

2005

Improving the Appellate Process Worldwide Through Maximizing Judicial Resources

Honorable J. Clifford Wallace

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Recommended Citation

Honorable J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 *Vanderbilt Law Review* 187 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol38/iss1/5>

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ESSAY

Improving the Appellate Process Worldwide Through Maximizing Judicial Resources

*Honorable J. Clifford Wallace**

ABSTRACT

As the number of cases filed each year has surged, U.S. federal appellate courts have evolved in order to fulfill their core functions of deciding appeals and setting guiding precedent. Many of the challenges created by overwhelming caseloads are also being tackled in foreign judicial systems. In this Article, Judge Wallace offers the approach of the United States Court of Appeals for the Ninth Circuit as a possible model of reform, although he also points out that each judiciary will need to tailor reform efforts to its particular circumstances.

In Part II, Judge Wallace details several of the case management techniques that have proved most useful in the Ninth Circuit. Where possible, he also identifies appellate courts in other U.S. and foreign jurisdictions that have similar mechanisms in place.

Part III considers in greater depth two particularly significant reforms: appellate level mediation and the appointment of an Appellate Commissioner. These reforms more fundamentally alter the conventional approach to appellate court adjudication.

* Senior Judge and former Chief Judge, United States Court of Appeals for the Ninth Circuit. The views expressed in this Article are entirely the Author's. He does not attempt to reflect the views of the other members of his court. He does express his sincere appreciation to Gerald Neugebauer, Esq., for his effective assistance with this Article.

Part IV briefly considers arguments that these reforms erode the quality of judicial decision-making. Judge Wallace concludes that increasing efficiency with streamlined case management and mediation mechanisms does not necessarily compromise core judicial principles.

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I. INTRODUCTION

There has been no shortage of studies profiling the stark surge in the United States federal appellate courts' caseloads.¹ The numbers speak for themselves. Filings leapt from 3,900 a year in 1960 to 11,600 in 1970, then almost doubled over the next decade, only to double again by 1992.² Since 1992, filings have jumped an additional seventy-five percent, exceeding 60,000 in 2003.³ The number of appeals pending at the end of each fiscal year rose from 2,220 in 1960 to 44,600 in 2003,⁴ more than a twenty-fold increase.

1. See generally THOMAS E. BAKER, JUSTICE RESEARCH INST., RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 31-43 (1994) (summarizing previous studies of increased appellate caseloads); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985).

2. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.1.3 (2003), available at <http://www.uscourts.gov/judicialfactsfigures/table1.03.pdf> [hereinafter JUDICIAL FACTS AND FIGURES].

3. *Id.*

4. *Id.*

I have witnessed this growth firsthand, and I can vouch that the statistics and resultant workload are indeed startling. During my thirty-two-year tenure on the Court of Appeals for the Ninth Circuit, I have watched the circuit's appeals more than quintuple from 2,258⁵ to 12,872 filings a year.⁶ I was appointed in 1972 to fill one of thirteen authorized active judgeships; at that time, five judges were serving the circuit on senior status.⁷ I am now one of twenty-two senior judges. The active ranks have grown to twenty-eight judgeships, and there are urgent pleas to add more.

Many commentators have treated the burgeoning caseload as a cause for alarm.⁸ The quality of appellate decision-making, they say, has been diluted by more cases in competition for finite judicial resources. Enlisting an ever-expanding army of judges to cope with the volume has decreased collegiality among those on the bench. Article III judges are forced to delegate more responsibility to their staffs; law clerks and staff attorneys actually make the decisions, some fear, while the judges relegate themselves to supervisory roles. A shrinking proportion of litigants is afforded the opportunity to present cases orally before the tribunal; fewer parties still are fortunate enough to have their disputes resolved in a published, fully reasoned decision. Despite all of the procedural shortcuts, expediency has given way to protracted delay.⁹

Although the rise in caseload has been striking, I see no reason for doomsaying. Federal appellate courts continue to fulfill their two core functions: (1) to decide the appeals by correcting material errors in the cases reviewed, and (2) in so doing, to establish clear precedent to guide constituents within the circuits' jurisdictions. In other words, appellate courts are still delivering justice to individual litigants while laying the foundation for a just and orderly society.

5. See ADMIN. OFFICE OF THE U.S. COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS 9-0 (1972) [hereinafter MANAGEMENT STATISTICS].

6. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2003 JUDICIAL BUSINESS: ANNUAL REPORT OF THE DIRECTOR LEONIDAS RALPH MECHAM app. tbl.B (2003), available at <http://www.uscourts.gov/judbus2003/appendices/b.pdf> [hereinafter 2003 ANNUAL REPORT].

7. See MANAGEMENT STATISTICS, *supra* note 5, at 9-0.

8. See, e.g., BAKER, *supra* note 1, at 31-51 (documenting previous studies and the consequences of appellate delay); DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974) (coining the phrase "crisis of volume"); Hon. Richard J. Cardamone, *Foreword: How an Expanding Caseload Impacts Federal Appellate Procedures*, 65 BROOK. L. REV. 281 (1999) (discussing decreased collegiality and increased dependence on law clerks and technology in the appellate courts). For a more tempered reaction, see JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURT OF APPEALS (2003).

9. The median time from the date a party files notice of an appeal to disposition of the appeal is 10.5 months. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2003: COURTS OF APPEALS (2003), available at <http://www.uscourts.gov/cgi-bin/cmsa2003.pl>.

True, courts could not have succeeded had they not changed the way they approach their duties, and the need to adapt certainly remains constant. But we do not have to throw our hands up in desperation.

I have made it a point to think prospectively and constructively rather than yearn nostalgically for the past. That is, I focus on how appellate courts can evolve to preserve—in the face of the challenge presented by an overwhelming caseload—the twin aims of deciding appeals and setting guiding precedent. As the Chief Judge of the Ninth Circuit from 1991 to 1996, for example, I worked to implement a series of structural reforms to mitigate the court's inefficiencies. Similarly, for more than three decades I have worked with foreign judiciaries on my vacations and, since stepping down from the chief judgeship and assuming senior status, I have spent roughly half of my time participating in international consultations and legal education programs. The goal of these initiatives has been to improve the administration of justice in judicial systems throughout the world.

Initially, these programs afforded little opportunity to apply my experience as an appellate judge directly. The countries involved logically wanted to tackle first the problems plaguing trial courts, including their impossibly clogged dockets. For instance, the second Conference of the Chief Justices of Asia and the Pacific, held in Islamabad in 1987, kicked off a two-year endeavor by the Chief Justices to lessen trial court delay. A later survey revealed that a large majority of the countries had implemented judicial education programs to train judges in conducting trials more efficiently.¹⁰ In fact, more than one-third of the countries had established institutions to find the optimal method for handling caseloads. The Chief Justices have indicated that their efforts were successful.

As efficiency has improved at the trial level, cases arrive at the appellate court more quickly, and the backlog and delay have naturally shifted upward.¹¹ The focus of reform efforts likewise is now being drawn to the appellate courts. The Law Commission in New Zealand, for example, recently recommended altering the New Zealand Court of Appeal's jurisdiction in light of its recognition that the "Court of Appeal cannot continue to operate with its present

10. Hon. J. Clifford Wallace, *Survey of Chief Justices of Asia and the Pacific* (1993) (on file with author).

11. According to the 1993 survey I conducted, the average time needed to resolve an appeal in Asian and the Pacific appellate courts was 8.5 months. *Id.* At the end of 1996, thirty percent of the appeals filed in England's Court of Appeal Civil Division took longer than fourteen months to decide. DEPT FOR CONSTITUTIONAL AFFAIRS, REPORT TO THE LORD CHANCELLOR BY THE REVIEW OF THE COURT OF APPEAL (CIVIL DIVISION): CURRENT SITUATION AND REASONS FOR THE REVIEW (1996), available at <http://www.dca.gov.uk/civil/bowman/bowman2.htm> [hereinafter CURRENT SITUATION AND REASONS]. The average among the remaining seventy percent was fourteen months. *Id.*

volume of work.”¹² Although reforms thus far have been modest, as the case of New Zealand demonstrates, it is clear that the impetus to improve appellate court case management is growing.

