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JUDICIAL ADMINISTRATION AND INVISIBLE JUSTICE

Mary Murphy Schroeder*

The past decade has seen an ever-rising and advancing tide of appellate cases. The courts are meeting that tide with elaborate and formidable flood control systems.

In the midst of this furious activity, Professors Carrington, Meador, and Rosenberg have thoughtfully and creatively analyzed the new problems facing the courts and the devices which have been or could be used to meet them.¹ The main body of their work addresses specific procedural areas, such as use of centralized staff, enlarging courts, and the special needs of criminal appeals. The work in many ways complements the important contribution of the American Bar Association in its *Standards Relating to Appellate Courts*.²

However, in the opening chapter the authors of *Justice on Appeal* stand back to reflect upon the essential purposes of our appellate justice system and our means of achieving them. When the authors analyze the "functions and imperatives" of the system, they give particular attention to what they term the "individuality" of the appellate judge.

Carrington, Meador, and Rosenberg sound a warning deserving amplification: appellate courts must not become faceless institutions. Judges must be "identifiable" and must "take personal responsibility for the appellate court's decision."³ Many recent court practices, aimed at efficiency in handling volume and protection of judges' time, undercut the identifiability and visibility of the judges themselves and jeopardize the imperative of individuality.

My theme here is the conflict between the visibility of the appellate judge and recent procedural changes designed to cope with the quantum leaps in the numbers and complexity of cases. I will develop that theme,

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¹ P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* (1976) [hereinafter cited as *JUSTICE ON APPEAL*].

² ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, *STANDARDS RELATING TO APPELLATE COURTS* (1977), [hereinafter cited as *ABA STANDARDS*]. Another major, recent analysis of appellate judicial administration of appellate courts is R. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* (1976). A special ABA Task Force on appellate procedure has developed a manual on the methodology of appellate reform expected to be published this fall. The Commission on Revision of the Federal Court System has some illuminating insights into the bar's perception of the need for openness and visibility in the courts. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, A PRELIMINARY REPORT 144-68* (1975).

³ *JUSTICE ON APPEAL*, *supra* note 1, at 8-9.

first, by suggesting the ways that three of the major controls on the system, namely the selection, evaluation, and discipline of judges, depend upon the exercise of recognizable and individual judicial responsibility; second, by illustrating how this "imperative" can be undermined if devices intended to cope with increased volume are adopted without vigilance; and finally by pointing up some approaches to permit courts to adjust to the demands of volume while retaining visible individual responsibility for decisions.

I. VISIBILITY OF JUDGES

I begin with the fundamental notion that the purpose of the judicial system is to make decisions, and that no matter how sophisticated the institutional apparatus, the decisions must be made by people.

Justice is an alloy of men and mechanisms in which, as Roscoe Pound remarked, "men count more than machinery." Assume the clearest rules, the most enlightened procedures, the most sophisticated court techniques; the key factor is still the judge. In the long run, "There is no guarantee of justice except the personality of the judge." The reason the judge makes or breaks the system of justice is that rules are not self-declaring or self-applying. Even in a government of laws, men make the decisions.⁴

If our system is necessarily dependent upon imperfect human beings, then there must also be certain institutional checks on the exercise of power to help insure that it is exercised with restraint, without arbitrariness, and in an impartial, informed, and honest way. To give obvious examples, we now almost universally require that appellate judges be trained in the law with long years of experience, that decisions be limited to the actual cases and controversies which litigants bring to the court, that appellate justice be administered not by one judge but by a panel of at least three, each of whom must take a position openly as part of a continuing chronicle of individual performance. Under traditional practice at least, fundamental institutional checks on performance of judges have been provided by what Karl Llewellyn described as "those strange and beautiful institutions, the signed opinion and the recorded vote."⁵

The value of the visible judge is evident not only in the decisional process itself, but in related fields of judicial administration: the methods by which we select, evaluate, and discipline judges.

⁴ Rosenberg, *The Qualities of Justices—Are They Strainable?*, 44 TEX. L. REV. 1063 (1966) (footnotes omitted).

⁵ K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 35 (1960). Llewellyn develops a list of institutional factors which steady appellate decision making. Visibility is an attribute of many of his factors. *Id.* at 35-61.

