delay on Appeal: A Process for Identifying Causes and Cures*. (Chicago: American Bar Association, 1990).

Guidepost 2.4.4 uses the same data gathered for the three preceding Guideposts. However, in addition, more specific information is needed on the underlying trial court proceeding and the nature of the most serious offense at conviction on appeal in criminal cases. Are there some types of cases that take a longer time to resolve? Guidepost 2.4.4 is a framework to use in addressing that question.

A first step is to draw finer distinctions between cases that are finer than the traditional criminal versus civil appeal dichotomy. Past research suggests what factors explain why some cases take longer to resolve than others. However, for a court to replicate comparative research studies conducted by the National Center for State Courts or other organizations would require a complicated methodology and a very extensive database that are not likely to be within the capacity of most appellate courts. Nevertheless, a second-best strategy is for a court to focus on the leading “causes” of delay that will require the least amount of additional administrative time and cost to gather and that will produce interpretable and understandable results.<sup>30</sup> These determinants are the underlying trial court

---

<sup>30</sup> The full list of statistically significant determinants of why some cases take longer to resolve than others depends on the type of case (e.g., civil v. criminal) and on the type of court (e.g., intermediate appellate court v. court of last resort). However, the following list

---

includes leading data elements found in previous research to be of causal influence in explaining *why some cases take longer than others to resolve*: (1) length of the court's opinion (the longer the opinion, the longer the resolution time), (2) whether the opinion is published (cases with published opinions take longer), (3) method of resolution (cases decided on the merits take longer than those that are dismissed), (4) degree of agreement (unanimous decisions take a shorter time on appeal than non-unanimous decisions), (5) brief length (the longer the briefs, the longer the resolution time), and (6) number of substantive motions, (the greater number of motions, the longer the resolution time). See, for example, Joy A. Chapper and Roger A. Hanson, *Intermediate Appellate Courts*, op. cit., Roger A. Hanson, *Time on Appeal*, op. cit. The reasons *why some courts take longer to resolve cases* than others involves two basic factors: (1) the amount of judicial and legal staff resources (courts with more judges per case filings and more legal staff per judge tend to be more expeditious than others) and (2) caseload composition. See, for example, Roger A. Hanson, *Time on Appeal*, op. cit., Roger A. Hanson, "Resources: The Key to Appellate Court Timeliness," *Court Review*, 1999.

<sup>31</sup> Chapper and Hanson, *Intermediate Appellate Courts*, op. cit; Roger A. Hanson, Steven Hairston, and Brian J. Ostrom, "Time on Appeal: Beyond Conjecture," paper presented at the American Society of Criminology, Phoenix, Arizona, 1993.

of offense also is related to timeliness. Moreover, cases arising from jury trials and cases that involve homicide convictions take appreciably more time than any other category of cases. In fact, these cases consume a disproportionate amount of court resources and disproportionately influence a court's overall appeal time.

If the hypothetical results above actually occur, a court can focus attention on a particular set of cases and provide the legislative and executive branches with a specific rationale for why more judicial resources are needed. The toughness of a court's caseload, as represented by the percentage of cases arising from homicide convictions and jury trials, is an index of the need for court resources. Every increase in this index calls for more resources. This information should be of assistance to a court because it informs what cases demand judicial attention and why more resources may be needed. Without this information, a court is in the position of having to treat all cases equally and to base its rationale for resources on the overall caseload.

In a parallel manner, the type of underlying proceeding in civil cases is important to monitor. As the percentage of civil cases arising from jury trials increases, there is a need for more resources. Interestingly, the impact of the jury trial holds true across the different areas of civil law (e.g., tort, contract, real



## Needs

The objective of this Guidepost is to determine if individuals with special needs are able to obtain case-related information and to attend court hearings as easily as individuals who have no disabilities. This Guidepost proposes a field test comparing the experiences of an experimental group (i.e., persons with disabilities) and the experiences of a comparison group (i.e., persons with no disabilities). This Guidepost suggests three possible types of disabilities with corresponding experiential and comparison groups. They are:

1. Hearing impairments.
2. Visual impairments.
3. Physical impairments (e.g., confinement to wheelchairs, use of walking aids).

A court, with the help of the state bar association, public service organizations, and community groups, should contact individuals to determine their willingness to participate in a field experiment. Five individuals with each type of disability should be paired with five individuals with no disabilities. Additionally, groups should be matched as closely as possible on basic demographic features (e.g., age, gender, and race).

questionnaire concerning their experiences. The items on the questionnaire may include the following:

1. From the time that you were in your automobile in front of the courthouse, how long did it take you to find a parking place?
2. Did you notice any designated places for persons with handicaps?
3. Were they available?
4. How long did it take you to reach the courthouse entrance?
5. Did you have any difficulty entering the courthouse?
6. Did anyone assist you?
7. If yes, please identify that person. \_\_\_\_\_  
\_\_\_\_\_
8. How long did it take you to reach the entrance to the clerk's office?
9. Did you have any difficulty entering the clerk's office?
10. Did anyone assist you?
11. If yes, please identify that person. \_\_\_\_\_  
\_\_\_\_\_
12. Did you have any difficulty approaching the counter?