That is where this Article enters the picture. Since courts in the United States have confronted many of these problems already, I offer the approach of one—the United States Court of Appeals for the Ninth Circuit—as a possible model.¹³ The approach is a simple one. Experience in every part of the globe has demonstrated that trial court reform is most successful if based upon two key aspects: case management and alternative dispute resolution (primarily mediation).¹⁴ Our program focuses on these two principles, but adapts them to fit the situations facing appellate courts.

I advance this model assertively, putting aside the qualms others have expressed about the state of federal appellate court decision-making. Despite my confidence, though, I do not intend to suggest that courts in other jurisdictions should adopt the Ninth Circuit strategy in its entirety. Rather, a foreign judiciary needs to consider those modifications that have the potential to improve its appellate courts, and it should tailor the methodology herein to fit its particular circumstances. I also do not mean to imply that this is a one-way street; U.S. courts have much to gain from the expanding practical knowledge of foreign courts. In addition, the dialogue among courts struggling with similar problems and embracing similar solutions will assure us that our judicial system has not headed down the wrong track, but rather is adjusting properly in order to continue serving its important purpose.

With these goals in mind, I organize this Article as follows. Part II describes several changes that an appellate court can undertake to administer its caseload more effectively. Part III considers in greater depth two additional significant reforms: appellate level mediation and the appointment of an Appellate Commissioner. Part IV briefly considers arguments that these reforms erode the quality of judicial decision-making.

12. LAW COMM’N, REPORT NO. 85, DELIVERING JUSTICE FOR ALL: A VISION FOR NEW ZEALAND COURTS AND TRIBUNALS 277 (2004), available at <http://www.lawcom.govt.nz/Documents/Publications/R85%20STC/Parts%2056.pdf>.

13. For those readers interested in learning more about the approaches of other circuits, see JUDITH A. MCKENNA ET AL., FED. JUDICIAL CTR., CASE MANAGEMENT PRINCIPLES IN THE FEDERAL COURTS OF APPEALS (2000).

14. See CURRENT SITUATION AND REASONS, *supra* note 11; see also Wallace, *supra* note 10.

II. EFFICIENT CASE-MANAGEMENT TECHNIQUES

As the largest appellate court in the country, the United States Court of Appeals for the Ninth Circuit might have collapsed under the weight of its ever-increasing caseload had it not developed innovative ways to allocate its limited judicial resources. I detail here several of the case management techniques that have proved most useful. Where possible, I also identify appellate courts in other jurisdictions that have similar mechanisms in place.

A. *Initial Review*

We have learned from trial court reforms that early court intervention is indispensable. Similarly, it goes without saying that an appellate court must begin managing the life of a case the moment it arrives at the courthouse. When a party undertakes to file the appeal, the clerk should confirm that the party is remitting all the required fees and submitting all the necessary papers. Court staff should simultaneously chart the course to come by imposing a schedule for the compilation of the appellate record, submitting the parties' "briefs" (i.e., written arguments) and completing whatever else is necessary for the court to hear the appeal. The court should apprise litigants of the consequences of failing to comply with deadlines—such as dismissal of the appeal—and enforce the schedule.

While the parties are busy making these preparations, the court has the opportunity to conduct a potentially time- and asset-saving initial review of the case—one geared toward rooting out dispositive defects early on. For example, a preliminary inquiry into appellate jurisdiction prevents the court from spending much of its time and resources on a case over which it has no power. Should the court discover a jurisdictional or other flaw, the litigant may be ordered to explain why its appeal should not be dismissed. If the litigant cannot, the court can dismiss the appeal at an early stage and bypass a time-consuming preparation for review of its merits. It is important to highlight the role non-judge personnel play in this process. Judges can free themselves to attend to more important matters by assigning this initial investigation to well-trained court staff; only if a staff member detects a problem do the judges need to get involved during an appeal's infancy.

This largely describes the practice of the Court of Appeals for the Ninth Circuit, which delegates many preliminary tasks to "staff attorneys" (or court-employed lawyers). With the exception of *pro se* cases, which I cover in the next subsection, a specific subset of the Ninth Circuit's staff attorneys—those in the "Motions Unit"—are responsible for reviewing every appeal filed. If the motions attorney

discovers what appears to be a jurisdictional defect in a particular case, the attorney can issue an Order to Show Cause, an instrument from the court directing the party to explain how the court has jurisdiction over the party's appeal. If the party's response does not persuade the motions attorney that there is a ground for appellate jurisdiction, the attorney can set the case for consideration by a "motions and screening panel" of judges,¹⁵ resulting, most likely, in a prompt dismissal of the case. If the motions attorney is satisfied by the party's response, the court is free to revisit the question of its jurisdiction as the case progresses (and indeed has a duty to do so).

While nearly every court has some sort of administrative office or clerk in charge of initially processing an appeal, I spotlight one here: England's Court of Appeal Civil Division. Given the amount of time cases wait in its system,¹⁶ the Court of Appeal set out in the mid-1990s to study possible remedies for the delay. One of the solutions proposed was to restructure the administrative arm of the Court of Appeal—the "Civil Appeals Office" (hereinafter "Office")—by, among other things, concentrating authority in one administrative head and placing greater reliance on the Office's legally qualified staff. The study explicitly recognized that using the Office to improve the court's case management was key; it recommended generally that "[t]he approach of the [Court of Appeal] and the Civil Appeals Office should be towards managing a case from the time it is set down to the final disposal."¹⁷ The Office was to "ensure that[] members of the [Court of Appeal] receive their papers in good time and in good order, have adequate legal support; and are not asked to do work which could be delegated appropriately to others, not necessarily of judicial rank."¹⁸ In other words, the Office was to play a more active role in processing an appeal from start to finish.

B. *Special Considerations for Pro Se Cases*

The doors of the appellate courthouse—like those of the trial court—should be open to all litigants, regardless of whether they

15. I discuss "motions and screening panels" in greater depth later. For present purposes, I point out only that a "motions and screening panel" is distinct from what I call an "argument panel" in that the former never involves oral argument. Both, though, are composed of three judges, as is required by law to adjudicate an appeal.

16. See CURRENT SITUATION AND REASONS, *supra* note 11.

17. DEP'T FOR CONSTITUTIONAL AFFAIRS, REPORT TO THE LORD CHANCELLOR BY THE REVIEW OF THE COURT OF APPEAL (CIVIL DIVISION): SUMMARY OF RECOMMENDATIONS No. 56 (1996), available at <http://www.dca.gov.uk/civil/bowman/bowman3.htm> [hereinafter SUMMARY OF RECOMMENDATIONS]. Sir Jeffery Bowman chaired the committee that produced the report; hence, it is often associated with his name.

18. *Id.* at No. 47.

have the means to afford (or the desire to secure) legal representation. Preservation of this principle, however, often exacts a cost on the court. When a litigant chooses to represent him or herself,¹⁹ the court loses the valuable assistance of a trained lawyer; in the attorney's stead, the court frequently must contend with an individual untutored in court procedure and substantive law. Not only might this skew the normal adversary system to one side, but *pro se* litigants are more prone to make frivolous or incoherent arguments, neglect to fulfill important procedural requirements, and/or file appeals with jurisdictional defects. It is best to catch these deficiencies early so that they can be remedied promptly or, if incurable, the appeal can be dismissed.

