Vanderbilt Law Review

Volume 26
Issue 6 *Issue 6 - Judicial Clerkships: A Symposium on the Institution*

Article 5

11-1973

Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity

T. John Lesinski

N. O. Stockmeyer, Jr.

Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity

*T. John Lesinski**
*N.O. Stockmeyer, Jr.***

I. INTRODUCTION

The business of American appellate courts has been escalating, and never at a pace greater than in the past half dozen years.[1] The problems presented by swelling caseloads require that court systems reexamine their operation. As Hart and Sachs recognized,

> [t]he courts in any legal system . . . can handle only so many contested cases at any given time, without major reorganization. In hosts of respects the pressures of work in the courts affect or even determine the ways in which the work is done. How the courts work cannot be understood without understanding this.[2]

The traditional response to increasing appellate caseloads has been the creation of additional courts, principally intermediate appellate courts,[3] and the proliferation of additional judgeships.[4] Add-

* Chief Judge, Michigan Court of Appeals. A.B., J.D., University of Detroit; L.L.D., Detroit College of Law.

** Research Director, Michigan Court of Appeals. A.B., Oberlin College; J.D., University of Michigan.

The authors wish to express their appreciation to Mr. Thomas P. Hustoles, J.D., University of Detroit, and to Mr. Charles J. Senger, J.D., University of Detroit, for their excellent research and assistance in the preparation of this Article.

1. The number of filings in the Michigan Court of Appeals increased from 1,475 in 1966 to 2,799 in 1972. In the Superior Court of New Jersey, Appellate Division, the number of appeals filed increased from 1,263 in 1966-67 to 3,574 in 1971-72. The California Courts of Appeal experienced an increase in filings from 5,013 in 1965-66 to 8,039 in 1969-70.

2. H. HART & A. SACHS, THE LEGAL PROCESS 717 (10th ed. 1958).

3. As of 1972, 23 states had intermediate appellate courts. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1972-1973, at 125, table 2 (1972). Of these, 11 have been created since 1956, including 4 in the past 6 years. The most recent states to add intermediate appellate courts are Colorado, Washington, Oregon, and Massachusetts. Tate, *Containing the Law Explosion*, 56 JUDICATURE 228, 232 n.16 (1973).

4. For example, the Superior Court of New Jersey, Appellate Division, had 6 judges from 1948 to 1959. To meet the increasing caseload, a third part of 3 judges was added in 1958, a fourth in 1965, a fifth in 1971, and a sixth in 1973. The California Courts of Appeal underwent a similar experience. The number of judges increased from 30 in 1961 to an authorized number of 48 in 1969.

ing judges, however, is expensive and may adversely affect a court's cohesiveness and doctrinal consistency.[5] Furthermore, the palliative effect of additional judges may inhibit efforts to seek lasting solutions and may result only in the recurring necessity for even more judges as caseloads continue to increase.[6]

Another response to increasing caseloads has been the use of judicial law clerks. Law clerks are so generally accepted and universally utilized by appellate courts today that they have become an institution. The position is, however, a relatively recent innovation. Law clerks did not come into general use by the Justices of the United States Supreme Court until the 1920's, and it was not until 1930 that judges of the United States Courts of Appeals were authorized to employ clerks. At the state level, a survey conducted in the early 1930's revealed that law clerks were in general use in the appellate courts of only seven states.[7] Ten years later, almost one-half of all state supreme courts employed law clerks, although not always in sufficient number for each judge to have his own.[8]

A 1968 survey reported that 90 percent of all state supreme courts and twelve of the eighteen state intermediate appellate courts then in existence employed law clerks, generally at a ratio of one clerk per judge.[9] The figures are undoubtedly higher today. Indeed a widely suggested remedy for appellate court congestion is the use of multiple law clerks.[10] The practice of employing two clerks for each judge has been followed by the United States Supreme Court since 1947 and is becoming commonplace at the state supreme court level. Today United States Supreme Court Justices are

5. This is especially true when a court sits in several panels of 3 or more judges.

6. For example, the Judicial Council of California projected a need for an increase from the then authorized strength of 48 judges to 59 judges for the 1969-70 court year, 65 for 1970-71, and 71 in 1971-72. JUDICIAL COUNCIL OF CALIFORNIA, 1971 ANNUAL REPORT 92.

7. Curran & Sunderland, *The Organization and Operation of Courts of Review*, in THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN 147-52 (1933).

8. ABA SECTION OF JUDICIAL ADMINISTRATION, METHODS OF REACHING AND PREPARING APPELLATE COURT DECISIONS 37-38 (1942).

9. AMERICAN JUDICATURE SOCIETY, LAW CLERKS IN STATE APPELLATE COURTS 1 (Report No. 16, 1968). Other comparatively recent surveys may be found in INSTITUTE OF JUDICIAL ADMINISTRATION, APPELLATE COURTS, INTERNAL OPERATING PROCEDURES 162-67 (1957) and ABA SECTION OF JUDICIAL ADMINISTRATION, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 43-46 (1961).

10. *See, e.g.*, Shafroth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 243, 290 (1968), wherein 2 clerks per judge is recommended, and AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS—REPORT OF RECOMMENDATIONS 2 (1968), recommending that "[e]very Circuit judge should have two, and perhaps three, law clerks to assist him."

alloted three law clerks each,[11] and the seven justices of the California Supreme Court have a total of 28 clerks.[12]

There are indications, however, that multiple law clerks may not be altogether beneficial. One observer, commenting upon the increase in United States Supreme Court law clerks, expressed the fear that "[t]he traditional image of the several justices bringing the dispassioned reason of law to bear on problems may be blurred by the noise of typewriters and the scurry of subordinates."[13] Moreover, the addition of law clerks is not necessarily the most efficient approach. The use of multiple law clerks compounds the problems of selection, training, and supervision. A study undertaken by the Judicial Council of California reports that "the productivity of each justice is only slightly increased by augmentation of his own research staff."[14] After reviewing several new approaches to productivity adopted by various appellate courts, Justice Winslow Christian of the California Court of Appeal recommends:

> [W]hen staff is to be added, any staff beyond the necessary personal staff of the judges should work in a centrally supervised unit, rather than be scattered among the judges. Some excellent judges can never be trained to use staff effectively.[15]

The Michigan Court of Appeals reached this same general conclusion in 1968, after having experimented with two clerks per judge. The court soon found that simply attaching more law clerks to the individual judges did little to increase judicial productivity. Accordingly, the court decided to organize the extra clerks into a central division, responsible for researching and screening appeals prior to hearing.[16] Now, five years later, due principally to prehearing research and screening, the court remains current with its caseload despite a 50 percent increase in the number of appeals.

An overview of the organization and duties of the Michigan

---

11. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, *reprinted in* 57 F.R.D. 573, 609 (1973).

12. AMERICAN JUDICATURE SOCIETY, *supra* note 9, at 3.

13. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 ORE. L. REV. 299, 304-05 (1961). *See also* FEDERAL JUDICIAL CENTER, *supra* note 11, 57 F.R.D. at 582-83, 609-10. Reference to the "noise of typewriters" in this context is apt in light of the revelation that, due to lack of secretarial assistance, Supreme Court law clerks must personally type their memoranda. *Id.* at 611.

14. JUDICIAL COUNCIL OF CALIFORNIA, 1970 ANNUAL REPORT 25.

15. Christian, *Using Prehearing Procedures to Increase Productivity*, 52 F.R.D. 55, 61 (1971).

16. In doing so, the court drew upon some of the experience of the Appellate Division of the New York Supreme Court, First Department, in its use of "law assistants," described in D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 15, 18-19 (1963).