A. *Judicial Selection*

Concern in this area is mounting. The principal controversy in recent years has been whether state judges should be selected by the electorate among competing individuals for the job or whether judges should be appointed through a process known as "merit selection" which guarantees security of tenure approximating the federal mode. A key argument in favor of direct, contested elections assumes that it is of value for judges themselves to face popular judgment and to have their records exposed to public scrutiny. A strong argument against contested elections is the importance of freeing judges from public pressures and giving them security to increase their freedom to exercise independent and impartial judgment.⁶ The concern with selection has spilled over into the federal sphere where a system of screening applicants by merit selection commissions has recently been instituted.⁷

The measure of any method of judicial selection depends upon the judges themselves and upon an identifiable record of performance. A faceless judiciary cannot conceivably be assessed by any sort of popular election, whether contested or "on the record" under merit selection. A system in which judges are appointed with maximum security of tenure and then retreat from public view is disquieting. Without visibility of judges, we can never know how well the selection processes are working: any discussion about which system produces better judges becomes vacuous speculation.

B. *Evaluation of Judges*

As an increasing number of states have done away with contested judicial elections, there has been a developing interest in methods to evaluate judicial performance in some objective manner. This is because most merit selection plans call for judges to stand against their own records at periodic intervals.

The loss to the system, whether real or imagined, resulting from the abolition of contested elections has given rise to bar polls. These polls are attempts by a presumably informed group to assess individual judges'

⁶ For a general discussion of the historic background of this controversy, see Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081 (1966). See also Burnett, *Observations on the Direct-Election Method of Judicial Selection*, 44 TEX. L. REV. 1098 (1966); Schroeder & Hall, *Twenty-five Years' Experience with Merit Judicial Selection in Missouri*, 44 TEX. L. REV. 1088 (1966). For a collection of articles on the subject, see G. WINTERS, *JUDICIAL SELECTION AND TENURE* (1973).

⁷ By Executive Order, President Carter recently created nominating commissions for vacancies occurring in the Courts of Appeals. Exec. Order No. 11,972, 42 Fed. Reg. 9659 (1977). The system is discussed in 63 A.B.A.J. 909 (1977).

performance on the bench.⁸ While we have always had some informal and amorphous methods of evaluating appellate judges, principally by law review commentary on appellate court opinions and by the general acknowledgment of judicial reputation in the legal community, these formal polls of lawyers to rate judges' performance are recent developments in most jurisdictions.⁹ My concern here is not with whether polls are good or bad, with what distribution they should have, or with the problems of framing criteria.¹⁰ Regardless of their virtues or faults, they represent a conspicuous response to the felt need to rate the performance of judges.¹¹

Yet fewer jurisdictions have attempted to evaluate appellate judges than trial judges.¹² While there are, no doubt, a variety of reasons for this, they must include the fact that appellate judges are already far less visible and more isolated than trial court judges, making rating more difficult. In Arizona, the committee devising the poll wished responses only from lawyers who practiced before the judges being rated. However, because of the small number of lawyers who actually appear before appellate judges in a given year, the committee decided that the respondents could evaluate appellate judges if the lawyer was familiar with the opinions of the judge.¹³

The only measures which the bar can apply to the evaluation of appellate judges are, like the measures applied to trial courts, dependent upon the identifiability of the judge. The bar must be able to observe the judge and must be able to assume that judges are taking personal responsibility for the decisions of the court. In order to determine whether a judge has an impartial attitude, the polls inevitably must look to the visible performance of the judge during oral argument and the manner in which written

⁸ It is widely recognized that the bar should have some role in evaluating judicial performance.

Whatever method of judicial selection is used, the legal profession should undertake an advisory and educational role in the selection process. Acting through professional associations at the local and state levels, the bar should ascertain professional opinion concerning the qualifications of those who may be considered for judicial office and should seek to make its judgment known and influential.

Where elections for judicial office are held, preferential polls among the members of the bar may be appropriate where their opinion is informed by regular involvement in court proceedings.

ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ADMINISTRATION, § 1.21, at 49-50 (1974).

⁹ D. MADDI, JUDICIAL PERFORMANCE POLLS 3 (1977).