Even if the appeal is properly before the court, the interests of both the litigant and the court are generally best served when the litigant secures legal representation. A trained attorney is more likely to make the strongest legal argument, marshal the most probative evidence, and cite the most relevant cases on his or her client's behalf. A lawyer's greater appreciation for the virtues of brevity and clarity spares the court from wading through myriad contentions and deciphering cloudy reasoning or the occasional illegible brief. These downfalls associated with unrepresented parties, of course, result in more difficult decision-making, as the appellate court is deprived of the virtues of the adversarial system.

Acknowledging the problems that *pro se* representation can pose, the Ninth Circuit established a specialized unit—the "Pro Se Unit"—in 1992 to process all *pro se* appeals in civil and habeas corpus cases.²⁰ The first task of the Unit, which currently consists of a staff attorney and paralegals, is to review carefully each case in which there is *pro se* representation on one or both sides. If the Unit concludes that the appeal contains a flaw that mandates its dismissal, it prepares an order that a motions and screening panel can issue if it agrees. The Pro Se Unit does much the same for unmistakably frivolous appeals. It also keeps track of individuals who frequently make baseless, vexatious *pro se* filings, and, if

19. *Pro se* filings in the Ninth Circuit have grown from just under 2,200 in 1993, 1993 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR L. RALPH MECHAM, in ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES COURTS: SELECTED REPORTS app. I tbl.B-9 (2003), to nearly 5,000 in 2003. 2003 ANNUAL REPORT, *supra* note 6. In 2003, roughly forty-five percent of all litigants who filed an appeal in the Ninth Circuit did so *pro se*. *Id.*

20. The circuit also produces information packets to apprise *pro se* parties of relevant court procedures, schedules, etc. *See, e.g.*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, INFORMATION PACKAGE FOR PRO SE APPELLANTS/PETITIONERS (2003), available at [http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/7fb84500dd29323888256c3e005d2315/\\$FILE/revisedProSe03.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/7fb84500dd29323888256c3e005d2315/$FILE/revisedProSe03.pdf) (last visited July 16, 2004); U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PERFECTING YOUR APPEAL (2003), available at <http://www.ca9.uscourts.gov> (last visited July 16, 2004).

appropriate, will recommend that the court file an order requiring the vexatious *pro se* litigator to secure permission from the court before filing another appeal. Along the same lines, the Pro Se Unit monitors *pro se* appeals for inactivity and shepherds the appropriate cases toward dismissal for failure to prosecute.²¹

The Pro Se Unit also processes cases referred to it for inclusion in the Ninth Circuit's Pro Bono Program, which was created in 1993. The program is intended for appeals where counsel, by composing clearer briefs and presenting a more effective oral argument, could materially assist the court. Prime candidates are appeals raising issues of first impression or issues of some complexity. Once a case has been selected for the Ninth Circuit's Pro Bono Program, the Unit secures, with the court's approval, the services of an attorney (or supervised law students) willing to work on a pro bono basis; the court then appoints the attorney as counsel. The advantages are palpable: the litigant gains needed free legal services, and the court benefits by hearing a better researched, prepared, and argued appeal on a case requiring such representation. The party, of course, is not obliged to accept pro bono counsel, and there are multiple other checks in the system to ensure that the appeal is appropriate for the program. For those cases in which counsel remains appointed until the court renders a decision, pro bono attorneys prevail (at least partially) fifty percent of the time,²² a testament to both the success in selecting the proper cases for the Pro Bono Program and the quality of the lawyers' donated legal services.

I am not aware of any foreign appellate court that has instituted a *pro se* program as comprehensive as the Court of Appeals for the Ninth Circuit. Although England's Legal Services Commission provides some funding for legal services related to appeals,²³ most countries have grappled primarily with the problems presented by self-represented litigants in the courts of first instance. Appellate judges nonetheless are beginning to call for increased attention to the problems *pro se* parties bring to their courts. In Australia, for

21. Much of the information presented here is found in the Ninth Circuit "Pro Bono Handbook," accessible on the court's website. See U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, HANDBOOK FOR THE PRO BONO PROGRAM, available at <http://www.ca9.uscourts.gov> (last visited July 16, 2004).

22. *Id.*

23. See LEGAL SERVS. COMM'N, A PRACTICAL GUIDE TO COMMUNITY LEGAL SERVICE FUNDING, available at http://www.legalservices.gov.uk/old_docs/lsc/archive_leaflets/fund_ngf.htm (last visited July 16, 2004). The Court of Appeal Civil Division also makes efforts to connect certain unrepresented litigants with pro bono assistance. See, e.g., COURT OF APPEAL CIVIL DIV., REVIEW OF THE LEGAL YEAR 1998 - 1999, available at http://www.courtservice.gov.uk/using_courts/guides_notices/notices/civil/report.htm#Pro (last visited July 31, 2004); COURT OF APPEAL CIVIL DIV., REVIEW OF THE LEGAL YEAR 2002 - 2003, available at http://www.courtservice.gov.uk/cms/media/review_legal_year_2003.pdf (last visited July 31, 2004) [hereinafter REVIEW OF THE LEGAL YEAR 2002-2003].

instance, an appellate judge was confronted with the question of whether he had the power, acting as a single judge, to dismiss a deficient notice of appeal.²⁴ He “regard[ed] th[e] question as one of practical and increasing importance” particularly because “[t]he number of self represented litigants who are approaching the Full Court are increasing and if a single judge is empowered to deal with inadequate documents or deficiencies in documents by using [summary dismissal] powers, it would greatly assist the expeditious handling of the court’s business.”²⁵ The Australian Law Reform Commission subsequently recommended that the relevant statute “be amended to allow a single judge in an appeal[] to exercise powers to stay or dismiss an appeal where no available ground of appeal is disclosed.”²⁶ For Australia and other jurisdictions²⁷ seeking to improve the processing of appeals involving self-represented litigants, the Ninth Circuit’s Pro Se Unit provides a useful model.

C. Issue Identification and Case Grouping

Once an appeal—counseled or *pro se*—is briefed, the court can effectuate further timesaving devices before sending the case to the judge or judges who will decide it. Many appellate courts in the United States utilize an “inventory” process whereby non-judge personnel are trained to review the case to identify the basic legal issues it raises and assess its overall degree of difficulty.²⁸ This exercise yields two principal advantages. First, the court can “group” together cases posing similar issues and assign all the cases in the group to one panel for hearing and decision (“issue grouping”). Thus, in deciding one case, the court can quickly dispose of the others without duplication of effort. Second, the court can develop a system to classify cases according to their difficulty. Using an imperfect yet reasonable method to weigh cases enhances the court’s ability to apportion its workload more equally among judges; the court does not schedule a judge or panel to hear a certain number of cases, but rather a certain number of “points.” Allocating cases according to weight prevents a decision from being held up unnecessarily because

24. D’Ortenzio v. Telstra Corp. (1998) 83 F.C.R. 154, 160 (Austl.).

25. *Id.*

26. AUSTRALIAN LAW REFORM COMM’N, REPORT NO. 89, MANAGING JUSTICE: A REVIEW OF THE FEDERAL CIVIL JUSTICE SYSTEM § 7.41 (2000) [hereinafter MANAGING JUSTICE].

27. For example, despite the English Court of Appeal Civil Division’s strong efforts to rein in the problems associated with unrepresented parties, Lord Justice Brooke, Vice President of the Court, continues to lament “the extent to which litigants in person with hopeless cases are taking up the time and skills of the judges, lawyers and staff of the court on a scale which we simply lack the resources to handle.” REVIEW OF THE LEGAL YEAR 2002-2003, *supra* note 23, at 7.

28. See MCKENNA ET AL., *supra* note 13.

the luck of the draw dealt the heaviest cases to the same panel of judges.