Court of Appeals may aid in understanding the function and operation of its prehearing system. The Michigan Court of Appeals is an intermediate appellate court of statewide jurisdiction.[17] It hears appeals taken as a matter of right from both civil and criminal judgments of inferior courts,[18] and has original jurisdiction in specified habeas corpus, superintending control, apportionment, quo warranto, and mandamus proceedings.[19] The court also hears appeals by leave, including applications for delayed appeal not timely filed as of right, appeals from state administrative agencies (principally workmen's compensation awards), and appeals from probate and district courts.[20] The court's opinions are final, subject only to review by the Michigan Supreme Court on grant of leave to appeal.[21]

Since 1969 the court has consisted of twelve elected judges, frequently augmented by three retired judges or circuit judges assigned to the court as the caseload requires. Appeals are heard by three-judge panels assigned to hearing divisions whose membership rotates monthly to ensure that the judges sit with each other with equal frequency. In the tradition of the circuit riders of the past, the judges travel to the hearing site located in one of the three divisional offices.

The court's hearing year runs from October through June, during which each panel hears 21 full issue-joined appeals per month. Generally a second hearing session is scheduled during the month of June so that cases ready for hearing need not be held over to the following October. During the year 1972 three retired judges were assigned to the court on a continuous basis. The fifteen judges heard a total of 1,025 calendared appeals on the merits, and they decided an additional 200 appeals on the merits without the traditional trappings of a formal hearing. Thus in 1972 the court handled in excess of 80 appeals per judge. Sitting in panels of three, each member of the court participated in the decision of approximately 240 appeals. This activity represents the most significant part of the court's function, but certainly not all of it. The court also processes about 6,000 motions, running the gamut of those normally consid-

17. MICH. CONST. art. 6, § 1.

18. MICH. STAT. ANN. §§ 27A.308-09 (Cumulative Supp. 1973); MICH. GEN. CT. RULES OF 1963, 801, 806.

19. MICH. STAT. ANN. §§ 27A.309-10 (Cumulative Supp. 1973); MICH. GEN. CT. RULES OF 1963, 713-15, 806.

20. MICH. STAT. ANN. §§ 17.237 (861), 27A.309 (Cumulative Supp. 1973); MICH. GEN. CT. RULES OF 1963, 806.

21. MICH. GEN. CT. RULES OF 1963, 853 (Cumulative Supp. 1973).

ered by appellate courts. These include applications for leave to appeal and motions for extension of time to perfect an appeal. Applications for leave are significant matters because, in many instances, denial of leave effectively disposes of the case on the merits.

In large measure, the court's ability to manage a caseload of this magnitude can be attributed to the innovative use of supporting research personnel. In describing the court's initial success in this direction, a previous article concluded:

> The day of the single, unassisted legal practitioner is over and so is the day of the unassisted judge. With appeals fast becoming the routine "next step" in the litigation process, it is incumbent upon our appellate courts to modernize procedures and develop new techniques for coping with the steadily increasing volume of appeals. Our experience to date indicates that the use of supporting research personnel, functionally organized, can effect a significant increase in judicial output without derogation of the essential judicial function.[22]

Five years of experience with centralized staff and prehearing procedures have fulfilled the above predictions. This article seeks to describe in detail the prehearing research and screening procedures used in the Michigan Court of Appeals, to evaluate the system's performance, and to compare similar prehearing practices employed by other court systems. In conclusion, the shifting role of supporting research personnel—traditionally embodied in the position of personal law clerks—is explored.

II. Description of the Prehearing Research and Screening System

A. Prehearing Research

The nucleus of prehearing research as practiced by the Michigan Court of Appeals is the preparation by the central staff of legal research memoranda after appellate issue has been fully joined. These memoranda resemble those traditionally prepared by judicial law clerks prior to oral argument or submission. They are distinguished, however, by more extensive fact analysis and independent research. The "prehearing report" includes a fact resume with reference to the actual record, a statement of the parties' contentions, and a documented analysis of the existing law applicable to each issue. The prehearing report, the briefs of counsel, and the record provide the judges with the information necessary to decide the

22. Lesinksi, *Judicial Research Assistants: The Michigan Experience*, 10 Judges J. 54, 55 (1971).

outcome and prepare an opinion.

Cases presenting questions totally devoid of jurisprudential significance or merit (elsewhere designated as "frivolous") are often decided by a short per curiam or memorandum opinion. In such cases, a proposed draft opinion is generally included in the prehearing report for the court's consideration. At the other extreme, where complex and unprecedented issues are present, the prehearing report serves as a guide to judicial deliberation and further research. Thus the prehearing system transfers preliminary research and record review from judicial law clerks to a prehearing staff. Moreover, the shift of these functions from after to before oral argument enables the early identification of appeals appropriate for per curiam or memorandum treatment.

1. The Prehearing Report[23]

Prehearing research and record review by a central research staff rather than by individual law clerks results in the standardization of the format and content of prehearing reports. In the Michigan Court of Appeals, a prehearing report includes the following elements:

(1) a caption giving the full and correct title of the appeal and the court's docket number, the identity of the trial judge and trial counsel, the name of the prehearing attorney preparing the report, and the date upon which the report was drafted;

(2) a full statement of facts in a style generally suitable for use in a draft opinion, verified by page citations to the lower court record;

(3) an objective statement, or restatement where necessary, of the issues on appeal;

(4) a detailed discussion of each issue, starting with a brief summary of the arguments of the parties and followed by an analysis of the applicable law;

(5) a conclusory recommendation suggesting the result or alternatives available to the court and the type of opinion most appropriate for the particular case (if the prehearing attorney recommends a per curiam or memorandum opinion, he drafts a proposed opinion and attaches it to his report);

(6) an appendix including photocopies of the opinion—if

23. For a typical, hypothetical example of a prehearing research report prepared by a Michigan prehearing attorney see D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS, Appendix K, 266 *et seq.* (1973).

any—of the trial court or tribunal below, relevant portions of the pleadings or testimony which the court should examine, and any previous research memos prepared on the case, such as a commissioner's report if the appeal came by way of application for leave to appeal.

If it will aid in their discussion of resolution, prehearing attorneys are free to consolidate issues or change their order of presentation in the briefs. They may also bring to the court's attention any unraised issues that may dispose of the appeal[24] or that may affect the quality of justice in the case, emphasizing that such issues were not briefed by the parties. Generally, however, their research is confined to the issues raised rather than to de novo examination.

The prehearing report's most important function is to provide an analysis of the law applicable to the issues. Virtually every case involves a considerable degree of independent legal research, even when both sides of the appeal are well briefed. All appellate judges are well aware that because of its adversary nature, the brief can rarely be relied upon to present a sufficient exposition of the law. Furthermore, the quality of written appellate advocacy often is lacking, in which case the issues must be researched almost afresh. While the prehearing report serves to call the court's attention to briefs grossly violative of applicable court rules or standards of professional conduct, the prehearing attorney is still obliged to research the issues fully.

Prehearing attorneys do not ordinarily extend their treatment of existing law beyond Michigan authorities, except in cases clearly warranting such an extension. If an exhaustive multi-jurisdiction survey must be undertaken, the task normally falls to the judicial law clerk. If a prehearing attorney discovers a problem that might be resolved by an appropriate inquiry at oral argument, he lists the question in his report. Additionally, since the presentation of the facts often influences the disposition of a case, the report also includes a thorough and objective review and verification of the facts stressed by the parties.

Although there is a degree of inter-office discussion in their preparation, prehearing reports are primarily an individual undertaking. Originally sent to the court anonymously, the reports now

24. One function that is not a primary source of concern to the prehearing staff is the policing of appeals for jurisdictional and procedural defects. The clerk's office of the court is staffed with legally trained and in-house trained personnel who screen all appeals for such defects before the appeal reaches the prehearing staff.

bear the author's name in order to promote pride of authorship and to assist the judges in evaluating each prehearing attorney's performance.