21. If yes, please identify that person. \_\_\_\_\_
22. Did you have any difficulty in finding a place to sit in the room?
23. Did anyone assist you?
24. If yes, please identify that person. \_\_\_\_\_
25. Did anyone assist you in leaving the courthouse when the hearing was completed?

The responses to these questions should reveal if individuals with all, some, or none of the designated impairments spent more time locating desired information or courtrooms than individuals with no disabilities. Was the difference, if any, only a matter of a few minutes? Or did persons with disabilities spend two, three, or four times as much time in gaining access to information or court proceedings? Were the persons with handicaps more likely to experience difficulties in entering the courthouse, the clerk's office, and courtrooms? Finally, the time and effort spent by the nondisabled individuals should be of interest to the court. Does everyone appear to spend too much time obtaining desired information or locating courtrooms?

A well-performing court will seek to minimize the extra time and the inconveniences that persons with handicaps may

requirements that the litigant must meet at each step in the appellate process. A suggested list is as follows:

Event	Amount of Fee	Number of Copies Required
Filing the notice of appeal		
Record preparation		
Transcript preparation		
Docketing		
Briefing		
Motions		

A second step is to view the information above in light of several key questions.

1. Does a court impose separate fees for filing the notice of appeal or the petition for review, making photocopies of the designated record, and docketing? If so, does this encourage litigants to file an appeal because the fee for filing notice of appeal is low, only to abandon the case when they find out that their photocopying bill may be \$500-\$1,000? And if they abandon the case, is the trial court stuck with \$500 to \$1,000 worth of fees for photocopying?

the judges assigned to the case to share a copy? Is it necessary to provide copies for a court library or archives?

5. How do the practices in a court compare with those in adjoining states?<sup>32</sup> Are their fees higher, lower, or about the same? Are their requirements concerning the number of copies of briefs and records similar or different?
6. Does a court provide levels of relief for litigants who have different levels of resources? Are all fees waived for the most acutely indigent, while some fees are waived for those litigants who have some resources?

By addressing questions like these, a court should have a clearer sense of whether its fee structure and other requirements are inhibiting access.

---

<sup>32</sup> Some information on court fees is available in Carol R. Flango, *Appellate Court Procedures*. (Williamsburg: National Center for State Courts, 1998).

2. Type of case.
3. Type of jurisdiction.
4. Date case filed.
5. Date case resolved.
6. Method of resolution.
7. Type of representation (attorney v. pro se).

Are some areas of law (e.g., administrative agency cases) experiencing a higher rate of dismissal? If so, how long after filing? Is the rate of dismissal higher or lower among pro se litigants in all or only in some areas of law? If the rate of dismissal is higher for pro se litigants than those with attorney representation, a court might want to look at the pro se cases more intensively.

What exactly are the causes of the dismissals? Have the pro se litigants failed to submit affidavits of indigence? Or are their briefs improperly formatted? The answers to those questions might help a court ascertain whether the dismissals are occurring because of lack of comprehension or because of frivolousness. If there appears to be a problem of comprehension, a court can make a good-faith effort to make some procedural requirements less complicated and to communicate the requirements more clearly.

copy of a court decision? The following Guidepost offers a strategy to address that question.

### **Guidepost 3.2.1 Retrieval of Decisions**

A first step is to ask individuals to participate in a field test to determine the methods used, the time involved, and the ease of obtaining copies of published and unpublished court decisions. A random selection of litigants and attorneys in civil cases resolved during the past year should be contacted and asked to participate in a field test. The random selection will ensure a representative mixture of participants by status, area of law, and type of legal practice.

Each participant should be given a list of three cases decided in the past year that identifies the docket number and the caption in each case. The participants should also be told if the cases are published or unpublished. They should be instructed to retrieve these cases and record the holding in each case. Finally, the participants should be told to obtain the information on a designated day (e.g., five individuals are assigned January 19, five individuals are assigned on February 1, and so on).

Published report

Electronically

Case file

6. Did anyone else assist you in the retrieval process?  
If so, please identify that person.

Are attorneys more successful than litigants in accessing decisions? Does their greater degree of success hold true for both published and nonpublished decisions? Does success depend on the method of retrieval used? Is the amount of time required to locate decisions, by type of opinion, attorneys versus litigants, or method of retrieval significant?

Is the time and cost of accessing decisions acceptable to a court? Are the disparities among litigants and attorneys acceptable? What does a court need to do to correct any disparity or unacceptable amount of time and cost? For example, should it provide access to all decisions by placing them on the bar association's web site?