¹⁰ For some analysis of these problems, see *id.*; see also PHILLIP, HOW BAR ASSOCIATIONS EVALUATE SITTING JUDGES (1976); Jenkins, *Retention Elections: Who Wins When No One Loses?*, 61 JUD. 79 (1977).

¹¹ A recent study of bar polls concludes they may have little effect on public opinion in elections; judges condemned by lawyers in bar polls still are retained by the electorate. Jenkins, *supra* note 10. Independent of the impact that such polls have on the voters, they may have considerable influence on the judges themselves and on those responsible for appointing future judges.

¹² A recent study for the American Bar Foundation of bar polls in 14 jurisdictions revealed that only three attempted to evaluate appellate judges. The jurisdictions were Arizona, Dallas, and Florida. D. MADDI, *supra* note 10.

¹³ Slavin, *Judicial Evaluation in Arizona*, 12 ARIZ. B. J. 41, 42 (August 1976). See also Cameron, *Merit Selection in Arizona—The First Two Years*, 1976 ARIZ. ST. L. J. 425.

decisions are set forth. To determine whether the judge is diligently performing his duties, the bar can see whether the judge appears with punctuality and attentiveness at oral argument but can do little more than guess whether the judge is taking responsibility for a fair share of decisions. The appellate judge's knowledge of the law and grasp of the contentions of the parties is knowable only by examination of the judge's written decisions and the nature of the questions asked during oral argument.

C. Judicial Discipline

Related to the problems of evaluating judicial performance are the problems of disciplining or removing judges who perform badly, or who through disabilities are not performing at all. This, too, is an area of lively current interest.

The states have developed a variety of methods of judicial discipline.¹⁴ Development of standards for judicial discipline and disability is under way.¹⁵ There are currently a number of proposals in Congress to create systems other than the present constitutional impeachment process for discipline and removal of federal judges.¹⁶ One such proposal, S. 1423, the Judicial Tenure Act,¹⁷ would create a special court of federal judges to handle disciplinary problems. The bill gives illustrations of bad behavior which include "wilful misconduct in office, wilful and persistent failure to perform duties of the office, habitual intemperance. . . ."¹⁸

These developments reflect recognition that some methods of discipline are needed. It is not enough to try to select good judges in the first place. The main function of discipline and removal-retirement procedures is "to deal with those causes for terminating a judge's service that develop or become manifest only after he has taken office and which could not have been detected, or at least were not, at initial selection, *i.e.*, misconduct and disability."¹⁹

As with judicial selection and evaluation, judicial discipline requires knowledge of the performance of the individual judge. It is in the area of judicial discipline that the need for indentifiability of the judge and his record of performance is most dramatically evident. We have no way to discipline an entire court. No matter what system of discipline is adopted, and regardless of the difficulties in defining misconduct and disability and in determining appropriate sanctions, there is a fundamental problem of

¹⁴ AMERICAN JUDICATURE SOCIETY, JUDICIAL DISABILITY AND REMOVAL COMMISSIONS, COURTS AND PROCEDURES (G. Winters & R. Lowe ed. 1973).

¹⁵ JOINT COMM. ON PROFESSIONAL DISCIPLINE OF THE APPELLATE JUDGES CONFERENCE AND THE STANDING COMM. ON PROFESSIONAL DISCIPLINE OF THE AMERICAN BAR ASSOCIATION, PROPOSED STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY (Preliminary Draft August 1977).

¹⁶ These proposals are discussed in Woytash, *Who Should Judge the Federal Judges?*, 63 A.B.A.J. 1057 (1977).

¹⁷ S. 1423, 95th Cong., 1st Sess. § 379 (1977).

¹⁸ *Id.* § 382(b).

¹⁹ W. BRAITHWAITE, *WHO JUDGES THE JUDGES?* 11 (1971).

determining when misconduct or inability to perform exists. As the appellate judge and his individual work product recede from the view of the public, the bar, and the other judges themselves, discovery of misconduct or disability becomes increasingly difficult.