2. Prehearing Screening

The comprehensive research reports prepared for all cases in advance of oral argument provide the foundation for the prehearing screening of appeals. Because legal analysis is performed prior to calendaring, appeals may be screened more accurately than if screening were based solely on a docketing statement or a reading of the briefs. As practiced by the Michigan Court of Appeals, the basic screening function is the categorization of appeals according to the type of opinion each will require for disposition. At the conclusion of a prehearing report, the prehearing attorney suggests whether an authored opinion, a per curiam opinion, or a memorandum opinion is most appropriate for the resolution of the particular appeal. While no appeal is given summary treatment, and every case is fully examined, the ultimate treatment each case receives is affected by knowledge of what it involves, and the category attached to a case determines how it is processed.

An authored or, in the jargon of appellate judges, "full blown" opinion needs no extended explanation—it is the thorough exposition traditionally rendered by appellate courts. In the Michigan system a per curiam opinion, typically two or three typed pages in length, is employed when the issues are not jurisprudentially significant and may be adequately resolved with a brief discussion of controlling precedent. The memorandum opinion is simply an order of the court affirming the judgment below. It is employed where the issues border on frivolity or where they have been resolved by the court on several occasions and are so well settled that they require no discussion.

If the prehearing attorney recommends per curiam or memorandum treatment, he attaches to his report a draft that the court may adopt, modify, or reject. In full opinion cases, the prehearing report may occasionally be sufficient to constitute a rough outline of the eventual opinion. In the past two years approximately 50 percent of the court's opinions have been per curiam or memorandum opinions. To save the bar from having to purchase reporters containing a large percentage of nonprecedential opinions, memorandum opinions are not published, and per curiams are published only upon request by a member of the three-judge panel. Judges

have shown significant self-restraint in ordering publication of per curiam opinions.

Appeals are not screened for the purpose of limiting oral argument. Arguments impose no burden on the court because they are limited to 30 minutes per side and are confined to a three or four day period each month for each panel. A sufficiently large number of cases are submitted on briefs alone to allow the court to reach promptly cases ready for disposition. To the extent that screening is practiced in Michigan, the convening of special screening panels is unnecessary. The prehearing attorney's opinion recommendation is weighed with the merits of the appeal by the panel of judges who decide the case.

As an adjunct to the screening practiced by the prehearing staff, Michigan permits the extensive use of motions to affirm and dismiss. The motion to affirm, which is filed after the appellant has filed his brief, places the case at issue and allows the court to reach frivolous or simple-issue controversies quickly. A motion to dismiss can be filed any time the appellee feels he can affirmatively demonstrate a basis for such action. Preparation of a prehearing report often precedes consideration of these motions, which are placed on the court's weekly motion calendar for early disposition.

In addition to the benefits derived from the categorization of appeals by type of opinion each will require, the prehearing screening provides several secondary benefits. These include the early identification of latent jurisdictional problems, the facilitation of calendaring and assigning cases to writers to provide a balanced work load for the court, and the compilation of an "in-house" digest of pending issues.

B. The Prehearing Staff

The prehearing staff varies in size according to the court's caseload. During the period from 1970 to 1972, from fifteen to eighteen prehearing attorneys were employed. In January 1973, the number of appeals heard each month increased from 105 to 120, necessitating a staff increase from eighteen to twenty.[25] Responsibility for administrative supervision of the prehearing staff is vested in a Research Director, and staff performance is closely monitored by the court's Chief Judge.

25. Recent increased activity calls for increasing the staff to 24 or 25.

1. Selection, Orientation, and Tenure

Because of the size of the staff, the degree of turnover, and the responsibilities of the position, recruitment of law school graduates to serve as prehearing attorneys is an important undertaking. To attract candidates of the highest caliber, interview teams visit the four Michigan law schools and a half-dozen other major schools each fall for on-campus interviews. The interviews are conducted by a team consisting usually of a judge of the court and either the Research Director or another senior member of the court's staff. Involving judges in the recruiting process helps demonstrate to the applicants the importance the court places on the quality of its staff and enables the judges to recruit their personal law clerks at the same time.[26]

Each applicant is requested to submit a completed employment application, a personal resume, a copy of his law school grade transcript, and one or more examples of his legal writing. Based on these materials and on the law school interview, the interview team determines which candidates have the best potential for law clerk or prehearing service. The applicant's materials are then reproduced and, together with an interview summary and appraisal, are sent to the judges. Once the judges have made their clerkship selections, the best of the remaining applicants are invited to the prehearing offices for a further personal interview, following which offers of employment are tendered.

As an intermediate state appellate court, the Court of Appeals is at a disadvantage when competing with more prestigious federal and state supreme courts for the top students. An effort is made to overcome this by offering a higher than average salary ($14,900), an excellent fringe benefit package, and attractive offices. Less tangible, but perhaps more effective, is the attitude of the judges toward the staff; a spirit of openness and receptivity is shared by all members of the court.

If prehearing attorneys are recruited and selected with care, they do not require a great deal of orientation upon commencing employment. New prehearing attorneys are supplied with a com-

26. Joint recruiting offers several advantages. The judges are insulated from a constant stream of inquiries and unsolicited applications each fall, and students who might not otherwise apply are attracted to prehearing work. In the past most students have indicated a decided preference for law clerkships. As the nature and function of the position of prehearing research attorney has become more widely recognized, however, this attitude is diminishing. The starting salary and fringe benefits are identical.

prehensive staff manual, which is revised annually with the assistance of the prehearing attorneys themselves and which describes in detail the responsibilities and procedures attending their position.[27] As part of the orientation process, prehearing attorneys are offered legal research and writing tips found valuable by members of the staff, are invited to review books on legal research methodology and legal writing style, and are instructed in the use of dictaphones.

In the tradition of law clerkships, the tenure of a prehearing research attorney is generally one to two years. Coupled with the circumstance that Michigan law schools graduate students in January, June, and August, staff level flexibility is easily achieved.

It was initially envisioned that the prehearing staff eventually would consist largely of career employees; however, this has not occurred. Indeed, the court is satisfied that the same considerations that have led the overwhelming majority of appellate courts to opt for short-term law clerks who have recently graduated from law school apply equally to the prehearing staff. Turnover can intensify administrative problems, but avoids the more subtle adverse effects of institutionalism. Recent law school graduates seem to make up in freshness of thought and purpose what they may lack in practical experience. After a year or two, some prehearing attorneys develop what we call the "second-year syndrome," a malaise manifested by delusions of infallibility. Once a prehearing attorney starts taking more interest in defending his conclusion than in objectively discussing the alternatives, it is time for him to seek other employment.

2. Office Procedures

The prehearing staff is centralized in a one-floor suite of offices situated in the building housing the court's main office at Lansing, the state capital. The location facilitates access to the court's central records and research materials and provides liaison with the personnel of the Clerk's office. On a weekly basis a list of cases ready for prehearing is furnished by the Clerk's office. A case is ready for

27. The manual begins with an introduction to the Court of Appeals and its jurisdiction and procedures, and includes a summary of the function of other divisions of the court, such as the clerk's office and the court commissioners. The main body of the manual details the format and content of prehearing reports as well as office procedures and productivity expectations. Other topics covered include confidentiality, restrictions on extracurricular activities, and the conditions of employment. An appendix to the manual contains a sample prehearing report, a citation style guide, and copies of various inter-office forms.

prehearing when it has been noticed for hearing (both briefs having been filed or the time for filing the appellee's brief having expired) and the lower court record and transcript have been filed with the court. From that list cases are assigned to individual prehearing attorneys, as needed, on a blind-draw basis, although an effort is made to equalize the assignment of civil and criminal cases. A carbon copy of the assignment memorandum goes to a Deputy Clerk who then delivers a set of briefs and the lower court record and transcript to the prehearing attorney. Upon completion of the prehearing report, the author deposits the briefs, record, and transcript in a bin from which frequent pickups are made by the Deputy Clerk or a member of his staff.