## Court

The purpose of this survey is to determine what different sectors of the public expect of a court. Do some sectors have different expectations than others? Hence, the first step is to identify pools of potential respondents. The following five groups are suggested:

1. A random sample of 50 attorneys who handled an appeal in the past year.
2. A random sample of 50 attorneys who are members of the state bar association.
3. A random sample of 50 litigants who had an appeal resolved in the past year.
4. A random sample of 50 litigants who had a case resolved in the largest trial court in the appellate court's jurisdiction in the past year.
5. A random sample of the membership of a public service organization (e.g., League of Women Voters).

All of these groups have some reason to know about the appellate court system. They are users or potential users and are likely to have some expectations about a court's performance.

- know
4. How long should it take, on average, for a court to reach a decision in a family-related case (e.g., marital dissolution, child custody, child support)?
    - a. 6 months
    - b. 12 months
    - c. 18 months
    - d. don't know
  5. Appeals fulfill a number of functions in the criminal justice process. Here is a list of potential functions. Please indicate the importance of each function on a scale of 1 to 5, where 1 means very important and 5 means very unimportant.
    - a. ensure uniformity in how cases are handled at the trial level
    - b. correct lower-court errors
    - c. protect constitutional rights
    - d. clarify the laws
  6. Would you like appellate courts to communicate more information about their activities to you?
  7. How would you like to receive that information?
  8. Where do you currently get most of your information concerning appellate courts?
  9. Would you like more assistance from a lawyer in deciding whether to appeal case?
  10. Would you like more information on which lawyers are experienced in handling appeals?

## **Standard 3.4 Regulation of the Bench and Bar**

### **Appellate court systems should ensure the highest professional conduct of both the bench and the bar.**

How does the bench and bar expect from an appellate court system to curb misconduct? There is one Guidepost that addresses this question.

#### **Guidepost 3.4.1 Survey of the Bench and Bar**

The purpose of the survey is to gain a sense of what judges and attorneys believe the court is doing to maintain ethical conduct and what they think a court should do to improve performance.

A brief questionnaire may be sent to a random sample of the state's bench and bar. Questions include the following:

1. How many cases of misconduct are filed each year against attorneys?
2. How many cases of misconduct are filed each year against judges?
3. What percentage of the attorney disciplinary cases are appealed?
4. What do you believe is the most important reason why the misconduct occurs?

conduct?

A court, in cooperation with the board of professional responsibility, should obtain information on bench and lawyer misconduct cases for each of the previous three years. The desired data are:

1. The number of misconduct cases.
2. The number of cases closed with no sanctions.
3. The relative frequency of different type of sanctions (e.g., admonition, reprimand, censure, temporary disbarment, permanent disbarment).
4. The number of exceptions to the board's decisions.
5. The number of appeals filed in an appellate court.
6. The relative frequency of disciplinary appeals decided in favor of the attorney.

How accurate are the perceptions of the bench and bar on the volume of misconduct charges, appeal rates, and the number of individuals severely sanctioned? Is the total number of misconduct cases decreasing or staying the same, relative to the size of the bar? Is the severity of the sanctions increasing over time? Are the outcomes of disciplinary appeals changing over time?



resource needs associated with the variety of cases being handled by a court. Resource sufficiency is determined by taking differences in the *complexity* of appeals and petitions into account. Complexity is the basis for building a set of “appeal weights” that are derived from the amount of judicial and staff time needed to handle a particular type of case from filing to resolution. The weights can then be applied to all major types of cases handled by a court.

Guideline 5 of *Assessing the Need for Judges and Court Support Staff* states that the “best direct measure” of the demand for court services is the number of weighted case filings.<sup>33</sup> Weighted caseload measures have several advantages over other methods for assessing workload. First, the weighted caseload approach takes into account the composition of cases rather than simply the total number of cases. Merely summing the total number of cases filed will not indicate the amount of judicial and court staff work *time* it will take to resolve that caseload. In the absence of explicit case weights, *all* cases, whether civil or criminal, are counted equally. Or in other words, they are all given a weight of 1.

---

<sup>33</sup> Victor Flango and Brian Ostrom, *Assessing the Need for Judges and Court Support Staff*. Williamsburg: The National Center for State Courts, 1996.

different cases may require taking different steps in the appellate process:

- Filing of the notice of appeal
- Filing a docketing statement (or a prebriefing settlement conference statement, prebriefing memoranda, and so forth)
- Submission of the record
- Docketing
- Submission of briefs
- Oral argument
- Conferencing
- Decision
- Rehearing
- Filing of a petition for review and a subsequent respondent's brief
- Initial review of the petition
- Oral argument
- Conferencing
- Decision

A weighted caseload study for appellate courts begins by establishing the *possible or potential* steps for each type of appeal. Once that is accomplished, the nature of the decision also must be categorized to allow for the varying degree of effort

and published opinion typically will require more judge time than a criminal case resolved by a per curiam affirmance. Yet, how much more? How much staff attorney time is needed for different types of cases?