This can be demonstrated by examining the commonly accepted grounds for discipline or removal.²⁰ One widely recognized concern is the judge who, because of physical or mental disability, is unable to perform effectively. A related problem is excessive use of alcohol. We are all familiar with examples of judges who develop these infirmities. These disabilities are manifest to those with whom the judge has contact. When appellate courts adopt procedures which tend to limit the judges' contacts with the bar, the public, and even with each other, the disabilities become less and less observable. The same is true with respect to poor judicial demeanor on the bench which may signal deeper deficiencies in fairness and impartiality.

A judge who refuses to perform duties, whether because of laziness or too many competing outside interests, should be disciplined. But with increased isolation and availability of auxiliary staff personnel, this problem too becomes less and less identifiable. The impairment of the system remains, but the ability to identify the source of the problem diminishes.

The existence of disciplinary mechanisms and standards of judicial performance are checks on judges' behavior militating toward more diligent and responsible performance. The system lets judges know that someone is watching. No matter how we refine our standards and methods of discipline, there must be something capable of being watched. Again, in the language of *Justice on Appeal*, individuality is an imperative.

II. DIMINUTION OF JUDICIAL VISIBILITY

Traditional appellate court procedures gave some assurance that this imperative was being met. But the traditional procedures are yielding to the demands of volume, and inevitably, some of these assurances are also giving way. Four specific trends in recent appellate court operating procedures serve to illustrate this actual and potential diminution of judicial visibility. They are reduction in oral argument; use of central staff; changes in the form of opinions; and reduction in conferences among judges themselves. For purposes of identifying their effect on visibility, the pros and cons need not be considered; brief identification will do.

A. Reduction of Oral Argument

Oral argument has been a major casualty of the response to volume. An argument of one-half hour per side is now considered lengthy. Many

²⁰ For a concise and useful analysis of these grounds, see Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117 (1966).

courts are eliminating it in large numbers of cases.²¹ Yet oral argument is almost the only time in which appellate judges appear publicly in the official performance of their duties. Fairness, demeanor, knowledge of the law, familiarity with the specific problems of individual litigants, and compassion are all observable in oral argument and are otherwise obscured from view in the appellate system.

For the litigant, oral argument provides the only visible assurance that a judge is paying attention. For the bar, it provides an opportunity for personal contact and persuasion. For the judge, it is the only opportunity to ask questions and to hear the answers of those presumably most familiar with and interested in the case, the counsel involved. "[W]ithout [oral argument], the judge is isolated from all but a limited group of subordinates."²² It is the only occasion when the judges responsible for a decision "address themselves together and in public view."²³

Personal contact between judges and lawyers is important. In the absence of oral argument, the process of deciding appeals becomes a never-ending progression of pieces of paper, judges become faceless to the interested bar, and, just as significantly perhaps, large elements of that bar become faceless to the judges.

Such anonymity contributes to the bureaucratization not only of the courts but of law offices as well. In large jurisdictions, small armies of lawyers may be involved in criminal appellate litigation, for both the prosecution and the criminal defendants, with only the rarest opportunity to appear publicly on the record on briefs for which they are responsible. The moment of oral argument, subject to questions, gives the lawyer the opportunity to stand up and be counted.

The value of oral argument as an institution is widely recognized.²⁴ But practical problems exist. Unlimited oral argument for every case is impossible in many appellate courts. No matter how well prepared the bench and the bar, there will inevitably be cases in which oral argument is not profitable, *e.g.*, where the legal issue has recently been decided in another case, where there has been patent and glaring error below, or where the appeal is taken to satisfy the obligation of counsel to an indigent

²¹ JUSTICE ON APPEAL, *supra* note 1, at 16-17; HAWORTH, SCREENING AND SUMMARY PROCEDURES IN THE UNITED STATES COURTS OF APPEAL 257, 265 (1973).

²² JUSTICE ON APPEAL, *supra* note 1, at 17.