Once the prehearing report is dictated, typed, edited, and corrected, it is reproduced; one copy is sent to the author and another copy is delivered to the Clerk's office for use in drawing up the next monthly calendar. Three copies are routed to the Deputy Clerk; he in turn sends them, together with the briefs, to the members of the hearing panel after the case is calendared. Prehearing reports are considered confidential working papers and are not made available to counsel or the public.

3. Caseload and Quality

The production goal for each prehearing attorney is an average of two reports per week over the course of a month. Because cases vary widely in complexity and in sheer bulk of the transcript that must be read, it is frequently impossible to complete eight reports a month. For this reason, six reports a month is considered a minimum level of satisfactory performance.[28]

The caliber of the staff's work is evaluated in several ways. Before each prehearing report leaves the floor, it is reviewed by the Research Director or, in his absence, by a senior prehearing attorney. For new employees, this review generally includes a paragraph critique using the report to illustrate facets of case analysis and writing style. More seasoned staff members' work is reviewed in more cursory fashion. The review may include reading the briefs, but usually does not. Spot research to confirm that the report has

28. It is also much closer to the actual average. In 1972 a total of 1,105 reports were prepared by a staff that ranged from 16 to 18 prehearing attorneys, except during the summer months when it dipped to 12. In addition, several prehearing attorneys served as law clerks to judges temporarily assigned to the court. Assuming an average staff size of 15, and assuming that each member took the alloted 2 weeks of sick leave and a 2-week vacation, production averaged 6.7 reports per prehearing attorney per month.

not overlooked leading cases on a particular issue is more common. The purpose of this review is not to ensure that the reports are totally free of errors or omissions—an impossible task given the rate of twenty to 30 reports a week—but to guarantee that they "ring true."

When sent to the judges, each report is accompanied by a judicial evaluation card. The judges rate reports as to quality, without regard to the ultimate result recommended. Each judge may make any specific comments he sees fit. The cards are returned to the Research Director who analyzes them on a monthly basis and reports the results to the Chief Judge. Reports rated less than good are frequently discussed with the author in an attempt to identify and correct the source of dissatisfaction. Perhaps the best test of the caliber of a prehearing report is its comparison with the ultimate opinion issued by the court. Accordingly, opinions are sent to the author of each prehearing report so that he may determine whether the court decided the case the way he recommended, relied upon the authorities he found controlling, or made use of his proposed opinion, if one was furnished.

III. Evaluation of the System's Performance

In evaluating screening procedures used by the federal circuit courts of appeals, one commentator suggested:

> It is not at all clear what, if any, conclusions can be drawn from the experience of experimental judicial administration. Programs tried thus far may have been helpful in facilitating some particular task in the court's workload; nothing, however, can claim substantial success.[29]

The prehearing research and screening system used by the Michigan Court of Appeals has now been operating for five years and has passed the stage of "experimental" judicial administration. Furthermore, the operational results of the system's five-year performance lay a strong claim to substantial success not only in reducing appellate delay and eliminating the necessity of adding large numbers of judges to meet the burgeoning caseload, but also in satisfying the essential functions of intermediate appellate review.

A. Benefits Derived from the System's Basic Features

Both increase in judicial productivity and reduction of appel-

29. Note, *Screening of Criminal Cases in the Federal Courts of Appeals: Practices and Proposals*, 73 COLUM. L. REV. 77, 88 (1973) [hereinafter cited as *Federal Screening*].

late delay result from the smoother case flow attributable to the prehearing system. The underlying reasons for these effects can be best understood by examining the benefits—both anticipated and unanticipated—springing from the system's two basic features: the transfer of the preliminary research from judicial law clerks to a central staff; and the shift of a substantial portion of the research from after to before oral argument.

The transfer of the preliminary research to the central staff results in greater economy of effort as well as a better work product. Even where panels consist of only three judges, the economy is obvious: instead of three clerks researching the same case for each of their judges, one prehearing attorney prepares a report that is sent to all members of the panel. Working in an atmosphere tailored to research and uninterrupted by other duties, the prehearing attorneys are able to devote their entire energy and attention to the preparation of research reports. A central research department also permits a catalogued collection of research on issues litigated in this state, which collection contributes to a superior work product with a minimum of effort.

The shift of factual and legal research from after to before oral argument and the resulting categorization of appeals according to appropriate mode of disposition further contribute to the time saved. Knowing that an appeal will probably be treated in a memorandum, per curiam, or full opinion allows calendaring tailored to the amount of time necessary to resolve the case. In a multi-panel court, the opinion recommendations also help to equalize dockets so that each panel receives an equivalent measure of full opinion, per curiam, and memorandum cases at each session. Identification of related cases is facilitated, allowing separate appeals by codefendants or appeals presenting similar issues to be heard together. Serving as an inventory of all issues pending before the court, the prehearing reports aid in the retrieval of staff research being done on similar or identical issues. This inventory function is enhanced by the preparation of subject-index cards used to prepare a "pending issue digest," supplemented monthly, which is distributed to all judges, law clerks, and prehearing attorneys. The digest serves not only to prevent separate panels hearing similar issues from inadvertently issuing inconsistent opinions, but also to alert judges on the same panel of the positions their fellow judges may previously have taken on a similar issue.

The transfer of the focus of research to before oral argument also yields benefits during the oral argument, judicial conference,

and opinion writing stages. Supplied with the briefs and a prehearing report in each case, well in advance of oral argument, the judges are—despite the heavy caseload—much better prepared for the argument. Similarly, this procedure expedites the afternoon conferences held to discuss the cases heard that morning. If a full opinion is warranted, the advance preparation often enables the judges to delineate their positions at the initial conference and permits the prospective writer to proceed without the duplication of further conferences.

Moreover, the prospective writer may find in the prehearing report an outline for his opinion. The statement of facts in the prehearing report is arranged so that it would be suitable for use in an opinion. If the judges agree at conference that some or all of the statement of facts in the prehearing report may be directly adopted, this alone can be a great time saver. During the conference the judges may decide to use the report's legal analysis as the underlying framework of the opinion. Since the basic structure may be easily modified or augmented as necessary, the prehearing report can save significant time for an opinion writer at the preliminary organization phase. This is even more true in unusual or complex cases. In sufficiency of evidence cases, for example, the entire record can be more readily examined with the prehearing report serving as a roadmap, and the amount of judicial time expended in the search of a voluminous record may accordingly be minimized.

Even judges who disagree with conclusions drawn in a prehearing report find it a useful tool. Sometimes the reasoning of the report can be adjusted and used to support the opposite result. The report can also aid a dissenting judge in recording those areas that he has read, weighed, and dismissed.

If a per curiam or memorandum opinion seems appropriate, the time savings become still more apparent. Apprised of the applicable law and facts at the initial conference, the judges are ready to act immediately, and such opinions are often filed within days of argument. Advance review of the prehearing report additionally assures that the record is complete before the case is considered, allows time for the production of missing exhibits, and provides a double check of proper jurisdiction. In short, no one document serves as many useful functions in an appellate court system as the prehearing report does in Michigan.

While aiming at an increase in judicial productivity, the Michigan prehearing system has also succeeded in expediting the appellate process. By conserving and concentrating judicial energy, by

tailoring dockets to maximum judicial capacity, and by identifying cases not ready for decision, it assists the court in handling a larger volume of cases, avoiding the delay inherent in a backlogged docket. By pinpointing routine cases for immediate disposition and by focusing on problems presented by more complex cases, the prehearing system enables the court to prepare opinions in the minimum possible time. Therefore, although an extra month is required to pass a case through the prehearing system, the overall process is speeded by the smoother flow of the cases.