The process of weighting appeals is a method for measuring the amount of court time spent on each major type of case. The basic procedure is outlined below:<sup>34</sup>

1. Determine the current extent of appellate court resources.
2. Calculate time available to judges, staff attorneys, and law clerks.
3. Select the types of cases to be weighted and analysis of caseload composition.
4. Analyze the volume and trend of the appellate caseload.
5. Move from caseload to workload—create the “appeal weight.”
6. Verify the appeal weights.
7. Examine the efficiency of the appellate process.
8. Initiate a procedure to keep the weights up to date.

---

<sup>34</sup> For a complete discussion of the case weighting procedure in the trial courts, please see Flango and Ostrom, *op. cit.*

clerk may be used almost exclusively to conduct research on more complex cases under the guidance of a particular judge, who is assigned to write the opinion. At the outset, it also must be decided whether the full range of court support staff (e.g., clerk's office staff and secretarial support) will be included in the study.

The completion of a weighted caseload system requires calculating the total amount of *judicial time available* each year (including judges, central staff attorneys, and law clerks)—“the judge year”—and how time is typically spent (e.g. screening cases, conducting research, conferencing, writing opinions)—“the judge day.” The total amount of time required to process the anticipated caseload is then compared to the amount of time available from the individuals who will do the work.

The calculation of available judge time also must include work not directly related to deciding specific cases, such as attending education and training programs, participating in task forces, and speaking at meetings and conferences. Such activities enable an individual to remain abreast of developments in the law. Work that is more administrative in nature also must be factored into the workday. Likewise time necessary to read correspondence, educate students and members of civic organizations, and so forth must be taken into account.

This database will allow a careful analysis of caseload composition and how it is changing over time. For example, what has been the trend in civil petitions in a state's court of last resort? If an intermediate appellate court is structured into regional districts, how has the growth in criminal appeals varied among the individual districts?

The analysis also should examine:

1. Filings per judge and per legal staff
2. Clearance rates
3. The number of briefed appeals that are pending
4. Time to disposition

Two other general types of analyses also may be valuable. First, examining the historical trend of case filings in an appellate court allows analysts to make some basic inferences about probable future change in case filings levels. Past filing levels can provide an important source of information for forecasting the future work of a court. The accuracy of estimates based on past filing trends likely will reflect the extent to which caseloads have changed fairly consistently over time and whether the factors that have influenced caseload growth in the past will continue to affect filings in the future. Ideally, requests for additional resources should be based on expected future

conference) may be adopted by some but not all intermediate appellate courts in a regional district state. This situation provides an opportunity to gauge the potential impact of the innovation on court performance if it is adopted throughout the state.

The caseload analysis suggested above illuminates some aspects of appellate court performance. However, the rationale for moving budgetary decisions from the traditional focus on court caseload to court workload is an acknowledgment of case complexity. The challenge facing appellate courts is to develop objective measures of judicial and staff work required to resolve the mix of cases entering the court and then to use that information to allocate limited judicial resources.

There are two options for determining the hours of work attached to appellate caseload: (a) an approach that draws on judicial or staff “expert opinion” to estimate workload and (b) a longer-term, more intensive time-study approach that directly *measures* judicial workload. Explicit knowledge of workload is important because it helps ensure that judges have the time necessary to handle their caseload reasonably and appropriately.

---

<sup>35</sup> California Rules of Court, Rule 39.1A.

involve sentencing issues and those that do not. The Delphi technique was developed to allow judges to estimate the amount of time various case activities take, without conducting an actual time study. Estimates are tabulated, and averages (and ranges) are calculated and returned to each judge with a request to adjust these original estimates in light of the new information. This technique bypasses the need to measure how much time judges actually spend on each type of case. A potential limitation, of course, is that the judges could reach consensus on the times required for court activity, but the times still might be inaccurate.

*Option 2. Self Reports.* Judges (or legal staff) are asked to report on judicial activity, and a direct measure of the time spent on cases is generated. Activities both on the bench and in chambers are included. Self-reports are expensive, however, and intrude on the time judges and staff have during the workday. Judges also may resist “accounting” for their time and may be concerned that the time data might be used improperly. In addition, self-reports require a substantial length of study time to compile the required data. This approach does provide actual measures of judge time and, consequently, will produce the most accurate case weights.

The end result of either technique is an estimate or measure of the judge time necessary to handle the different types of cases processed in a court—the “appeal weight.” Estimating

analysis produces estimates of resource need based on the *average* amount of time taken to complete specific activities by all judges on the court, their central staff attorneys, and law clerks. Some judges, for example, may rely on a law clerk or a central staff attorney to review the record, while other judges may review the record with little or no assistance. Because different judges on the same bench may use different practices, determining the typical amount of time needed to complete a particular activity will require considering the contribution of *all* participants. For example, assessing the work involved in determining whether a discretionary petition should be granted full review will require considering the contribution of judges, central staff attorneys, and law clerks.