In the Ninth Circuit Court of Appeals, staff attorneys in the "Case Management Unit" are trained and responsible for preparing inventory cards for each case. Once the parties submit their briefs, a staff attorney "inventories" the appeal by summarizing the case's history, enumerating a list of issues the parties appear to raise, assigning the appeal a numerical value ("weight") based on its perceived degree of difficulty, and noting which cases in the court's inventory raise similar issues. Modern technology makes possible the final task on this list by enabling the Case Management Unit to search a computer database containing the inventory information for all cases. Current software allows for word searches of the data, improving on a prior version that required the case management attorney to use a more limited numbering system. Cases that appear to present the same issue or issues can be "batched," or placed before the same panel of judges for disposition. When the court issues a precedential opinion, the Case Management Unit circulates a report to all Ninth Circuit judges indicating those cases that were not batched, yet nonetheless may be affected.

The process of weighting appeals serves a variety of functions. As an initial matter, it controls whether a case is presumptively without need of oral argument and thus appropriate for motions and screening panels (as opposed to argument panels). If the case is hefty enough for an argument panel, its weight still plays a part in determining the number of appeals placed on a panel's oral argument calendar on a particular day. Furthermore, it is common for a panel's members to divide disposition-drafting responsibility according to case weight.

The practice of weighting cases also generates useful administrative data. For example, as Chief Judge, I analyzed appellate filings according to case weight and, over a period of time, found that approximately seventy-five percent consisted of relatively easy cases (one to three points on a ten-point scale). More important, the data demonstrated that the remarkable growth in our docket was attributable to a surge in these lesser-weighted cases; the average appeals (five points) and harder ones (seven to ten points) remained fairly constant. I thus learned that our ability to absorb the increasing caseload depended on enhancing our efficiency in processing the simpler cases. This information was vital for a chief judicial administrator. Before establishing this system, a Chief Judge was flying blind—treating each case the same with its resultant inefficiencies and inability to generate useful planning statistics. No business can succeed if it ignores the nature of its product. Neither, I suggest, can appellate courts succeed if they ignore the nature of their caseloads.

Courts elsewhere have adopted similar strategies. The Supreme Court of India, for example, practices "issue grouping." When aware of several cases before it (or before two or more of the State High Courts) that involve substantially the same legal questions, the Court has the power to assume jurisdiction over all the cases and decide them together.²⁹ Often, the Court will write one lead opinion and dispose of all the others based on that recently minted precedent. According to my colleagues in India, this device has been the basis of a program eliminating 100,000 cases from the Indian Supreme Court's backlog.³⁰ The Federal Court of Malaysia (the country's highest court) has implemented a system akin to India's. It puts all cases with the same issues before one panel, requires the lawyers for all cases to be present, hears the lead case argument, and then asks the remaining lawyers whether they have anything to add. Unlike India, however, Malaysia groups the cases by hand. While computer automatization is useful, it is not indispensable for a successful program of this nature. Thus, every appellate court can benefit from this proven model.

D. *Motions and Screening Panels*

As alluded to above, one of the positive attributes of having court personnel review an appeal soon after filing is the weeding out, at an early stage, of those cases with very little or no merit. To take full advantage of the staff's efforts, the court must be able to shed these cases from the docket with an investment of judicial time commensurate with the case's minimal difficulty. One effective method is employed by the Ninth Circuit Court of Appeals: a "motions and screening panel" that decides many of these cases in one sitting, along with certain motions (i.e., requests by the parties for preliminary or other relief prior to the completion of briefing) made in other appeals.³¹ The arrangement is simple: a panel of three judges is assigned motions and screening duty for a month. The panel dedicates one week out of the month to deciding all the current screening cases and any pending motions. During the remainder of the month, the panel considers any new motions of sufficient urgency.

During its week together, the panel addresses the screening cases first. These cases are selected by trained case management attorneys. Usually, only cases whose weights approximate "one" are

29. For a general description, see http://indiancourts.nic.in/indian_jud.htm.

30. The proportions of this backlog as of 1995 are discussed in Hiram E. Chodosh et al., *Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*, 30 N.Y.U. J. INT'L L. & POL. 1, 7-8 (1998).

31. For an academician's perspective on this subject, see John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859 (1991).

chosen; that is, the appeal raises relatively few issues, and the resolution of these issues is clear under well-settled law. Once the case management attorney has designated an appeal a "screening case," one of the nearly fifty "research" staff attorneys assumes responsibility over it. The research attorney presents the merits of the case to the motions and screening panel; neither the parties nor their legal representatives attend the hearing. The panel members review parts of the briefs and record as necessary. If any of the three individual judges believes that the determination of the merits would be assisted by oral argument, the case is reassigned to an argument panel for further consideration. If, on the other hand, the panel unanimously agrees that oral argument is unnecessary, the panel reviews a proposed disposition that the assigned staff attorney prepares in advance. The panel amends the disposition as desired and files it. The circuit disposes of more than one hundred cases a month through the screening process, and recent panels have handled as many as 200.³²

The motions and screening panel spends the latter portion of the week deciding a wide range of motions not suitable for the Appellate Commissioner (described later). The Ninth Circuit delegates preparation of these matters to the Motions Unit and Pro Se Unit of the staff attorneys' office. The motions and screening panel can rule on the motion on the merits, refer the motion to the argument panel deciding the appeal's merits, or hear argument itself. During this part of the week, the motions and screening panel also considers the cases that the Pro Se Unit determined had jurisdictional or other dispositive defects.

While I am unaware of another appellate system that uses a procedure identical to these motions and screening panels, some courts have implemented (or are considering implementing) something that bears a strong resemblance: varying the number of judges who hear an appeal according to the case's anticipated degree of difficulty. For example, prompted in part by a recommendation for "greater use of two-judge courts in appropriate cases where no fundamental point of principle or practice is involved"³³ as well as one-judge dismissals of "[a]pplications for leave to appeal which are manifestly ill-founded, unreasonable or vexatious,"³⁴ England enacted legislation altering the Court of Appeal Civil Division's composition. The Access to Justice Act of 1999 dispensed with the requirement that three judges hear every case and provided instead that "a court shall be duly constituted for the purpose of exercising any of its

32. U.S. Court of Appeals for the Ninth Circuit, *Motions/Screening Cases Averages* (on file with author).

33. SUMMARY OF RECOMMENDATIONS, *supra* note 17, at No. 36.

34. *Id.* at No. 97.

jurisdiction if it consists of one or more judges.”³⁵ Following England’s lead, Australia’s Federal Court is entertaining the possibility of using two-judge courts for particular categories of cases.³⁶

E. *Deciding the Appeal on the Briefs*

Once an appeal passes through all these channels and reaches the panel of judges that is to decide it, case management efforts do not cease; judges, too, play an active role in efficiently processing the court’s caseload. In practical terms, judges need to assess what stands between them and their final decision and then plot their decision-making process accordingly. For example, if a criminal defendant is appealing from a conviction and the judge is an expert in criminal procedure, he or she probably would be wasting his or her time spending an afternoon studying the basic principles of this area of law. Instead, the judge should devote attention to an appeal involving unfamiliar issues—for instance, a bankruptcy case. Similarly, for courts that solicit both written and oral arguments, the judges must evaluate whether the materials submitted by the parties are a sufficient basis on which to make their decision, or whether hearing oral argument deserves that portion of their schedule it would consume. The amount of time saved by foregoing oral argument is significant, and it affords the court that much more time to allocate to more difficult cases. Dispensing with unnecessary oral argument also enables the parties to avoid the substantial costs associated with having their attorneys prepare presentations and attend the hearing. Incurring these expenses is a waste if further efforts to persuade the court would be futile.

In the United States, federal appellate courts often consider cases solely on the written arguments of the parties. The Court of Appeals for the Ninth Circuit, for instance, decides approximately two-thirds of its cases on the parties’ briefs.³⁷ The Federal Rules of Appellate Procedure govern when the court should grant litigants time to make their cases orally:

Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

35. Access to Justice Act, 1999, c. 22, § 59(2) (Eng.), available at <http://www.hmso.gov.uk/acts/acts1999/90022--d.htm#59> (n.d.).