While other benefits of the prehearing system can be theoretically isolated, perhaps the best measure of its contributon is the statistically verifiable increase in judicial productivity. Various figures can be cited, depending upon which years are chosen for comparison, but the increase in opinions per judge per year is at least 46 percent.[30] It is difficult to translate this figure into an exact amount of money and time saved, but, to say the least, it is substantial.

B. Meeting of Proper Screening Criteria

Various commentators have expressed uneasiness over the propriety of screening and research pooling procedures. Such expressions have taken the form of concern over the delegation of judicial authority,[31] the "de-humanization" of the judicial process,[32] the constitutionality of such procedures,[33] and the correlation of screening procedures with the basic functions of judicial appellate review.[34]

30. For the derivation of this 46% figure see Michigan Court of Appeals Annual Report, reprinted at 39 Mich. App. xxii, xxviii (1972). The figure was based on the first 3 years of prehearing operation. Five years have now elapsed since the inception of the prehearing system. Since the major features of the process have remained unchanged, this time period establishes a firm foundation for comparisons with the prior history of the court's judicial productivity. Meaningful statistics are best obtained by deletion of figures for 1965, the first year of the court's operation, and for 1968, the first year of the prehearing system, thus eliminating the possible peculiarities associated with the launching of new systems. The figures for the 2 years 1966-68 can be effectively compared with those from the 4 years 1969-72, with the addition of the prehearing system as the primary variable affecting the statistical outcome. From 1966-68, 846 opinions were written, an average of 45 per judge per year. From 1969-72, 4,555 opinions were written, an average of 84 per judge per year. Stated as a percentage of the prior opinion production per judge, this increase represents an 87% gain in judicial productivity. If the figures from 1965 and 1968 are included, the percentage gain increases to 132%.

31. *See* Huth v. Southern Pac. Co., 417 F.2d 526, 529-30 (5th Cir. 1969); Carrington, *The Dangers of Judicial Delegation*, 52 F.R.D. 76 (1971); Christian, *supra* note 15, at 58.

32. *See* Carrington, *supra* note 31, at 77-78.

33. *See* Huth v. Southern Pac. Co., 417 F.2d 526, 529-30 (5th Cir. 1969); Christian, *supra* note 15, at 58; *Federal Screening, supra* note 29, at 82-85.

34. *See Federal Screening, supra* note 29, at 80-82.

It is clear that a viable screening and pooling system must meet a variety of tests; the nature and purpose of the court system, State and Federal Constitutions, and practical considerations all impose their own demands. During its five years of operation, the system used by the Michigan Court of Appeals has satisfactorily met these demands.

1. The Dangers of Delegation

The prehearing system endeavors to avoid delegation of authority to nonjudicial staff personnel. The basic element of the system, the prehearing report, is only a preliminary research tool to aid a panel of judges in arriving at its decision. Suggestion by a prehearing attorney that a case be decided via a per curiam or memorandum opinion is simply a *recommendation* having no judicial force. The decision-making responsibility rests with, and is carried out by, a three-member panel of judges. None of the research staff has any power of decision.

Concern that prehearing research procedures dehumanize the judicial process[35] or result in production line justice[36] is unwarranted. A case backlog hanging over the head of a judge and his law clerk is not an incentive to a detached, unhurried examination of an individual party's rights. The prehearing system not only produces a detailed research report examining in depth both parties' contentions, but also serves to avoid the inconvenience and agony caused by case backlogs that suspend parties' rights for disturbingly long intervals.[37] Proper concern for the humaneness of appellate review dictates prompt intermediate appellate court determinations of the rights of people with meritorious claims. Moreover, the early and swift disposition of unmeritorious appeals that is aided by staff research and recommendations results in more available judicial time for considering extensively those cases of particular significance to the state's jurisprudence.[38] The prehearing system is not a

35. *See* Carrington, *supra* note 31.

36. *See generally* Edwards, *The Avoidance of Appellate Delay*, 52 F.R.D. 61 (1971).

37. Appellate delay, as pointed out by Judge Griffin B. Bell, causes "concomitant effects. The recidivist criminal may continue on bail, the hapless plaintiff is without his damages, interest accrues against the defendant, and controversies remain unsettled. Witnesses are lost for retrial in the event of reversal." Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237, 238 (1971).

38. It is equally important that judges do not waste their valuable time with extended research on unmeritorious appeals. *See* Presiding Justice Gordon L. Files's remarks, *reprinted in* JUDICIAL COUNCIL OF CALIFORNIA, 1970 ANNUAL REPORT, Appendix B, at 36.

production line. Prehearing attorneys have the same concern for the rights of an individual that a law clerk researching for his particular judge would have.In addition, the preparation of a report by a neutral prehearing staff attorney, uninfluenced by the real or imagined prejudices of a law clerk's particular judge, may well result in a fairer, more objective examination of the issues presented.

2. Purposes of Appellate Review

Each stage of the judicial process must have certain functions if the overall system is to accomplish its proper goals. A high-volume intermediate court inundated with appeals as of right must handle its docket differently from a discretion-exercising supreme court. The functions of such an intermediate court include: to do justice to the parties; to maintain standards in the trial courts; to develop the law of the jurisdiction; and to contribute to the prompt termination of litigation.[39] The Michigan prehearing system significantly improves the performance of each of these roles.

Common sense dictates that an overworked court will have difficulty doing justice or giving the parties a fair examination of respective contentions on appeal. Screening facilitates the application of extensive decision-making criteria to those cases which merit it. At the same time, the prehearing report provides even in unmeritorious appeals a detailed analysis of parties' contentions and permits a fairer examination of all positions on appeal.

By interjecting a reasonably objective third party between the disputing parties and the judge who has to live with the decision he ultimately makes, the prehearing report helps to maintain consistent trial court standards. Identifying those cases suitable for per curiam or memorandum disposition not only eases the uncertainty inherent in prolonged pending appeals, but it also focuses prompt judicial attention on those remaining cases that do have jurisprudential significance affecting trial court standards.

Another aid to the maintenance of consistent trial-court standards is the compilation of pending issues. Incident to each prehearing report, the prehearing attorney prepares index cards stating the issues. Compiled in a central digest, these cards help synchronize the court's consideration of related cases before they are decided and permit retrieval of completed research for later reference. In both instances, decisional consistency is enhanced.

---

39. *Federal Screening, supra* note 29, at 80 & n.26.

This same consistency develops the law of the jurisdiction by presenting a firm stance on the interpretation of laws and by framing precise vehicles for higher review.

Finally, the contribution of an intermediate court of appeals to the prompt termination of litigation is obviously facilitated by a prehearing system that not only significantly expedites the appellate process, but also prevents unnecessary rehearings and further appeals by applying swift and consistent interpretations of the law. Temporal economy is most evident in those cases decided by per curiam or memorandum opinions.

3. Constitutional Considerations

Several possible constitutional objections to prehearing procedures have been suggested, including whether significant parts of what is considered judicial work can properly be delegated to nonjudicial personnel,[40] and whether the system meets the requirements of constitutional due process and equal protection.[41] The Michigan system satisfactorily answers these constitutional challenges.

The provisions of the Michigan constitution mandate that judicial power be vested in "one court of justice," including the court of appeals. Because Michigan's prehearing system does not involve the delegation of judicial duties to others, the impartial presentation of the facts and law of a case embodied in the prehearing report aids rather than usurps the judicial function. If a prehearing attorney's recommendation as to form of opinion is followed, or if a proposed opinion is adopted, it is only after the judges themselves have examined the record and briefs and come to their own decision. Accordingly, the proper judicial role as required by the constitution is preserved.

The keystone of the due process safegnard is that a hearing must be fair—arbitrary, capricious, or unreasonable procedures cannot be tolerated. The Michigan prehearing system results in a fairer hearing for all parties. Even those parties who file unmeritorious appeals of no jurisprudential significance have their case carefully and unhurriedly scrutinized in the prehearing report. Prompt treatment of unmeritorious appeals allows more time for extensive consideration of those cases of significant importance and avoids unnecessary delay of meritorious appeals. Since the system's uni-

40. *See* sources cited *supra* note 31.