The quantitative criteria suggested above will provide an estimate of how much time appellate courts need to process their caseload *using existing case processing practices and procedures*. This stage of the study is designed to assess the strengths and weaknesses of a court's current caseflow management activities, policies, and procedures. This information will help a court assess whether it is managing its business effectively. It also addresses the costs and benefits of alternative practices and procedures. How much judicial time is saved by limiting oral argument? What are the consequences of these limitations on the quality of judicial review?

Review the possibility of experimenting with alternative procedures (e.g., special expedited calendars).

3. Explore options that will address concern over judicial workload without increasing the number of permanent, full-time judges, such as expanding the role of central staff attorneys and law clerks for certain types of procedures.
4. Keep in mind that judicial productivity and, hence, the need for new judges also depend on the effectiveness of court staff. Without the proper type and level of support, judges may be performing some activities that may be delegated to qualified staff.

### **Guidepost 4.1.3 Updating and Adjusting Case Weights**

Weights must be adjusted and updated periodically. Otherwise, judges and legal staff might contend that the weights do not represent their workloads accurately. Frequent adjustment is expensive; therefore, it should be based upon readily available data to the extent possible. Moreover, the differences between weighted and unweighted case filings should be compared. If the differences are slight, perhaps specific weights are not required for some case types.

The clearance rate is the number of cases resolved divided by the number of cases filed in the same year, multiplied by 100. For example, if a court receives 500 cases in a given year and resolves 400 cases that same year, the clearance rate is  $400/500 \times 100$  or 80 percent. The cases resolved were not necessarily filed that same year, but the clearance rate has a reasonable ease of calculation and is a useful measure of the responsiveness of a court to the demand for services. If a court is keeping up with the incoming caseload, the clearance rate should be close to 100 percent.

A court has three criteria to use in assessing its performance: (1) the average clearance rates for courts of last resort and intermediate appellate courts as reported in the annual publication of the NCSC's Court Statistic Project;<sup>36</sup> (2) a court's past performance, if available; and (3) a court's own standards, illustrated below.

How well is a court doing compared to the national average? Is a court's performance becoming better, worse, or remaining the same over time? Finally, a court might judge its

---

<sup>36</sup> See, for example, Brian Ostrom and Neal Kauder, eds., *Examining the Work of State Courts, 1997*. Williamsburg: National Center for State Courts, 1998.

contribute to this situation? Has a court experienced an increasing number of cases filed each year while remaining static in the amount of court resources? Do other courts with higher rates have fewer cases filed per judge (i.e., more resources)? If the rate is 100 percent or more, is this the result of a backlog-reduction effect? Has the number of cases filed each year either remained constant or actually decreased? Finally, a court can apply the clearance rate to both mandatory and discretionary appeals. The rate also is applicable to different areas of civil law and different criminal offenses. Is the clearance rate uniform across various types of cases? Or is productivity significantly greater for some types of cases than for others?

#### **Guidepost 4.2.2 Screening and Case Differentiation**

Virtually every appellate court engages in some form of tracking or case differentiation. Different kinds of cases are handled under different procedures. Cases are examined early in the process for their degree of complexity. Those cases that are deemed to be less complex might be directed to a special procedure to resolve the case quickly (e.g., civil case settlement conference). Less complex cases also may be handled under some modification of full appellate review (e.g., a non-argument calendar rather oral argument). In fact, some courts simultaneously modify the several steps in the process to create what is called a special expedited calendar. It is important to

The needed data are the same as those gathered in Guidepost 2.4.1, Time to Resolution. To use this Guidepost, a court would also have to measure the cases in terms of whether they have been handled under a modified procedure (or placed on the special expedited calendar) or handled in the traditional manner (or placed on the regular calendar).

A special expedited calendar combines several modified procedures (e.g., limited briefs, no argument, and a short, nonpublished opinion versus fully written briefs, oral argument, and a published opinion). For reference to illustrative special expedited calendars, see footnote 15 in the discussion of Guidepost 2.1.1.

The average lapsed time from the filing of the notice of appeal or petition for review to resolution should be calculated for each method of handling cases. Additionally, the average time consumed for each stage in the appeal process should be calculated for each method.

Positive performance is achieved if the time to resolve cases handled under a modified procedure (or a special expedited calendar) is shorter than the time to resolve cases handled in the traditional manner (or placed on the regular calendar). Is the difference as expected? It is neither obvious nor automatic that case differentiation will result in shorter processing times. If

involve a published opinion? Presumably, such a result is expected. Does it, in fact, occur? On the other hand, while a no-argument calendar may reduce the overall time to resolve cases, does it affect the time from the close of briefing to argument/submission? It could be argued that whether cases are argued or submitted on the briefs alone should have no effect on this step. Is that the case? Answers to these questions will help a court assess its performance in terms of intended and unintended effects.