²³ *Id.*

²⁴ *Id.* at 17-18; ABA STANDARDS, *supra* note 2, § 3.35 at 56-57. The American Bar Association has publicly opposed the drastic curtailment or total elimination of oral argument which has occurred in certain United States Courts of Appeals. ABA Resolution (August 1974). Professors Carrington, Meador, and Rosenberg, as well as the ABA Commission on Standards Relating to Appellate Courts, have recognized, however, that in some cases it is not useful. JUSTICE ON APPEAL, *supra* note 1, at 21 (appellate court should invite waiver of oral argument when case for appellant is hopeless or unanswerable or when parties' briefs are complete and sufficient). ABA STANDARDS, *supra* note 2, § 3.35 at 56-57 (court may deny oral argument when it appears from summary review of the briefs and record of the case that court's deliberation would not be significantly aided by oral argument; parties can submit statement of reasons why argument should be allowed).

defendant and is acknowledged as hopeless.²⁵ We must also recognize that some courts take in a wide geographic jurisdiction where both counsel and judges are scattered. In such jurisdictions, the costs of oral argument in terms of both time and money in many cases outweigh its value.

Assuming that our most congested appellate courts cannot have oral argument in all cases, or at least in all cases in which there is anything to argue about, then serious thought must be given to the selection of cases to be argued. Which cases benefit most from oral argument and which do not? The tendency has been to retreat from oral argument in matters which do not involve complex issues. More routine cases involving simple but recurrent problems should also be heard.

The dissatisfactions with traditional oral argument in today's pressured world are real. Complaints of unpreparedness come from both sides of the bench. Some useful suggestions have been made to improve that situation. For example, the *ABA Standards* recommend that the judges confer prior to argument and inform counsel of particular areas of concern to the court.²⁶ We should also consider adjusting the traditional format of oral argument to enhance interchange between the court and counsel, and perhaps between counsel themselves. We should not be slaves to the format of opening, answer, and rebuttal.²⁷

B. Use of Central Legal Staff

Appellate judges have traditionally had the services of individual law clerks, generally very recent graduates, serving for a limited period of time and responsible solely to the individual judge. In recent years, many appellate courts have employed a central staff of lawyers who serve in a capacity unlike the individual judge's law clerk. The central staff is responsible to the court as a whole rather than to a specific judge and is intended to serve in a more permanent and independent capacity. Staff utilization has received much attention. It has been a particular interest of Professor Meador.²⁸

While central staff attorneys can function as valuable auxiliaries to the court, there is as yet no universal wisdom on what functions they can best perform.²⁹ *Justice on Appeal*, for example, recommends that staff screen

²⁵ On the last point, see *Anders v. California*, 386 U.S. 738 (1967). See note 24 *supra*.

²⁶ ABA STANDARDS, *supra* note 2, § 3.34 at 54-55. For a discussion of the ways in which an appellate court can direct the conduct of oral argument, see Conford, *Management of the Oral Argument by an Appellate Court*, 14 JUDGE'S J. 14 (1975).

²⁷ This and other suggestions for experimentation are offered in Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432, 445-47 (1976).

²⁸ D. MEADOR, *APPELLATE COURTS—STAFF AND PROCESS IN THE CRISIS OF CHANGE* (1974). Professor Meador also compares the duties and functions of a law clerk with those of a staff attorney. *Id.* at 112-20.

²⁹ Appropriate utilization of staff may vary from court to court. A discussion of large staff functioning in a congested intermediate appellate court is contained in Lesinski & Stockmeyer, Jr., *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211 (1973).

cases to select those which can be easily disposed of on issues of little or no precedential significance, and that staff then prepare memoranda containing a proposed disposition of the cases.³⁰ The *ABA Standards* emphasize the subordinate position of staff and warns against relying on staff in the decisional process.³¹

There is, however, general agreement that the use of staff creates a risk of overdelegation of decisional responsibility to the detriment of the administration of justice. Judges should not be rubber stamps for staff decisions.³² Institutional controls on judges which depend so much upon individual responsibility and public accountability and visibility do not exist for staff. Staff attorneys are not selected either by a popular election or by appointment of another branch of government; they are appointed by the court and generally serve at its pleasure. Staff attorneys are wholly unknown outside the court and generally take no action which is ever a matter of public record.