41. *See* Huth v. Southern Pac. Co., 417 F.2d 526, 529-30 (5th Cir. 1969); *Federal Screening, supra* note 29, at 82-85.

form procedures assure that each appeal receives extensive background consideration through the prehearing report and then receives individual attention by the judges who retain sole responsibility for decision, the requirements of due process are satisfied. The uniform procedures and the vesting of all decision-making authority only in the judges also assure that the system meets the requirements of equal protection. Although appeals are treated differently according to the type of opinion used in deciding them, the distinctions are squarely justified by the overwhelming state interest in the numerous benefits the system offers to the judicial process as a whole. Thus, although constitutional questions are properly raised, they present no problems for the Michigan prehearing system as presently constituted.

IV. Comparison with Other Prehearing Systems

While no other court enjoys the scale and depth of prehearing research employed in Michigan, a number of American courts have utilized prehearing pooling or screening procedures.[42] Of timely interest is the Appellate Justice Project, sponsored by the National Center for State Courts and under the direction of Professor Daniel J. Meador, in which variations of the Michigan system have been incorporated on an experimental basis in several types of appellate courts.[43] The comparative analysis undertaken here will focus on three basic strains of appellate experience with prehearing procedures: those found in other state courts; in the federal circuits; and in the English Court of Appeal.

A. State Courts[44]

1. New Jersey[45]

The New Jersey experience with a central appellate research

42. The state court list includes at least the New York Supreme Court, Appellate Division; the California Courts of Appeal; the Superior Court of New Jersey, Appellate Division; the Missouri Court of Appeals; the Illinois Court of Appeals; the Louisiana Court of Appeals; the Virginia Supreme Court of Appeals; and the Supreme Courts of Iowa and Nebraska. Several federal circuits have employed screening procedures, notably the Fifth, Sixth, Tenth, and D.C. Circuits.

43. The courts chosen for demonstration projects are the Supreme Courts of Virginia and Nebraska, the Illinois Court of Appeals (First District), and the Appellate Division of the Superior Court of New Jersey.

44. This analysis of other state court experiences with prehearing systems is not intended to be an exhaustive survey. Systems were chosen to illustrate differences from the Michigan system.

45. The following description of the New Jersey system is based upon information

staff is particularly instructive. Faced with a rapidly increasing number of appeals,[46] the New Jersey Superior Court, Appellate Division, attempted to respond to its caseload burden through the traditional remedy of adding more judges. The size of the court was increased from six judges hearing six cases a week in 1957 to fifteen judges hearing fourteen cases a week in the 1972-73 court year. Cognizant of the problems inherent in the continued addition of judges, including loss of doctrinal consistency and cohesiveness of the court, the Appellate Division established on an experimental basis a Central Appellate Research Staff responsible for screening cases to determine those that merited the full attention of the court. During the central staff's first year of operation, the court decided 209 more appeals than in the previous year. Two hundred eighty-four of the total appeals decided have been staff processed. The central staff's production is expected to halt the frequency with which new panels of judges must be added.

Due largely to New Jersey's much smaller prehearing screening staff and its greater appellate caseload, its screening system differs in several respects from the Michigan system. The Michigan prehearing staff of approximately twenty attorneys prepares a prehearing report on every case, regardless of complexity. In New Jersey, the screening staff of five attorneys cannot prepare a report in every case. Instead, the staff director screens all perfected appeals before they are channeled to the staff and selects those cases which upon superficial examination appear capable of ready disposition, either on their facts or on the basis of existing law. The report that the staff then prepares on these preselected cases may express ideas as to the recommended result, but it does not include a draft per curiam opinion. When, upon examination of the record, a selected case turns out to be more difficult than originally contemplated, the case is returned to the clerk's office, without memorandum, for regular disposition by the court. Initial results indicate the success of the screening process: of the 284 staff-prepared cases decided during 1972-73, the Appellate Division and the central staff reached the same conclusion in 259 cases and disagreed in only nine. The remaining sixteen cases either were moot or the staff reached no conclusion. As in Michigan, the conclusion of the central staff is simply

provided by Cynthia M. Jacob, Research Director of the Superior Court of New Jersey, Appellate Division, courtesy of Chief Judge Milton B. Conford.

46. During each court year since 1965-66, the number of appeals filed increased by approximately 300 per year, escalating from 1,263 in 1965-66 to 3,574 in 1971-72.

a recommendation—judges are entirely responsible for the final result and the rationale of any decision.

Because memoranda are prepared by the New Jersey staff only in those cases capable of ready disposition, the law clerks of the individual judges rarely see the prehearing memoranda, which are forwarded directly to the individual judges for decision. In Michigan, however, the opposite is true. Since a report is prepared in all cases, regardless of complexity, law clerks regularly use the prehearing report as a guide for further research in those cases that merit a full opinion.

A final significant difference between the New Jersey and Michigan systems is that in New Jersey a minimum of one year of appellate experience is required before a person can be considered for a position on the central staff. Accordingly, the staff is composed largely of attorneys who contemplate a career in judicial administration. In Michigan, however, the prehearing staff is composed largely of recent law school graduates who usually leave the court after one or two years.

2. New York[47]

The Third Department of the New York Supreme Court Appellate Division has a pooling system that dates from 1956. The Department comprises 28 upstate counties, which produce about 900 appeals per year. Eight justices, sitting in rotating panels of five, hear these appeals, and a law clerk, functioning in the traditional role, assists each justice. In addition to the law clerks, the Third Department pools nine "law research assistants" under the supervision of the Deputy Clerk of the court. Before oral argument, this pool prepares preliminary reports similar in form to the Michigan reports, but less extensive and without any draft per curiam opinion attached.

Some features of the New York procedure, however, differ significantly from the Michigan system. First, the Deputy Clerks select for the central staff only those cases that present substantial questions warranting preliminary research. Routine cases, the lifeblood of some prehearing systems,[48] are sent directly to the justices for

47. The following description of the New York system is based upon information provided by John J. O'Brien, Clerk of the New York Supreme Court Appellate Division, Third Department, courtesy of Presiding Justice J. Clarence Herlihy.

48. For example, in the Kansas City District of the Missouri Court of Appeals and the Appellate Division of the Superior Court of New Jersey, prehearing reports are prepared only in cases presenting routine issues capable of ready disposition.

disposition. A prehearing report is prepared in routine cases only if the judge requests one. Secondly, law research assistants are recruited directly from law school and serve for only one year. Without the benefit of even a few assistants in the pool with extended experience, the Deputy Clerk has a special burden of coordination and supervision. Finally, the law research assistants of the Third Department share some of the traditional law clerk's role. After oral argument, they may be called upon to do further research for an individual justice. Such research may, for instance, take the form of a preliminary report if one was not produced before. While such interchange of work also occurs in Michigan, it is not present to the extent found in the Third Department.

3. California[49]

A research staff in the California Court of Appeal, Third Appellate District, prepares calendar memoranda similar to the Michigan prehearing reports on all cases in advance of oral arguments. In addition, however, this same staff is divided to give special emphasis to two other functions. One half of the staff screens all appeals, both civil and criminal, as soon as the respondent's brief is filed, and selects cases suitable for routine disposition. The staff member then presents these cases orally to the court sitting in chambers. If the court agrees, the cases are decided by short per curiam opinions; cases not decided in this manner are placed in their regular order on the pending case file. The other half of the staff is assigned to a writ and motion unit. These attorneys are responsible for handling all extraordinary matters filed with the court. Petition, writs, and motions are presented to the court in chambers, where they are handled by appropriate court action.