36. See *MANAGING JUSTICE*, *supra* note 26, §§ 7.37-7.40.

37. 2003 ANNUAL REPORT, *supra* note 6, at 34 tbl.S-1. These figures are for the twelve-month period ending September 30, 2003.

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.³⁸

In short, there is no reason to entertain oral argument if it will not materially assist the court in its decision.

Admittedly, not every court can benefit from this practice, as not every court requires the parties to submit written arguments. But in those jurisdictions that do—which, according to a 1993 survey I conducted, comprise nearly two-thirds of the appellate courts of Asian and Pacific nations³⁹—fashioning a rule similar to that quoted above could be useful. In fact, the responses to the survey indicated that appellate courts in one-third of those countries (or approximately twenty percent of all the Asian and Pacific nations surveyed) do decide cases on the briefs.⁴⁰ These courts save substantial time; approximately thirty percent of their appeals are decided without oral argument.

As for appeals complicated enough to require the parties to appear before the judges, the court still has other means to maximize the utility of oral argument. For example, the court may limit argument time according to the appeal's complexity. One shorthand method for doing this is to set tentative oral argument time limits based upon the case's weight. The court is always free to add or subtract minutes if the case weight originally assigned turns out to have been inaccurately gauged. The judges may also instruct the parties to come prepared to focus on a particularly troublesome part of the appeal or, perhaps, binding legal authority overlooked in their briefs. By announcing the time limits or calling attention to an issue in advance, counsel can prepare with those parameters in mind. Certainly the court may allow the argument to exceed the set time limit, but this system allows the judges, rather than the lawyers, to control how much it spills over.

Similar practices are used internationally. For example, the Chief Justice of the Constitutional Court of South Africa “may decide whether the appeal shall be dealt with on the basis of written arguments only.”⁴¹ If not, the Chief Justice still retains the authority

38. FED. R. APP. P. 34(a)(2).

39. Wallace, *supra* note 10.

40. *Id.*

41. CONST. CT. R. 20(5) (S. Afr.), available at <http://www.concourt.gov.za/2003rules.pdf> (last visited July 23, 2004); see also CONST. CT. R. 13(2) (noting the Chief Justice's ability to disallow oral argument).

to impose time limits on oral argument.⁴² Hong Kong also establishes the duration of oral argument in advance on a case-by-case basis.⁴³

F. *Unpublished Dispositions*

Once each of the parties in an appeal has completed making its case to the court, following either oral argument or an order to submit the case without argument, the court turns its attention to making a decision and putting it in writing. As with other segments of the appellate process, the court should consider how it could, consistent with its purpose, shorten the time it has to invest in this venture. To repeat, an appellate decision can further one or both of an appellate court's functions: dispute resolution/error correction and/or promulgation of precedent. Accomplishing the former does not always entail the latter; thus, the court might have the option, as federal appellate courts in the United States do,⁴⁴ of issuing an unpublished, non-precedential disposition.

This procedural mechanism yields multiple advantages. First, the written product can be short. When the court opts not to publish the decision, the court can dispense with a recitation of the facts and ponderous discussions of the law. The court drafts the disposition for the benefit of the trial court and the parties, all of whom are already familiar with the case's factual background and legal issues. Second, the unpublished, non-precedential disposition is, by definition, of no precedential value for subsequent appeals. Judges therefore do not have to craft the decision as if each word will bind the court in future cases. Only a clear, reasoned disposition is necessary to advise the trial court and the parties of the court's rationale. Third, publishing only those decisions that are genuinely precedent-setting spares judges and parties in later appeals from having to research, read, and cite numerous, essentially identical cases that stand for the same well-established legal proposition.

Although the practice above invites criticism because some believe it an abdication of a court's duty,⁴⁵ I have no reservations

42. CONST. CT. R. 13(3)(a).

43. H.K. CIV. P. PRACTICE DIRECTION 4.1/6 (Sweet & Maxwell 2002) (H.K.). England's Court of Appeal Civil Division was considering procedures that "would enable . . . judges to limit oral argument to the salient points of the case and to impose time limits if appropriate" and that would allow, with the consent of the parties, "the case [to] be decided on the papers alone." CURRENT SITUATION AND REASONS, *supra* note 11.

44. See MCKENNA ET AL., *supra* note 13, at 18-21. For the past five years, the percentage of federal appeals ending in unpublished dispositions has hovered around eighty. JUDICIAL FACTS AND FIGURES, *supra* note 2, at tbl 1.6.

45. I am aware that this practice has drawn fire from various circles. Members of the academic community have voiced opposition. See, e.g., Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003);

with it. In my experience, judges take very seriously their responsibility to publish an opinion where the law in a given area is not settled. If reliance on the judges turns out to be misplaced in a given case, the parties, as well as other judges on the court, can operate as an additional check; Ninth Circuit court rules allow requests for publication.⁴⁶ More important, though, the practice undoubtedly is a sound use of limited judicial resources. In the twelve-month period that ended September 30, 2003, for example, only fifteen percent of the decisions or orders issued by the Ninth Circuit Court of Appeals required publication.⁴⁷ By disposing of the other eighty-five percent expeditiously in “memorandum dispositions,” the court ensured that the precedential opinions received the time and craftsmanship they deserved.

As with the other case management techniques listed above, appellate courts render their decisions in various ways. Some pronounce their decisions orally from the bench, whereas written decisions are the norm in many jurisdictions. Australia has expressed interest in permitting American-style unpublished dispositions. Labeling them “short form reasons,” the Australian Law Commission stopped short of recommending their approval, but lent its support to further study of the practice.⁴⁸ The Commission observed that the strongest opposition to short form reasons comes from members of the bar who, similar to critics in the United States, believe it lessens the accountability of judges.⁴⁹ The basis for these attacks is questionable since the disposition and court record provide more than sufficient transparency.

III. APPELLATE-LEVEL MEDIATION AND THE APPOINTMENT OF AN APPELLATE COMMISSIONER

I could continue to explore the finer points of the procedural devices used by Court of Appeals for the Ninth Circuit, but I wish to

Johanna S. Schiavoni, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859 (2002); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711 (2004). Some on the federal bench have offered similar criticisms: the Eighth Circuit Court of Appeals had held that Article III of the U.S. Constitution requires that all federal appeals court opinions operate as binding precedent, but this decision was vacated as moot by the entire court sitting en banc. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) (en banc). The Ninth Circuit, on the other hand, disagreed and held that unpublished non-precedential dispositions are fully consistent with the Constitution. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

46. See 9TH CIR. R. 36-4.

47. 2003 ANNUAL REPORT, *supra* note 6, at 36 tbl.S-3 (2003).

48. See MANAGING JUSTICE, *supra* note 26, §§ 7.31-7.36.

49. *Id.* § 7.36.

focus the balance of the Article on two additional significant innovations developed during my tenure as Chief Judge: appellate-level mediation and the position of Appellate Commissioner. Each more fundamentally alters the conventional approach to appellate court adjudication.

A. Mediation

Appellate level mediation has been a feature of the U.S. federal court system since the 1970s when the Federal Rules of Appellate Procedure first sanctioned the practice.⁵⁰ The United States Court of Appeals for the Seventh Circuit inaugurated a preargument-conference program in 1972. Although modest in scope, the program's governing concept was case management: to reduce the submissions to the court and abbreviate the time a case stayed pending an appeal.⁵¹ Two years later, the Second Circuit Court of Appeals became the first appellate court to use mediation to facilitate settlement negotiations.⁵² By 1996, all of the federal appeals courts had followed suit.⁵³

The obvious aim of these programs is to resolve the dispute between the parties, thereby ushering the case from the appellate docket. By design, mediation programs encourage the parties to realize the benefits—not the costs—of settling, as well as the strength of their legal positions. In general, conferences occur before the parties incur the expense of filing their briefs, and a neutral mediator, usually a court-appointed attorney, presides. The process is cost-free, thus eliminating difficulties encountered by other court-annexed mediation programs that have apparently failed because parties resisted paying mediator fees. Communication and collaboration are key; the adversarial posturing of traditional litigation is inimical.⁵⁴

While I could continue to discuss mediation in broad strokes, it would be more fruitful to expound on the initiative with which I am most familiar: the United States Court of Appeals for the Ninth

50. See FED. R. APP. P. 33. Federal Rule of Appellate Procedure 33, as currently worded, confers on federal courts the authority to “direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement.” FED. R. APP. P. 33. Rule 33 has undergone substantial revision since first promulgated. FED. R. APP. P. 33 advisory committee’s note.