Discussion of staff function in a state court of last resort is found in Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A. L. REV. 465 (1976). The National Center for State Courts had done studies of court operations in several jurisdictions with particular emphasis on appropriate use of staff. The studies include NATIONAL CENTER FOR STATE COURTS, *THE CALIFORNIA COURTS OF APPEAL* (Pub. No. R0013 1974); NATIONAL CENTER FOR STATE COURTS, *REPORT ON THE APPELLATE PROCESS IN ALABAMA* (Summary) (Pub. No. R0006a 1973); NATIONAL CENTER FOR STATE COURTS, *WISCONSIN APPELLATE PRACTICE AND PROCEDURE STUDY* (Pub. No. R0021 1975).

³⁰ JUSTICE ON APPEAL, *supra* note 1, 48-55, 227-28.

³¹ ABA STANDARDS, *supra* note 2, § 3.62 at 96-99.

³² *Id.*; see JUSTICE ON APPEAL, *supra* note 1, at 46-48. One commentator has stated that, while a judge may delegate summary and memorandum draft opinions having no lawmaking effect to a staff attorney or to a law clerk, a judge should never delegate "the two inherent functions of the appellate decisional process: (1) assuring justice . . . and (2) keeping the law in order." R. LEFLAR, *supra* note 2, at 93-94.

Dean Erwin Griswold, in an address at the Fifth Circuit Judicial Conference in May 1977, expressed the bar's concern about judicial delegation of decisional responsibility in vivid and personal terms:

When I was Solicitor General, it was one of my responsibilities to review every decision which the government lost in any court—except where double jeopardy prevented further action. I well remember a case from this Circuit where an opinion was written by a law clerk, with findings of fact, and designated as written by a law clerk, with his name. To this was attached a statement to the effect that "The foregoing findings and opinion are adopted as the findings and opinion of the court. A.B.C., U.S.D.J." I must say that startled me. I know the young men and women just out of law school. I have high regard for them. They are able and industrious. But they are inexperienced—in the law and in life. And they have not been through the mill. They have not been appointed by the President after confirmation by the Senate. It is not enough to say that the Judge approved what the law clerk had done. Any lawyer knows that the man who does the actual drafting can have great influence on the effect of what is drafted.

Let me give credit to that U.S. District Judge. At least he was candid, and made explicit what he was doing, so it could be criticized. It makes me wonder though how often the same thing happens without disclosing what has actually happened. If the fact is that many fundamental judicial decisions are in fact being made by beginners in the law—though with judicial oversight and blessings—it may well be that the quality of our justice has been impaired.

Report of the Task Force on Appellate Procedure to ABA President Justin Stanley 16-17 (June 1977).

More subtle factors may also come into play. We have as yet no very sophisticated techniques for evaluating whether individual staff attorneys are performing well. When staff attorneys are called upon to make recommendations as to disposition or to write proposed decisions, there is a tendency to measure their performance by the extent to which the court adopts their proposed decisions. As Professor Meador warns, a high degree of court agreement with staff may indicate that staff is doing a good job, but it may also indicate that the court is overly relying on and delegating to staff.³³ Moreover, measuring staff performance on court acceptance may lead to staff recommendations based not on independent analysis and judgment but on the staff's prediction of what the court will wish to decide in that type of case. Fresh thought is discounted, and existing biases of the court are reinforced.

Effective participation of staff is possible in every stage of the appellate process, from determining the existence of jurisdiction at an early stage of the appeal to participation in formulation of the court's actual decision. At the utter extreme of delegation, some courts assign to staff, before oral argument or any conference of the judges, the task of preparing a draft opinion setting forth fully the facts, reasoning, and disposition of the case in a form which the judges may then adopt or reject. If it is rejected, either the judge or the staff attorney must start over from scratch. The risk of rubber stamping is great; the reliance of the court on arguments of counsel and the views of other members of the court is reduced. If the opinion of the staff is adopted by the court in a per curiam opinion, then no individual judge even appears to take principal responsibility for what is written. Judicial responsibility and visible participation are at least increased in the courts which assign staff to prepare decisions after the judges have already heard argument and conferred as to the result and the reasons for it.

We should also work toward more staff visibility. Staff attorneys may be anonymous and invisible to the public, but they need not be to the judges themselves. Staff attorneys should participate in court conferences on cases in which they have been involved. The bar cannot know individual staff attorneys, but the bar can become familiar with the functions that they perform in a given court. Internal court procedures describing the functions of staff attorneys should be published. The American Bar Association's Appellate Judge's Conference has recently established the National Committee of Appellate Court Staff Counsel. It is hoped that this organization can promote interchange between staff attorneys and judges in different jurisdictions. Staff should also be encouraged to be active in bar activities and to contribute to legal publications.