This research staff is designed to replace individual law clerks assigned to a particular judge. The court's goal has been to maintain a permanent, professional research staff, and—although some of the attorneys do work for particular judges more than for others—the court does not employ a traditional judicial clerkship program.

4. Missouri[50]

In 1972, the Missouri Court of Appeals, St. Louis District,

49. The following description of the California procedures was supplied by Alan W. Strong, Principal Attorney of the California Court of Appeal, Third Appellate District, courtesy of Presiding Justice Frank K. Richardson.

50. The following description of the Missouri system was provided by Frances H. Mess,

adopted in full the Michigan prehearing system. After a year's experience with the system, however, the St. Louis District has incorporated several features of the California procedures. Instead of preparing complete prehearing reports for every case, regardless of difficulty, the Missouri staff now prepares complete reports only on limited-issue cases and cases where applicable state law is clear. In addition to the prehearing report, a tentative opinion is also drafted. Where long transcripts and multiple issues of law not readily decisive for either side are involved, a prehearing report is prepared on the basis of the briefs only. This report explains the facts and issues and indicates the results of research based upon the parties' citations.

The change was intended to avoid a duplication of effort. The Missouri court felt that there was loss of efficiency in having the research unit read lengthy transcripts and research lengthy briefs, only to have the law clerks repeat the process when the cases were assigned to particular judges.

B. Federal Circuits

It is beyond the scope of this article to describe or analyze in depth the screening procedures utilized in the federal circuit courts of appeals. As intermediate appellate courts, however, their experience offers a useful parallel to the procedures instituted in the Michigan Court of Appeals.

Screening as developed in the Fifth Circuit and as adopted with variations in several other circuits[51] differs in two fundamental aspects from the Michigan system. First, screening is done entirely by judicial screening panels operating without benefit of centralized nonjudicial research staff; secondly, a major focus is the limitation of oral argument. Chief Judge John R. Brown illustrates the first distinction:

Director of Research, Missouri Court of Appeals, St. Louis District, courtesy of Chief Judge Robert G. Dowd.

51. For detailed descriptions of federal screening procedures see Isbell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409 (5th Cir. 1970); Huth v. Southern Pac. Co., 417 F.2d 526 (5th Cir. 1969); Murphy v. Houma Well Serv., 409 F.2d 804 (5th Cir. 1969); Bell, *supra* note 37; Edwards, *Exorcising the Devil of Appellate Court Delay*, 58 A.B.A.J. 149 (1972); Edwards, *supra* note 36; Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L. REV. 159, 219-51 (1972). For very recent, exhaustive descriptions of federal circuit screening practices see Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, and Langer & Flanders, *Comparative Report on Internal Operating Procedures of United States Courts of Appeals*, Federal Judicial Center (July, 1973). The publication of these treatments came too late to receive the reference throughout the text and notes they would have otherwise merited.

> The important thing is that this screening is a judicial one performed by Judges, not the Clerk or other non-judicial staff. It is done through a series of standing panels of three Judges . . . . When cases are ripe for screening they are submitted to the screening panels at random, without reference to subject matter, state of origin, or any other criteria.[52]

The Michigan system, on the other hand, relies heavily on centralized nonjudicial staff to aid in the screening of cases according to the merit of the contentions. Since, however, prehearing staff attorneys in Michigan have no decisional responsibility whatsoever, the requirements of judicial selectivity and judicial decision are preserved.

The second basic difference is that in the federal system, the screening process classifies cases with an eye to limiting oral argument. For example, in the Fifth Circuit four screening panels of three judges each place all appeals in one of four categories:

> Class I, the frivolous appeal subject to dismissal or affirmance without opinion.
>
> Class II, cases in which oral argument is not needed; these are placed on the "summary calendar" for disposition, by the screening panel, on briefs and record.
>
> Class III, cases in which argument is appropriately to be limited to 15 minutes.
>
> Class IV, cases deemed to merit the full argument allowed by the appellate rules.[53]

In Michigan, cases are not screened for the purpose of limiting oral argument. While the parties do waive oral argument in perhaps one-third of all appeals, judges generally feel that the benefits of oral argument do merit the time devoted to it.[54] Elimination of oral argument and similar abbreviated procedures, such as announcing decisions from the bench, are readily adaptable to the Michigan prehearing system, but have not been regarded as necessary to its success.[55]

C. The English Court of Appeal

According to Daniel J. Meador, "A principal key—perhaps the

---

52. Murphy v. Houma Well Serv., 409 F.2d 804, 806 (5th Cir. 1969).

53. *Id.* The screening practices of the Sixth Circuit are only slightly less sophisticated, employing 3 categories: frivolous (dismissal), summary calendar (argument limited to 15 minutes), and full argument. Screening is done by 2 panels of 3 judges, aided by staff law clerk memoranda. *See* Edwards, *supra* notes 37 & 51. Similar categories are in use in the Tenth Circuit, althougb in that court screening is done by the Chief Judge and is based on a docketing statement filed shortly after notice of appeal. *See* Bell, *supra* note 37.

54. *Accord,* D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES and AMERICAN REFORM 80-81 (1973).

55. *See also* discussion, p. 1218-19 *supra.*

key—to the English Court of Appeal's ability to cope with its large criminal caseload is the Criminal Appeal Office."[56] After a defendant files an application for leave to appeal, the Registrar, head of the Criminal Appeals Office, is responsible for almost total management of the case. His professional central staff assembles the necessary papers, selects appropriate portions of the trial to be reproduced in written transcript, and, in general, packages the case for the court. The appellate process is thus distinguished by its nonadversary character, with the staff in effect determining the record.

Following preparation by the staff, the application must then hurdle a screening review. Since well over 90 percent of all cases involve discretionary jurisdiction, screening plays a dominant role in the English process. A single judge screens cases to determine whether to grant leave to appeal. As specified in the original act instituting the court in 1907, this preliminary step is a deliberate device designed to hold back hopeless cases. Only if the defendant is represented by retained counsel is he granted at this step a hearing complete with oral argument before three judges.

Applications for leave to appeal that are denied by a judge sitting alone may be renewed before a two-judge panel. This assures that an application will receive the consideration of at least three judges if the applicant so desires. As a matter of practice, however, many appeals—73 percent in 1970—end at the single-judge stage.[57] A principal reason for the failure to renew the applications may be that the appellate court, in order to discourage meritless applications, can direct that all or part of the time spent in prison before action on the appeal not be counted toward the applicant's sentence. Practical experience underlines the deterrent impact of this discretionary power.[58]

If leave to appeal is granted, the next stage is a full hearing before a three-judge panel. At this level the Registrar's staff also performs an essential role, preparing a summary for the panel hearing the case. This summary is especially important because written briefs are not received from the parties. During the hearing itself, a staff member from the Registrar's office sits in the courtroom near the judges so that he can answer questions about the case and supply any further information that may be helpful to either side. As

56. D. MEADOR, *supra* note 54, at 28. The following procedural digest is based upon Meador's description, chs. 2-4.

57. *Id.* at 45.

58. *Id.* at 63-65.

in the leave-granting stage, the hallmark of the hearing is flexibility, founded upon the comprehensive staff work of the Registrar's office.

At the hearing stage, screening techniques are more subtle, but nonetheless are still present. If arguments not covered in the original application are not raised, the judges, after considering the Registrar's summary, may limit the applicant's time for oral argument or may ask for argument only on given points. Argument from the prosecutor is presented only if the court requests it and is usually limited to exactly what the court specifies.

The Registrar's summary is similar to the Michigan prehearing report in that both distill the essential law and facts into a convenient form for the judges. The advantages of avoiding duplication of effort, aiding preparation for oral argument, and assuring a complete case file are also common to both systems. English staff reports, however, do not reflect the extensive independent research that characterizes the Michigan reports, but consist primarily in a synthesis of the facts and contentions. In addition, the staff does not append draft per curiam or memorandum opinions to the reports.