51. ROBERT J. NIEMIC, FED. JUDICIAL CTR., MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 3 n.7 (1997) [hereinafter MEDIATION].

52. *Id.* at 3.

53. *Id.*

54. For a discussion of the general theory of appellate-level mediation, see *id.* at 2-4.

Circuit's appellate mediation program. The Ninth Circuit, like the Seventh, first employed preargument conferences to clarify the issues on appeal, not resolve them.⁵⁵ The Ninth Circuit's focus gradually migrated toward settlement, and in 1992 the court instituted a formal mediation program.⁵⁶ In addition to Federal Rule of Appellate Procedure 33, mediation is subject to several local procedural rules.⁵⁷

Currently, all civil appeals filed—with certain notable exceptions⁵⁸—are eligible for the Ninth Circuit Court's program. Appellate mediators are lawyers trained and experienced in mediation, and employed full-time by the court.⁵⁹ Appeals are reviewed to determine which are amenable to settlement. The mediators base their determinations largely on the Civil Appeals Docketing Statement (CADS) that must be filed by litigants in most civil appeals.⁶⁰ The CADS lists the issues raised on appeal, provides details on the proceedings below (along with copies of relevant documents), and contains other useful information.⁶¹ If the mediator is unable to assess whether a case is appropriate for mediation based on the information in the CADS, the mediator can schedule an assessment conference with counsel to discuss further the prospect of settlement.⁶²

The Ninth Circuit program confronted a unique challenge at the outset: the court's expansive geographical jurisdiction. Ninth Circuit appeals originate in all parts of the nine western states plus Guam and the Northern Mariana Islands—approximately two-fifths of the entire land mass of the United States.⁶³ Attorney travel to our San Francisco headquarters was generally cost prohibitive, which spelled doom for the program, some thought, before it began. Common wisdom held that mediation could not be successful unless the

55. *Id.* at 3 n.5. This program began in 1984. *Id.*

56. *Id.*

57. See 9TH CIR. R. 3-4 (“Civil Appeals Docketing Systems”); 9TH CIR. R. 15-2 (“Civil Appeals Docketing Statement in Agency Cases”); 9TH CIR. R. 33-1 (“Settlement Program—Appeal Conferences”).

58. MEDIATION, *supra* note 51, at 72-73. These exceptions include appeals filed by *pro se* litigants, cases under the federal writ of habeas corpus statutes, and most cases in which the appellant is incarcerated. *Id.* at 72.

59. 9TH CIR. R. 33-1 advisory committee's note (a). I hired, on behalf of the court, the Ninth Circuit's first Mediator. More Mediators were added as the program expanded, and the current number stands at ten. The Mediators are seasoned litigators with extensive training in negotiation, mediation, and settlement. See MEDIATION, *supra* note 51, at 79.

60. See 9TH CIR. R. 3-4 (requiring most litigants to file a CADS); MEDIATION, *supra* note 51, at 73. The parties may request mediation, and appellate panels can refer a case to the program. MEDIATION, *supra* note 51, at 74; see 9TH CIR. R. 33-1 advisory committee's note (a).

61. 9TH CIR. R. 3-4(a) app. form 6.

62. MEDIATION, *supra* note 51, at 74-75.

63. *House Passes Legislation Splitting 9th Circuit Court of Appeals*, U.S. NEWSWIRE, Oct. 5, 2004, available at 2004 WL 89665654.

participants were in the same room. The Ninth Circuit, though, charted a new course: using the telephone. Although this was originally considered counterintuitive, there was no alternative given the circuit's vast territory. Nearly all conferences are currently held by telephone and are fruitful.⁶⁴

There is no definitive list of criteria that mediators take into account when choosing cases for the program, although some aspects, such as the parties' willingness to participate, are obviously significant. Once an appeal is selected, the court informs counsel of the time and date of the settlement conference, as well as whether it is to be held in person or by telephone.⁶⁵ The order notifying the attorneys is to be entered within thirty-five days after docketing the appeal; the mediation conference should be held within fifty-six days.⁶⁶

The exact settlement procedures vary by case in order to accommodate the unique set of considerations each presents. A few features nonetheless remain more or less constant. Chief among them is the initial conference, which provides a forum for an exchange of information between the parties and the mediator. Its "primary purpose . . . shall be to explore settlement of the dispute that gave rise to the appeal."⁶⁷ Participation in the conference, once scheduled, is mandatory.⁶⁸ It is not uncommon for the mediator to confer with one or both sides as a follow up,⁶⁹ and the mediation is not limited to the issues on appeal, but can be used to resolve related disputes.⁷⁰

It is critical to the success of any mediation program that the parties either participate directly in the conferences or vest their counsel with authority to propose settlements, respond to other proposals, discuss further settlement proceedings, and, ultimately, settle the case.⁷¹ After all, if a conference cannot lead to settlement,

64. MEDIATION, *supra* note 51, at 75.

65. 9TH CIR. R. 33-1 advisory committee's note (a).

66. 9TH CIR. R. 33-1 advisory committee's note (a).

67. 9TH CIR. R. 33-1 advisory committee's note (a).

68. MEDIATION, *supra* note 51, at 76; *see* 9TH CIR. R. 33-1 ("The judge or court mediator may require the attendance of parties and counsel."). The court may impose sanctions, which include dismissing the appeal, for failure to comply. *See Kajioka v. Comm'r*, 883 F.2d 57, 58 (9th Cir. 1989) (order) (dismissing an appeal because of counsel's repeated failure to appear at scheduled mediation conferences).

69. MEDIATION, *supra* note 51, at 76-77.

70. *Id.* at 76.

71. *See id.* Indeed, Ninth Circuit rules make explicit reference to counsel's settlement authority, as well as the possibility of clients participating directly. *See* 9TH CIR. R. 33-1 advisory committee's note (a); *see also* FED. R. APP. P. 33 ("Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case."). By extension, if a party's attorney is not vested with that authority, someone with full authority to settle on behalf of that party must be present.

mediation is an empty exercise. A nearly equally important imperative is confidentiality. Parties will not negotiate candidly if sensitive information may prejudice them in the end. Therefore, settlement-related information revealed to a mediator (or anyone to whom the mediator refers the case) is not disclosed to the judges who are to decide the appeal in the event settlement is not reached.⁷² Any documents or correspondence relating to the mediation are preserved only in the mediation office and never join the case file.⁷³

The normal appellate schedule generally does not abate while settlement negotiations are proceeding; settlement is a device to shorten appeals, not lengthen them. The briefing deadlines, for example, remain unchanged.⁷⁴ Mediators, however, do not require rigid adherence to time requirements where complying with them would divert too much of the attorneys' attention from the settlement process.⁷⁵ Because drafting a brief would consume time otherwise spent preparing for settlement conferences, mediators have the authority to entertain requests to alter the briefing schedules and enter other appropriate orders.⁷⁶

If at any point settlement negotiations crumble beyond the point of repair, or the mediator believes that further settlement activities would not be beneficial, the mediator releases the case from the program. In addition, if no order was entered to schedule a conference within fifty-six days of the appeal's docketing, a case is presumed to have been released.⁷⁷

It is fair to say that the appellate mediation program in the Ninth Circuit has been very successful. In 2003, for example, of the 878 cases mediated, the program resolved 803 of them—a success rate of ninety-one percent.⁷⁸ In practical terms, mediators therefore assumed the workload of approximately one and two-thirds appellate judges.⁷⁹ In a court in which there are often judicial vacancies, the

72. See 9TH CIR. R. 33-1 & advisory committee's note (a). In addition, a party's request for a settlement conference may be made confidentially. 9TH CIR. R. 33-1 advisory committee's note (a).