C. Changes in the Form of Opinions

Traditionally, decisions at the first level of appeal have been rendered in signed, published opinions setting forth the reasons for decision in the

³³ D. MEADOR, *supra* note 28, at 131.

particular case and establishing precedent for future cases. That traditional practice has been eroded in recent years by a number of developments.

First, many courts are no longer publishing all their decisions and dispose of many cases with unpublished opinions or memorandum decisions. This practice is usually accompanied by a rule that the decisions cannot be cited as precedent.³⁴ The underlying premises are that many cases do not involve issues of precedential significance, and the reasons for their disposition need not be preserved for posterity in the reporter system. The amount of time needed for the court to write formal, published decisions and for lawyers to read them is too great to justify a published opinion in every case.

A price is paid in terms of diminished visibility of court decisions, however, since unpublished opinions are seen only by those immediately concerned. There is also a related fear that nonpublication and noncitation will result in a court's hiding difficult cases by failing to publish significant rulings. A recent study by the National Center for State Courts on California's use of memorandum decision device indicates, however, that this is not happening.³⁵

Although there is some loss of visibility when decisions are not published, the decision is still available to the parties and to the public in court records. So long as the decision states the reasons for the result, there is still accountability to the parties of the case. When, however, the decision takes a form which contains no explanation and consists simply of a one-word statement of affirmance,³⁶ then the loss to the system is of a vastly greater dimension.

It is true that the process of explaining a decision is time consuming, but as a force to insure responsible action by the court, it has no match. More than that, it is an important and visible reassurance to litigants that someone has looked at the case and attempted to understand the positions being asserted. When a case has not been orally argued, it is the only assurance.³⁷

³⁴ *E.g.*, 9TH CIR. R. 21. See also the Advisory Council on Appellate Justice's proposed rule on the use of unpublished decisions. REPORTS AND RECOMMENDATIONS OF THE ADVISORY COUNCIL ON APPELLATE PRACTICES, INCLUDING SAN DIEGO CONFERENCE REPORTS 61-63 (1975).

³⁵ NATIONAL CENTER FOR STATE COURTS, REPORT ON UNPUBLISHED OPINIONS OF THE CALIFORNIA COURT OF APPEALS 15-16 (1976), reported in Mueller, *Unpublished Opinion Study*, 1 ST. COURT J. 23 (Summer 1977); see also, Frank, *Remarks before the Ninth Circuit Judicial Conference*, 16 JUDGE'S J. 10 (1977).

³⁶ See *e.g.*, 5TH CIR. R. 21, adopted in 1970, which lists the circumstances in which such a decision can be issued in that overworked jurisdiction. These circumstances include a disposition where the district court's judgment is based on findings which are not clearly erroneous, where a jury verdict is supported by substantial evidence, and where no error of law appears.

³⁷ The ABA Standards favor the use of reasoned decisions. ABA STANDARDS, *supra* note 2, § 3.36(b) at 58. The authors of *Justice on Appeal* have also called for reasoned opinions: "Every decision on the merits should be accompanied by a statement of reasons sufficient to demonstrate that in deciding the case the judges have taken due account of the issues and the law." JUSTICE ON APPEAL, *supra* note 1, at 226.

D. Elimination of Court Conferences

The recent tendency of appellate courts to limit conferences among the judges to decide cases is a reaction similar to the reduction of oral argument. As more and more cases need to be decided, the reaction is to spend less time talking about each case. As a result, many courts are not having any formal discussion of cases prior to their disposition. Here again, as *Justice on Appeal* points out, the impact on visible, responsible decision-making is real: "The conference is an important assurance of collegiality and also reinforces the individual judge's sense of personal responsibility."³⁸ Moreover, the conference forces judges to justify their thinking to each other. As the pressure of volume decreases the judge's visibility to the public, litigants, and the bar, conferences may take on added significance. They at least assure that members of the court do not become invisible to each other. There may be many ways of conducting conferences, including conference by telephone, "[b]ut practically everyone agrees that individual drafting of opinions and negotiation for signatures, without regular conference discussion, is totally unacceptable."³⁹

The need for efficiency has brought changes in all of the areas discussed. Each of these changes in varying degrees adversely affects the individual accountability of the judge. The harsh reality is that if all appellate courts were to take extreme measures in all of these areas, the visibility of the judge would disappear entirely. Thus, if a court were to eliminate oral argument in all cases, rely on staff to draft all decisions, never confer as to what the decision should be, and then announce them in one sentence without explanation or justification, visible and responsible justice could be eliminated.

