APPELLATE REFORM: THE APPELLATE PROCESS TASK FORCE MODEL

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When California's Chief Justice Ronald M. George created the Appellate Task Force in May 1997, he charged it to

> examine the constitutional requirements, statutory provisions, and rules of court governing the manner in which appellate courts perform their functions and . . . evaluate court organizational structures, work flows, and technological innovations that affect the work of the Courts of Appeal. The task force shall make recommendations to the Judicial Council for how the functions, structure, and work flow might be revised to enhance the efficiency of the appellate process. The scope of the examination should include the jurisdiction of the Courts of Appeal, mandatory and discretionary review including the use of writs in lieu of appeals for specified cases, the requirement for written opinions with reasons stated in every case, the requirements for publication of opinions, alternative types of dispositions, alternative appellate processes and different timetables for different types of appeals, use of subordinate judicial officers, and other structural changes, such as the use or elimination of divisions in the Courts of Appeal.[1]

This broad charge has served to guide the deliberations of the Task Force for the past two years.

The twenty-one members of the Task Force provide varying perspectives and significant appellate experience. The nine justice members come from each of the nine sites of the court of appeal. One judge of the superior court serves. Six appellate practitioners represent the bar. They include a deputy attorney general, the director of an appellate project that represents defendants in criminal cases, and four private counsel from a variety of practice backgrounds. Two additional attorneys come from the staff of the court of appeal. One clerk administrator from the court of appeal and one deputy clerk from the supreme court also served to provide valuable information concerning the internal procedures of the appellate process. A law professor with a long-standing interest and considerable experience in appellate procedure completes the group. Supreme court Justice Marvin R. Baxter is the judicial council liaison and Professor J. Clark Kelso is the reporter. The administrative office of the courts provides staff support.

The Task Force first met on June 30, 1997.[2] Three subcommittees were formed: Court Operations; Ideas and Projects—Case Management; and Jurisdiction.[3] For the next six months all meetings of the larger group and the

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1. Report of the Appellate Process Task Force, 2-3 (2000).
2. *Id.* at 3.
3. *Id.*

subcommittees consisted primarily of brainstorming and agenda-setting.[4] As indicated in our reports, we considered an extensive list of issues, which included the following:

- organization of districts and divisions;
- changes in juvenile law that affect appeals;
- pro per representation;
- vexatious litigants;
- allocation of work between courts of appeal and appellate divisions of superior courts;
- allocation of work between court of appeal districts and divisions;
- differential case management;
- use of docketing statements;
- calendar preferences;
- screening for expedited appeals;
- greater use of writ review in lieu of appeal;
- greater use of "certificate of probable cause" as prerequisite to appeal;
- use of subordinate judicial officers such as commissions or referees;
- use of retired justices;
- sanctions of non-meritorious appeals;
- appellate ADR and settlement;
- excerpts of the trial record;
- electronic record preparation;
- limitations on briefs;
- *Wende* briefs;
- special appellate panels for particular subjects;
- appellate education and training programs;
- oral argument;
- tentative opinions;
- publication of opinions;
- memorandum opinions;
- stare decisis and en banc procedures; and
- internal operating procedures.[5]

All of these topics have been discussed and debated within the Task Force, though specific recommendations have not resulted for each topic.

Perhaps the most significant, yet least acknowledged, aspect of the Task Force's work has been the sharing of the markedly differing methods of processing work. The court operations subcommittee sent a detailed questionnaire to justices, attorneys, and support personnel at each of the appellate court sites.[6] Subcommittee members then conducted personal visits and interviews at all of the locations. This first-ever survey resulted in valuable information about the differing practices and perspectives from around the state, which enriched the deliberations, the report, and recommendations of the Task

4. *Id.*
5. *Id.* at 3-4.
6. *Id.* at 4.

Force.

Some of these differences were open and well-known, if not well-studied. For example, variations exist in how courts without divisions and divisional courts distribute the process cases. The central staff in some courts works for the court as a whole under the supervision of a principal attorney, while other courts disperse their central staff resources to the divisions or even chambers. But more subtle, and at times unrecognized, differences exist—like the manner in which writs are considered or even how individual chambers divide up the work and produce tentative opinions. The opening-up of these and many other practices, some relating only to the work of the clerical staff, will allow those practices that appear to have more merit to become better-known and more widely adopted without any proscriptive top-down disapproval of less meritorious practices and systems. The light of knowledge and logic will weaken the power of repetition exemplified by the old saw, "that is the way we have always done it."

Thus far, the Task Force, by consensus or substantial majority vote, has made the following recommendations:[7]

- The four stand-alone divisions in Ventura County (2nd App. Dist., Div. 6), San Diego County (4th App. Dist., Div. 1), San Bernardino/Riverside County (4th App. Dist., Div. 2), and Orange County (4th App. Dist., Div. 3) should be converted into separate districts.
- Rule 6.52 of Title Six of the Rules of Court should be amended to require the Administrative Presiding Justices Advisory Committee to submit an annual report to the Chief Justice and the Supreme Court addressing the workload and backlog of each district and division, to ease analysis of equalizing caseloads under rule 20 of the rules of Court and article VI, section 6 of the state's constitution.
- A new Rule of Court should be adopted requiring the filing of a statewide docketing statement in civil appeals that can be used, among other things, to help identify jurisdiction on appeal.
- A new Rule of Court, rule 975, should be adopted to encourage the use of memorandum opinions when an appeal or an issue within an appeal raises no substantial points of law or fact.
- A pilot project should be established in two appellate districts to explore the use of subordinate judicial officers on appeal.
- Code of Civil Procedure section 906 should be amended to provide that the following issues must be raised in a motion for new trial in order to be cognizable on appeal: juror misconduct, accident or surprise which ordinary prudence would not have prevented, newly discovered evidence which could not have been discovered with reasonable diligence and excessive or inadequate damages.