73. MEDIATION, *supra* note 51, at 78.

74. See 9TH CIR. R. 33-1 advisory committee's note (a) ("The briefing schedule established by the Clerk's office at the time the appeal is docketed remains in effect unless adjusted by a court mediator to facilitate settlement, or by the Clerk's office. . .").

75. See MEDIATION, *supra* note 51, at 77-78.

76. See *id.*; see also 9TH CIR. R. 33-1 advisory committee's note (a) (granting Mediators authority to adjust the briefing schedule "to facilitate settlement").

77. 9TH CIR. R. 33-1 advisory committee's note (a).

78. Telephone Interview with David Lombardi, Esq., Chief Ninth Circuit Mediator (Aug. 2, 2004). Success rates for prior years include ninety-three percent in 2002 (789 cases settled out of 852 mediated) and eighty-seven percent in 2001 (756 cases settled out of 869 mediated). *Id.*

79. In 2003, each active Ninth Circuit Judge terminated, on average, 480 cases on the merits. ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES COURT OF

work of the mediators in removing cases from the appellate docket has been invaluable.

Appellate court mediation has a patchy history on the international legal landscape. Nonetheless, in some jurisdictions mediation is the norm. For example, mediation is the primary means of dispute resolution in China, as parties generally do not resort to litigation until efforts to mediate have failed. Even after the trial court delivers a judgment, mediation—including court-conducted mediation—continues to play a prominent role on appeal.⁸⁰ Singapore has developed a similar affinity for mediation and actually solicits business for its various alternative dispute resolution programs.⁸¹ The Singapore Mediation Centre, Singapore's principal mediation institution, reports that it has the capacity to mediate cases that have reached the appellate level.⁸² But given the common misconception that alternative dispute resolution is no longer useful once a dispute involves a question of law, few Singaporean parties have settled appeals through mediation.⁸³

B. Appellate Commissioner

"Magistrate judges,"⁸⁴ or judicial officers appointed for limited terms⁸⁵ who function below the principal trial court, help federal trial courts rule on the frequent, non-dispositive, usually routine matters that otherwise would overwhelm them.⁸⁶ Despite experiencing a similar deluge of many routine matters, the United States Courts of Appeals have not been provided with similar assistance by Congress. The Court of Appeals for the Ninth Circuit took it upon itself to respond to the mounting pressure in 1994 during the time I served as Chief Judge. Acting under Federal Rule of Appellate Procedure 27, which states that a circuit court of appeals "may, by rule or by order in a particular case, authorize its clerk to act on specified types of

APPEALS—JUDICIAL CASELOAD PROFILE (2003), available at <http://www.uscourts.gov/cgi-bin/cmsa2003.pl>. Settling a case spares the court the work it otherwise would have to do to terminate it on the merits.

80. See Stanley B. Lubman, *Dispute Resolution in China After Deng Xiaoping: "Mao and Mediation" Revisited*, 2 COLUM. J. ASIAN L. 229, 340 (1997).

81. See Joel Lee Tye Beng, *The ADR Movement in Singapore*, in THE SINGAPORE LEGAL SYSTEM 414 (Kevin Yi Tan ed., 2d ed. 1999); Karen Blöchlinger, Comment, *Primus Inter Pares: Is the Singapore Judiciary First Among Equals?*, 9 PAC. RIM L. & POL'Y J. 591, 600-02 (2000).

82. E-mail from Loong Seng Onn, Executive Director, Singapore Mediation Centre (July 25, 2004) (on file with author).

83. *Id.* For more information on the Singapore Mediation Centre, see <http://www.mediation.com.sg/index.htm>.

84. See 28 U.S.C. §§ 631-39 (2000 & Supp. 2004).

85. 28 U.S.C. § 631(e).

86. See 28 U.S.C. § 636.

procedural motions,”⁸⁷ the court established the position of Appellate Commissioner:

the Appellate Commissioner is an officer appointed by the court to rule on or review and make recommendations on a variety of nondispositive matters, such as applications by appointed counsel for compensation under the Criminal Justice Act and certain motions specified in these rules and elsewhere, and to serve as a special master as directed by the court.⁸⁸

In order to make room for the new post, the court needed to eliminate a prior position. Although there was a downside—the burden on other staff members increased in order to absorb some of the predecessor officer’s tasks—the experiment yielded a net gain in overall efficiency.

A main duty of the Appellate Commissioner is to rule on certain procedural and other non-merit-based motions. General Order 6.3(e) confers on the Chief Judge of the Ninth Circuit the power “to delegate to an appellate commissioner authority to issue for the court non-dispositive orders in all appeals and petitions except those that would reverse a decision or order by a district judge or where [certain types of] relief [are] requested.”⁸⁹ Some examples of motions under the Appellate Commissioner’s purview include motions to seal and unseal records, motions for voluntary dismissal, motions for leave to proceed in forma pauperis, and motions to consolidate cases on appeal.

Another of the Appellate Commissioner’s principal responsibilities is to decide the amount of compensation paid to statutorily appointed counsel in criminal appeals when the defendant is unable to afford representation.⁹⁰ This task had clearly been unsuited to appellate judges for several reasons. First, years had passed since most judges practiced law (and some judges had never done so), and thus, judges had little or no current experience in setting the appropriate sum of legal fees. Second, judges ordinarily received the fee request form weeks or months after deciding the appeal. Finally, when their memory of the case had begun to fade, the judges’ individual idiosyncratic criteria resulted in wide, inexplicable fee variations. Given the dysfunctions in the prior system, no proposed reform during my tenure was met with a warmer welcome by the judges and the bar than the Appellate Commissioner. As the sole arbiter of these requests, the Appellate Commissioner ensures that a uniform standard now governs where large variations once occurred.

87. FED. R. APP. P. 27(b).

88. 9TH CIR. R. introductory cmt. C(2).

89. 9TH CIR., GENERAL ORDERS 6.3(e) (2004), available at <http://www.ca9.uscourts.gov/ca9/Documents.nsf> [hereinafter GENERAL ORDERS].

90. 9TH CIR. R. 4-1(f); cf. GENERAL ORDERS, *supra* note 89, at 6.7. See generally 18 U.S.C. § 3006A(d) (2004) (providing for the “[p]ayment for representation”).

Closely related to his fee-awarding duties, the Appellate Commissioner also monitors the quality of appointed counsel and works with local agencies to ensure that the court retains the most capable members of the bar for indigent defendants.⁹¹ In addition to setting legal compensation in criminal appeals, the court usually calls upon the Appellate Commissioner to rule on requests for attorneys' fees in civil cases and to determine the appropriate amount of the award.⁹²

The Appellate Commissioner also functions as the Ninth Circuit's "special master." In this capacity, he holds evidentiary hearings and facilitates the resolution of other non-merit-based issues. For instance, when the court considers disciplining, suspending, or disbaring an attorney, the attorney may exercise his or her right to an evidentiary hearing.⁹³ The Appellate Commissioner routinely conducts these hearings at the court's request and submits his recommendations to a three-judge panel for its final ruling.⁹⁴ Also, when a criminal defendant wishes to represent himself on appeal, the Appellate Commissioner holds a hearing on the record to assess whether the defendant's waiver of counsel is knowing, intelligent, and unequivocal;⁹⁵ the Commissioner then recommends whether the court should exercise its discretion to permit self-representation on appeal.⁹⁶ As an additional example, the court refers certain National Labor Relations Board disputes to the Appellate Commissioner for similar proceedings.⁹⁷

One final aspect of the Appellate Commissioner's "special master" duties merits mention here: the Appellate Commissioner's case-management authority. In complex criminal appeals involving multiple parties or voluminous records, the Appellate Commissioner can hold case management conferences to set briefing schedules and

91. See 9TH CIR. R. 27-1 advisory committee's note 1.

92. 9TH CIR. R. 39-1.9.