A second way of assessing performance is to examine the range of processing times associated with the two calendars. Positive performance is indicated by a much narrower range of processing times under the special expedited calendar than under the regular calendar. Not only is the average time shorter under the expedited calendar, but the difference between the slower (e.g., 25th percentile) and the faster case processing times (e.g., 75th percentile) should be much less than it is for the cases on the regular calendar. The reason is that the screening process should have placed on the special expedited calendar a group of cases that resemble one another more closely than cases that were placed on the regular calendar.

To enhance the ability of trial courts to produce transcripts in a timely manner, the California Court of Appeal in San Francisco, has designated trial court liaisons to maintain communication and supervision in the preparation of transcripts of appeals in criminal cases. The liaison can assist trial court personnel about the procedural requirements for preparing cases on appeal and alerting the appellate court to systemic problems (e.g., shortages of reporters) that receive major corrections. Appellate courts that require a large number of appeals from several trial courts might find this technique especially useful in smoothing out problems because it establishes a single contact person for matters concerning record and transcript preparation in each location. (For further information on this tool, see Novak and Somerlot, *op. cit.* pp. 100-01).

2. Type of case: Guideposts 1.1.1, 1.1.2, 1.2.1, 1.4.1, 2.2.1, 2.3.1, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.1.3, 4.2.1, 4.2.2
3. Type of jurisdiction: Guideposts 1.1.1, 1.1.2, 1.2.1, 2.2.1, 2.3.1, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.1.3, 3.2.1, 4.2.1, 4.2.2
4. Date the notice of appeal, the petition for review, application for writ, or other original proceeding is filed: Guideposts 1.1.1, 1.1.2, 1.3.1, 1.4.1, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.1.3, 3.2.1, 4.2.1, 4.2.2
5. Date the petition for review, application is granted, denied, dismissed: Guideposts 1.1.2, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.1.3, 4.2.1, 4.2.2
6. Date the record is submitted: Guideposts 2.4.1, 2.4.2
7. Date the last brief is submitted: Guideposts 2.4.1, 2.4.2
8. Date of oral argument/submission: Guideposts 2.4.1, 2.4.2
9. Date of resolution: Guideposts 1.1.1, 1.1.2, 1.2.1, 1.3.1, 1.4.1, 2.3.1, 2.3.2, 2.4.1, 2.4.2, 2.4.4, 3.1.3, 4.2.1, 4.2.2
10. Method of resolution of appeals and petitions: Guideposts 1.3.1, 2.2.1, 2.4.1, 2.4.2, 3.1.3
11. Form of the decision in appeals and petitions: Guideposts 2.2.1, 2.3.1, 2.3.2, 2.4.1, 2.4.2, 3.2.1

- Guidepost 1.3.1
- 23. Outcome of a court's decisions in civil cases:  
Guidepost 1.3.1
- 24. Author of a court's decision: Guidepost 2.3.1

In addition, there are a few supplemental data elements that will greatly enhance the value of other Guideposts. They are more specific in nature, but they are worth the effort of gathering and analyzing. Hence, they are recommended to a court for its consideration. They include:

- 25. Type of the underlying trial court proceeding in criminal and civil cases: Guidepost 1.3.1, 2.4.4
- 26. Number of issues on appeal: Guidepost 1.3.1
- 27. Types of issues raised on appeal: Guidepost 1.3.1
- 28. Types of most serious offenses at conviction in criminal cases: Guideposts 1.3.1, 2.4.4
- 29. Area of law on appeal in civil cases: Guidepost 1.3.1
- 30. Type of legal representation for the offender in criminal cases: Guidepost 1.3.1

designed to meet specific state needs, such as the Water Court in Colorado or the Land Court in Hawaii.

The variety of ways in which appellate courts have changed to accommodate increasing caseloads have not been as systematically studied.<sup>1</sup> An understanding of variations in organizational responses is necessary to assist those interested in appellate courts to communicate meaningfully with each other, and to ensure that cross jurisdictional comparisons are made fairly. States have used *all* of the approaches described below, but in various combinations, to meet their appellate

---

\* This Appendix consists of an article that originally appeared as part of NCSC Court Statistics Project's *Caseload Highlights* series. It has been reproduced as it originally appeared with the permission of the authors.

\*\* The authors would like to express their gratitude to several chief justices who reviewed an earlier draft of this manuscript: Chief Justice David A. Brock, New Hampshire; Chief Justice Arthur A. McGiverin, Iowa; Chief Justice Thomas R. Phillips, Texas, and Chief Justice Gerald W. VandeWalle, North Dakota. We are also grateful for the critical reviews by members of the Court Statistics Project Advisory Committee and staff, as well as for comments from Roger Hanson and data runs by Pam Petrakis.