An abbreviated discussion of a few of the Task Force's reasons for some of these recommendations follows.

In the fiscal year, 1997-1998, the ninety-three justices of the courts of appeal

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7. *Id.* at 4-7.

saw 15,931 records filed.[8] The nine sites varied between a low of 123 appeals with records filed per justice to a high of 202 per justice.[9] This disparate workload has implications for staffing, internal procedures, and work product at each site. The local legal culture within and without each location also dramatically affects staffing differences among the districts. For example, some justices work with three or more attorneys, others with the traditional two.[10] Courts also do not handle the so-called "routine disposition" cases in the same manner. Some courts utilize a central staff to process these cases, while others assign them to chambers.[11] It is not possible, nor even desirable, to dictate a standard methodology that each court must follow, and the practice of locally tailored responses to the work is to be encouraged. Just as no vehicle attains maximum efficiency without a gearshift, the judiciary needs to be able to adjust the way in which different cases under divergent situations are handled.

Nevertheless, the Task Force recognized that at times the nature and volume of the work might well reach proportions that stretch even the most efficient court beyond its capacity to respond in a timely fashion. This recognition underlies our recommendation for a yearly review by the administrative presiding justices to identify these situations and recommend measures to the chief justice and the supreme court for equalizing the caseload under article VI, section 6 of the constitution and rule 20 of the rules of court. This annual exercise should serve to focus attention on unnecessary delay produced by unequal distribution of work and to encourage courts to take all prudent steps to limit the necessity of statewide action.

As a further encouragement to use the judicial "gearshift," the Task Force proposed new rule 975 of the rules of court to guide and sanction the use of memorandum opinions. The rule would not mandate the use of the opinions, but would legitimate their place and provide standards and guidelines for the types of cases suitable for this treatment and the form of the opinion itself.[12] The Task Force is firmly convinced that the disciplined utilization of shortened opinions would not compromise either the reality or the perception of justice. All practitioners and justices recognize the existence of a band of cases that properly could be handled in the recommended manner.

The current recommendations should not be seen as the final product of the Task Force. Many of the topics about which no recommendations have been made continue to be studied.[13] As Chief Justice Arthur Vanderbilt of New Jersey frequently remarked, "Judicial reform is no sport for the short-winded."[14] The Task Force has discovered that for improvements to occur, they must be well planned, carefully considered and persistently urged. There are no quick fixes

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8. *Id.* at 24.
9. *Id.* at 27.
10. *Id.* at 26-27.
11. *Id.* at 25-26.
12. *Id.* at 48.
13. *Id.* at 5-6.
14. 2000 FAMOUS LEGAL QUOTATIONS 496 (M. Francis McNamara ed., 1967).

or universal solutions in a state as large and diverse as California.

A graphic example of the complexity of reform centers on the move to unify the superior and municipal courts. This union had the unintended consequence of forcing a new look at the jurisdiction, processes, and practices of the existing appellate divisions of the superior court. These divisions vary from the sophisticated and well-staffed operation in Los Angeles County to the ad hoc and somewhat haphazard operations in some other areas. Procedures which make sense in large counties are of little benefit and doubtful efficacy in smaller jurisdictions. Yet issues of peer review, levels of jurisdiction, and obsolete rules remain constant. At the urging of the Task Force, Chief Justice George formed the Ad Hoc Task Force on the superior court appellate divisions to study the problem and make recommendations.[15] The eight-person group includes three members of the original Task Force and is chaired by Justice William Rylaarsdam. A survey by this group of all fifty-eight counties led to the realization that this problem area is far more complex and difficult than any had imagined. Although "one size fits all" solutions are simply not workable given the population and geographic variations of the state, improvements can and should be made. This discrete example demonstrates the confounding difficulties confronting the judicial reformer.

When the initial terms of all the members expired, the members of the Task Force took individual action that demonstrates the value and importance of its work. Each individual had to choose whether to opt for an additional term of service. Every single member asked to be reappointed, including two justices who had retired. This act more than any other underscores the value that each member puts on serving in the cause of judicial reform and the demonstrable achievements that have been made by this group in that end.

While the Task Forces' recommendations and its on-going deliberations provide a good beginning, much remains to be done. Certainly the future will bring change. For example, the old distinction between the published and non-published case is fast becoming blurred with the fruition of the digital age, and the distinction now is between citable and noncitable cases. However, it is questionable how long a useful but uncitable case known to all the parties and the court can remain impotent. The old paradigms pass and new ones appear. The role-creating behavior of Oliver Wendell Holmes working with a dipped pen at a standing desk or Learned Hand writing opinions with a fountain pen while lying on his couch once served as useful judicial images. But the need for each California appellate justice to produce eight to fifteen opinions a month has rendered this behavior as outmoded as shorthand court reporters. The struggle to envision methods that pour the old wine of fairness and justice into the new bottles of volume and efficiency will not be without contests of perceptions, imagination, prescriptions, and will. No individual, nor any committee can claim

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15. Report of the Appellate Process Task Force, *supra* note 1, at 5.

omniscience; only the desire to express clearly honest belief. The Task Force trusts that its recommendations fulfill that need.

The Task Force continues to study a variety of other subjects connected with the appellate process and is considering further recommendations.[16]

16. Copies of the Task Force's latest report may be obtained from the Judicial Council of California, 455 Golden Gate Avenue, San Francisco, California, 94102.