As can be readily observed from the varied duties of the registrar's office, English central staff involvement in a case is far more extensive than that of the Michigan staff. The central staff is the *only* staff—English courts have never used law clerks, a distinctively American institution, as individual assistants. Many of the English practices stem from the nature of their adversary system, but some, such as the use of oral opinions, could easily be added to American procedures. Many of the English procedures, however, including the nonadversary character of the appeal, the advantages for defendants with retained counsel, and the prison time penalty for unsuccessful appeal, would encounter clear constitutional obstacles to adoption in the United States.[59] Nevertheless, the English system remains an excellent model for the effective utilization of central staff and screening processes. As Professor Meador concludes:

> The Criminal Appeal Office is an integral part of the appellate machinery. In American terms, it performs the roles of clerk of the court and of staff law clerk, but it is much more than these positions together would normally imply in the United States. There is probably no exact counterpart to this central professional-administrative staff in any American appellate court . . . .[60]

59. *Id.* at 68-69.
60. *Id.* at 28.

D. Summary

An overview of the differences among the various central staff systems described indicates recurring areas of variance. The scope of prehearing report preparation ranges from all docketed cases, to routine cases only, to complex cases only. Report memos either include independent research or simply summarize the briefs of counsel and the record below. Some centralized staffs draft proposed opinions or orders, while others do not. Staff character varies from permanent to temporary, and from experienced to fresh out of law school. Finally, most systems function along with "traditional" law clerks, while a few have discarded this role.

V. Conclusion: The Trend Toward Central Research Staffing

A century ago the solution to appellate court congestion was the use of court commissioners, adjunct judges whose primary responsibility was to prepare opinions for the court to which they were appointed. During the late 19th and early 20th centuries a total of nineteen states used commissioners in this fashion,[61] and a few have continued to do so in more recent times.[62] The practice has fallen into disfavor and is declining, however; today the title "commissioner" is more often used to describe senior staff members who serve an entirely different function.[63]

As noted in the introduction, the use of judicial law clerks originated in the 1920's and has met with nearly universal acceptance among American appellate courts. Indeed there may have been a cause and effect relationship between the popularity of law clerks and the declining utilization of commissioners as opinion draftsmen. One may hypothesize that the virtual explosion of reported decisions in the early 20th century[64] caused a shift in the need for judicial assistance from opinion drafting to case-law research. At

61. Curran & Sunderland, *The Organization and Operation of Courts of Review*, in Third Annual Report of the Judicial Council of Michigan 65-66 (1933).

62. Blackmar, *Missouri's Appellate System*, 24 J. Mo. Bar 380, 383 (1968). *See generally* Institute of Judicial Administration: Court Commission Systems and References 12-15 (1955).

63. *See* Lesinski & Stockmeyer, *Appellate Court Commissioners: Old Title, New Function*, ___ Akron L. Rev. ___ (1973); Stockmeyer, *Rx for the Certiorari Crisis: A More Professional Staff*, 59 A.B.A.J. 846 (1973).

64. According to a contemporary survey based on the number of cases digested in the American Digest System, quoted in *Main Purpose of Opinions Is to Satisfy Litigants*, 23 J. Am. Jud. Soc'y 31, 32 (1939), there were almost as many reported decisions during the 20-year period 1916-1936 (490,297) as during the first 100 years of this Nation's existence (578,029).

the same time, a dramatic expansion in the opportunities for formal legal training[65] produced an abundant source of law school graduates to meet the demand for research aides.[66]

As recognition now spreads that the proliferation of personal law clerks, like the perpetual creation of additional judgeships, is subject to the law of diminishing returns, a new trend is emerging. The concept of differential case management, or screening, requires for its implementation a pool of legally-trained staff assistants. Consequently, several appellate courts have established centralized research staff units as an alternative to multiple law clerks. Their initial successes have led national advisory commissions to recommend that central staffing and screening procedures be incorporated within appellate court systems in general.[67]

While it is doubtful that central research staffs will ever eliminate the need for law clerks, who serve also as personal assistants to individual judges, it is interesting to note that at least two appellate courts, the Third District Court of Appeal of California and the English Court of Appeal, function effectively without using any "traditional" law clerks. A more likely development is a shift in the function served by law clerks from preparation of legal research memoranda toward greater assistance in opinion preparation. Research, basically an objective task, is easily centralized, while assistance in opinion drafting, a more subjective undertaking, benefits from a close working relationship between author and aide.

---

65. From 1920 to 1929 the number of students enrolled in American law schools nearly doubled, from 24,503 to 48,942. CURRICULUM STUDY PROJECT COMMITTEE, ASSOCIATION OF AMERICAN LAW SCHOOLS, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: 1971, app. II, at 146.

66. There also may he a relationship between the employment of law clerks, predominately top law school graduates with law review experience, and the increased frequency with which law review articles were cited as authority in judicial opinions during the same period. At the United States Supreme Court level, legal periodicals and other journals were cited in opinions in but 29 cases between 1916 and 1930. Thereafter the practice spread rapidly. The number of cases in which articles were cited in the 1930's increased to 71, and amounted to a total of 314 during the 1940's. Newland, *The Supreme Court and Legal Writing: Learned Journals as Vehicles of an Anti-Antitrust Lobby?*, 48 GEO. L.J. 105 (1959).

67. ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION (Tent. Draft, 1973), Standard § 1.10 and commentary to Standard § 1.13, at 31; NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, WORKING PAPERS FOR THE NATIONAL CONFERENCE IN CRIMINAL JUSTICE, Courts Standard 6.2 and commentary (1973); *cf.* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS (Approved Draft, 1970), Standard § 2.4 and commentary, critical of procedural devices for preappeal screening. It is clear from Standard § 3.1 and the commentary accompanying it, expressing approval of staff participation in prehearing preparation of appeals, that Standard § 2.4 relates solely to preappeal or "threshold" screening rather than to the screening procedures discussed in this article.

The judges of the Michigan Court of Appeals are united in the belief that prehearing procedures are a sound and effective weapon in the perennial battle of the backlog. Were it not for the resulting 46 percent increase in opinion productivity per judge, a comparable increase in the number of judges would have been required to keep pace with increased filings. Substantial productivity increases have also been reported by federal courts of appeals that have adopted screening procedures. In the Fifth Circuit, each panel of judges heard 233 appeals in 1970, compared with 180 prior to screening, a productivity increase of nearly 30 percent.[68] Implementation of screening procedures in the Sixth Circuit has increased the number of cases scheduled for argument by a like amount.[69]

Productivity increases of this magnitude do not result merely from screening cases solely for the purpose of eliminating or restricting oral argument. In both circuits memoranda prepared by staff law clerks are used in the screening process and undoubtedly contribute substantially to the identification of appeals that are appropriate for summary disposition.[70] When prehearing research is integrated more fully into the appellate process, further increases in productivity could well be achieved.

Contrary to the fears expressed by some,[71] experience also indicates that prehearing procedures do not result in abdication of the judicial function. Rather, prehearing research reports result in better pre-argument preparation and serve to achieve maximum judicial participation in the decisional process. This has been not only Michigan's experience, but also that of other appellate courts as well.[72] As appellate caseloads continue to increase, a proliferation of additional judges can be avoided and a more efficient organization of work can be achieved by employing staff personnel to research and screen pending appeals.

---

68. Bell, *supra* note 37, at 242.
69. *See* Edwards, *supra* note 51.
70. Christian, *supra* note 15.
71. *E.g.*, Carrington, *supra* note 31.
72. *See* Francis, *Post-Argument Procedures*. 52 F.R.D. 70, 73 (1971); Tate, *Containing the Law Explosion*, 56 JUDICATURE 228, 231 (1973).