<sup>1</sup> This overview is intended to cover the *appellate* workload of courts of appeal. Many of these courts have jurisdiction over original proceedings, but these are a comparatively small part of their workloads and are not used to construct this taxonomy.

work of appellate justices: read the briefs, hear oral arguments, prepare and critique draft opinions, and discuss issues in conference.<sup>3</sup>

## 2. *Creating Intermediate Appellate Courts or More Geographic Divisions*

The most common state response to increasing appeals is the creation of an intermediate court of appeals. Intermediate appellate courts permit many more petitioners at least one opportunity to appeal, but also create the possibility of a second appeal to the court of last resort. According to Professor Leflar “It is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multi-judge court.”<sup>4</sup> The taxonomy presented below shows the variety of ways intermediate appellate courts are used in the states. In 11 states, the intermediate appellate court is essentially another appellate court, similar in size to the court of last resort. In 29 states, the intermediate appellate courts have more than 9 members and as many as 88 authorized members serving on panels in geographically-based

---

<sup>2</sup> Most state courts of last resort have seven members, 18 have five justices, and only 7 have nine-justice courts. A history of the number of state supreme court justices in 34 states can be found in E. Curran and E. Sunderland, *The Organization and Operation of Courts of Review*, **Third Report of the Judicial Council of Michigan** 52, 61-62 (1933). Only New Jersey and Virginia ever had more than nine judges. The Virginia Supreme Court had 11 judges from 1779 to 1788, when it also served as a trial court. The New Jersey Supreme Court had 15 or 16 justices from 1844 until 1948. See Harison, *New Jersey's New Court System*, 2 **Rutgers L. Rev.** 60,65 (1948).

<sup>3</sup> J. Dethmers, *Delay in State Appellate Courts of Last Resort*, 328 **Annals** 153,1158 (1960).

<sup>4</sup> R. Leflar, **Internal Operating Procedures of Appellate Courts** (Chicago: American Bar Foundation, 1976).

Intermediate appellate courts typically hear appeals of right, but some also have discretionary jurisdiction for certain types of cases.

#### 4. *Using Panels*

Justices on larger courts of last resort can increase their capacity to decide appeals by sitting in panels, rather than en banc. Indeed, for large intermediate appellate courts, panels are a practical necessity. This adaptation, however, creates the possibility of inconsistency in decision making among panels, and generates the need to reconcile differences among panels. Techniques, such as conferencing the opinion drafts en banc, can be used to minimize inconsistent decisions among panels.

### **Patterns of Response**

These four structural responses can be combined to construct at least seven distinct patterns of appellate caseload. The patterns themselves are arranged according to degree of flexibility, from least to most flexible. Theoretically, the pattern with the least flexibility is the single, five-justice appellate court with mandatory jurisdiction that decides all appeals en banc (Pattern I). At the other extreme is the nine-justice court of last resort with mostly discretionary jurisdiction that hears cases in panels of three. It sits in a structure over a large

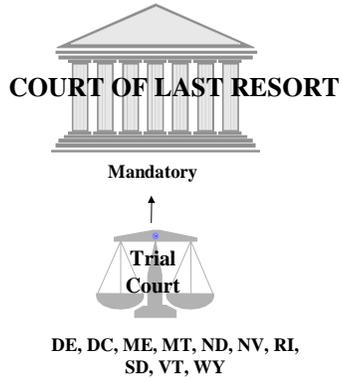
---

<sup>5</sup> S. Wasby, *Appellate Delay: An Examination of Possible Remedies*, 6 **JUST. SYS. J.** 329 (1981).

<sup>6</sup> See Pattern II, New Hampshire's and West Virginia's supreme courts have discretionary jurisdiction even though an intermediate appellate court has not been created in those states. Virginia, had the same structure for many years until the intermediate appellate court was established in 1985.



have not done so since February of 1994, and so are classified here. The North Dakota Court of Appeals is a “temporary court of appeals” composed of active or retired trial court judges, retired justices of the supreme court, and lawyers assigned to the court on a case-by-case basis.



---

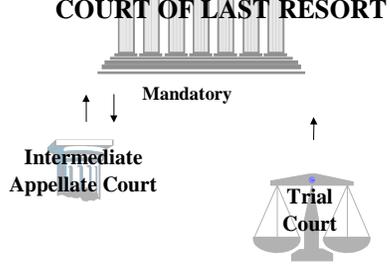
<sup>7</sup> Information on panels is from **State Court Organization, 1993** (US Dept. of Justice, Bureau of Justice Statistics, 1995), Table 25.



**Discretionary**



**NH, WV**



HI, ID, IA, MS, SC

# COURT OF LAST RESORT



Mostly Discretionary



Intermediate Appellate Court



Mostly Mandatory



Trial  
Court

AK, AZ\*, AR, CA\*, CO, CT, FL\*, GA, IL,  
KS, KY, MD, MA, MI, MN, MO\*, NE, NJ,  
NM, NC, OH\*, OR, UT, WA\*, WI\*

\* Denotes intermediate appellate court that sits in geographical divisions.

---

<sup>8</sup> Exceptions are: Connecticut, Massachusetts, and Nebraska.