93. FED. R. APP. P. 46(b)-(c); 9TH CIR. R. 46-2(e); GENERAL ORDERS, *supra* note 89 (providing for a motions-on-merits panel for determination of the propriety of sanctions).

94. 9TH CIR. R. 46-2(e)-(g).

95. See *Hendricks v. Zenon*, 993 F.2d 664, 669 (9th Cir. 1993) ("It is well established in the Ninth Circuit . . . that in order to invoke the Sixth Amendment right to self-representation, the request must be: (1) knowing and intelligent, and (2) unequivocal.")

96. GENERAL ORDERS, *supra* note 89, at 6.3(e); see also 9TH CIR. R. 27-1 advisory committee's note (1) (granting Appellate Commissioner authority to review a variety of motions).

97. See 9TH CIR. R. app. A., Nos. 40-43 (authorizing the clerk to refer various National Labor Relations Board matters to an appellate commission). Specifically, if the Ninth Circuit has enforced an order of the Board against a party, and that party violates the enforcement order, any subsequent Board petition for a contempt citation is typically referred to the Appellate Commissioner for a trial and preparation of a report and recommendation. 9TH CIR. R. app. A., Nos. 40-43.

allow oversize briefs.⁹⁸ Parties in a civil appeal may also stipulate to having one or more issues in their appeal referred to the Appellate Commissioner for binding determination.⁹⁹ Both of these mechanisms serve to narrow the dispute on appeal to its core issues; the judges can then focus on these issues without unnecessary distraction from collateral matters.

In performing all the tasks described above, the Appellate Commissioner has become an invaluable asset to the Ninth Circuit. First and foremost, the Appellate Commissioner has spared judges from the taxing workload of a seemingly endless stream of non-dispositive matters. In 2003, for example, the Appellate Commissioner ruled on more than 3,000 motions, processed 1,300 requests for compensation in criminal cases, and addressed scores of other issues in his role as special master.¹⁰⁰ Not only does the Appellate Commissioner aid the court, but he also does litigants a substantial service. The Appellate Commissioner responds to the parties' motions and requests in a timely fashion; no longer does a judge's hectic schedule delay the court's ruling. The Appellate Commissioner has brought a measure of consistency to decisions that previously fluctuated according to the idiosyncrasies of individual judges. Furthermore, the Appellate Commissioner provides accountable decision-making; by signing each order he issues, the Appellate Commissioner does not use anonymity to shield his decisions from criticism.

Although many countries have magistrates and other officials to resolve matters in the courts of first instance, I have yet to come across a jurisdiction that delegates similar magisterial duties to a person serving an appellate court. As with the other devices discussed above, it is my hope that this Article leads more judicial systems to consider adding a position akin to that of an Appellate Commissioner.

IV. THE QUALITY OF JUDICIAL DECISION-MAKING

This Article indicates that appellate courts have a number of potential tools at their disposal for the efficient management of their caseloads. The options range from the more obvious to those that cut against the traditional mold of appellate decision-making. Some entail minor procedural modifications, while others require a more radical reallocation of duties. It is up to each appellate court to select

98. 9TH CIR. R. 28-4 advisory committee's note; 9TH CIR. R. 33-1 advisory committee's note (b).

99. 9TH CIR. R. 33-1 & advisory committee's note (c).

100. APP. COMM'R, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 2003 MONTHLY SUMMARY REPORT (2003) (on file with author).

those mechanisms that will be most productive given its particular circumstances.

Proponents of appellate case management and mediation should expect to face some opposition. Trial courts experienced resistance three decades ago when they began instituting similar ideas. These ideas have gained acceptance and, indeed, are even identified as the superior way of handling trial court litigation.¹⁰¹ With the prior success on the trial court level, hopes run high for a more prompt endorsement of appellate case management and mediation.

Before ending, I wish to emphasize one final observation: this Article makes clear that the Court of Appeals for the Ninth Circuit is not the only court to have adopted innovative mechanisms to prevent its judges from drowning in a rapidly rising sea of cases. In fact, for almost every such case management technique described above, no less than one foreign appellate court has implemented something similar, or at least is considering doing so. This is significant, for it suggests that a consensus is developing among appellate courts.

I suppose there will always be commentators who argue that widespread adoption of appellate case management and mediation techniques signals not a ratification of the approach, but rather the acceptance of a necessary evil—that is, that oppressive workloads are corrupting more and more courts to prize efficiency over quality. I could not disagree more with such an assessment. To me, each time a judiciary embraces appellate court case management and mediation, more credence is lent to the practices. Indeed, not only is case management becoming pervasive, but courts readily recognize that increasing efficiency does not necessarily compromise core judicial principles.

Those of us in the United States, for example, speak in terms of according litigants due process of law. Due process, literally, is the amount of process due—that is, the proceedings to which a party is entitled to protect its rights in the face of the law's coercive power. Flexibility inheres in this concept; surely not every appeal is "due" extensive procedures. If it is patently obvious to the court the first time it reviews an appeal that it lacks jurisdiction, then that should mark the end of the court's consideration. The party who filed the appeal cannot seriously contend it was deprived "due process" if not afforded an opportunity to argue the merits. Similarly, if the court has repeatedly rejected the appellant's sole contention, the court need not plod through lengthy briefs or listen to an extended oral argument—the issue has been decided and the litigant's reasoning disapproved. A short disposition pointing this out and citing a

101. See, e.g., Daoud A. Awad, Note, *On Behalf of Mandatory Arbitration*, 57 S. CAL. L. REV. 1039, 1062-63 (1984); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 641 (1997).

controlling precedential opinion suffices. Moreover, the resolution of the appeal's underlying dispute is no less valid if effectuated by non-judicial means. Litigants should remain free to shed the rigid structures of litigation and meet with independent mediators who will work toward mutually acceptable settlements, rather than winner-take-all judgments.

In fact, if the legal system channeled all appeals to judges and expected them to reflect deeply on every case no matter how facially unmeritorious, it would risk depriving litigants of the right to due process in other cases, especially those that raise difficult or complex issues or confront the court with a question for the first time. For example, even if an issue is thoroughly discussed in the parties' briefs, the written arguments may not address a point of law a judge believes highly relevant. Thus, confronted with a litigant who is advocating a new legal rule, the court may wish to test the rule's application over a range of circumstances by bombarding counsel with questions on how it would operate in varying situations. Simply put, such an appeal might warrant more extensive proceedings; such would be the process due.

This basic principle is echoed outside the borders of the United States, particularly in jurisdictions that have been taking the largest strides toward case management reform. For instance, the study conducted at the behest of England's Court of Appeal Civil Division conceptualized the idea as one of proportionality. In articulating the principles it believed underlie a civil appeals system, the study maintained that "[a]ppeals should be dealt with in ways that are proportionate to the grounds of complaint and the subject matter of the dispute."¹⁰² This formulation resonated with New Zealand's Law Commission, as it agreed "that valuable resources should not be devoted to cases which have no real need of them, and that a move towards allowing judicial discretion to determine the constitution of the court according to the individual nature of the case sits well with the general principle of introducing greater case management."¹⁰³

In sum, as more demands are placed on scarce appellate judicial resources throughout the world, more courts are recognizing that case management and mediation efforts are not inimical to due process. Rather, these courts are coming to understand that the opposite holds true: streamlined case management and mediation mechanisms actually ensure that this lofty principle remains intact.

102. SUMMARY OF RECOMMENDATIONS, *supra* note 17, at No. 8.

103. LAW COMM'N, REPORT NO. 85, *supra* note 12, at 275.