# COURT OF LAST RESORT



Intermediate Appellate Court



Mostly Discretionary

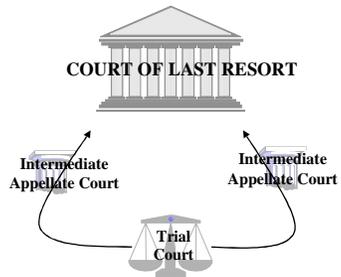


Trial  
Court

LA\*, VA

\* Denotes intermediate appellate court that sits in geographical divisions.

and criminal. New York has intermediate appellate courts at two different levels. So appeals can go through three levels of courts: (1) the lower level, comprised of the Appellate Terms of the Supreme Court in the First and Second Judicial Departments and the County Courts in the Third and Fourth Departments; (2) the Appellate Division, the primary intermediate appellate court, and (3) the highest court, called the Court of Appeals.<sup>9</sup>

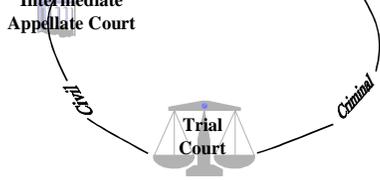


AL, IN, NY, PA, TN\*

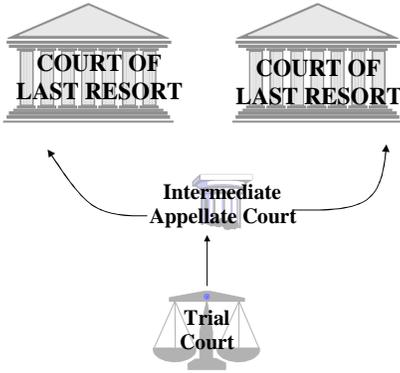
\* Denotes intermediate appellate court that sits in geographical divisions.

---

<sup>9</sup> See R. MacCrate, J. D. Hopkins, and M. Rosenberg, **Appellate Justice in New York** (Chicago: American Judicature Society, 1982). Appellate Terms are classified as intermediate appellate courts. Appeals to County Courts, used in the Third and Fourth Departments, are the equivalent of appeals from a court of limited jurisdiction to a general jurisdiction court in other states.



OK\*



TX\*

\* Denotes intermediate appellate court that sits in geographical divisions.

mandatory jurisdiction appears to be sufficient to handle the workload. As size of population, and number of appeals, increase some states adapt by using discretionary jurisdiction (Pattern II), experiment with intermediate appellate courts, or establish an intermediate appellate court to which cases are transferred from the court of last resort (Pattern III). The next stage are courts of last resort and a full-fledged intermediate appellate court, usually with mandatory jurisdiction (Pattern IV), but occasionally with discretionary jurisdiction (Pattern V). Finally, some states have adapted to caseload by creating multiple courts of last resort (Pattern VII) or multiple courts of appeal (Pattern VI).

---

<sup>10</sup> For a more complete discussion of appellate court caseloads and dispositions, see **Examining the Work of State Courts, 1995** (National Center for State Courts, 1997).

opportunity to highlight the essential aspects of the standards and to ask for ideas in improving the work-in-progress.

The benefits of these interchanges were complemented by the constructive criticism of several individuals who reduced their thoughts to writing. Positive reactions and helpful suggestions were received from The Honorable Robert C. Murphy, The Honorable A.M. (Sandy) Keith, The Honorable Patrick M. Schott, Joe S. Cecil, Peter W. Davis, Thomas L. Hafemeister, Susan L. Keilitz, Jean M. Kennett, Thomas B. Marvell, Daniel J. Meador, Donna Stienstra, and Stephen L. Wasby. To all of these individuals, we say thank you.

In addition to the many helpful comments that we received on the Standards, the Guideposts underwent strict scrutiny appellate courts in Florida and Oregon. We point in the text of this report how these two groups served as complementary pretests of the Guidepost. We now wish to acknowledge the particular individuals in each state who devoted so much time and attention to refining our drafts.

In Florida, the persons who contributed to the revision of the Guideposts included members of the Judicial Management Council Committee on District Court of Appeal Performance and Accountability. They are The Honorable Peggy A. Quince (Chair of the Committee 4/98-11/98) and now a member of the Florida Supreme Court, The Honorable Martha C. Warner (chair 11/98

The Honorable Mary Deitz, Chief Judge of the Oregon Court of Appeals; Kinsley W. Click, State Court Administrator, and Scott J. Crampton, Management Services Director. To all of these Floridians and Oregonians, we thank you most sincerely for taking our work seriously and offering specific ways to improve our work.

Finally, this project could not have been undertaken or completed without the support of the State Justice Institute (SJI). The Commission and the National Center for State Courts wish to express their gratitude to the Board of Directors of SJI and to its Deputy Director, Richard Van Duizend, who served as the project monitor. With the assistance of SJI, the state appellate court community has established goals to foster greater public accountability in all areas of appellate review.