I do not predict that anything approaching that grim spectre is immediate; the judge will not disappear as a recognizable feature of the appellate landscape. There will be oral arguments in some cases; judges will continue to confer with each other about some problems; not all matters will be able to be handled by staff; and judges will continue to play a major role in the formulation of significant opinions. But invisibility is the trend.

In courts faced with rising pressures of volume, the judge may already be invisible in large numbers of cases. This is one inevitable tendency of screening to sort out cases for summary disposition.⁴⁰ In each case that is

³⁸ JUSTICE ON APPEAL, *supra* note 1, at 29.

³⁹ B.L. WITKIN, MANUAL ON APPELLATE COURT OPINIONS § 56, at 10 (1977).

⁴⁰ For a survey of the screening methods used in the Federal Courts of Appeal, see D. MEADOR, *supra* note 28, at 231-39. Some courts have adopted sophisticated rules and procedures to classify cases into categories according to different degrees of dispositional treatment. The Fifth Circuit, for example, has a summary calendar where cases are placed after briefing. This procedure is established by the Fifth Circuit's Rule 18, 5TH CIR. R. 18, and was originally described in *Murphy v. Houma Well Service*, 409 F.2d 804, 805-08 (5th Cir. 1969). The Court's discussion of the procedures under Rule 18 was updated in *Huth v.*

screened at an early stage by staff and placed on a conveyor belt for disposition without oral argument, without oral conference, without reasoned disposition, there are no visible assurances of judicial participation.

III. THE NEED FOR ALTERNATIVES TO PROMOTE VISIBILITY

Even in the most congested courts, it is not necessary to eliminate so many assurances of visibility in so many cases. We need conscious experimentation to test to what extent timesaving measures can be used in combination with traditional safeguards. An example of such experimentation is the Arizona Appellate Project.⁴¹ The results of the experiment strongly suggest that a majority of appeals can be resolved soon after trial without full transcripts and without lengthy formal written briefs, but with heavy emphasis on oral argument.

The experiment utilized approximately seventy-five civil cases which had proceeded to judgment in the trial court. Three practicing lawyers, previously totally uninvolved in the litigation, assumed the role of appellate judges and heard oral argument from counsel for the parties very soon after the judgment. The simulated appellate panel had the benefit of postjudgment motions of counsel, a summary memorandum prepared by a law student from the file in the case, as well as the argument of the lawyers. At the conclusion of the argument, the panel determined how it would decide the case. The reactions of all the participants, panelists and advocates, were recorded on confidential questionnaires.

The procedures being tested departed from the traditional method of appellate review in several significant respects. First, there was no transcript. Second, there were no formal briefs, but only summary memoranda filed by the parties. Third, the oral argument was informal and subject to no time limitations. Fourth, the proceedings took place within only a few weeks of the trial court's decision.

The results showed that the panelists were able to decide a majority of the cases, seventy-five percent, and give reasons for their decisions. They also showed that the participants, both the members of the panel and the arguing counsel, believed that the oral argument and limited written materials were adequate or more than adequate to reach a fair decision. A modified form of the Arizona Project procedures has been approved for actual implementation in Colorado.⁴²

In terms of insuring visibility of the judges, the experimental procedure has several advantages. First, it insures that there will be oral argument

Southern Pacific Co., 417 F.2d 526, 527-30 (5th Cir. 1969), and in *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York*, 431 F.2d 409, 410-14 (5th Cir. 1970). The Tenth Circuit places cases in one of four categories on the basis of a docketing statement submitted prior to briefing. 10TH CIR. R. 9.

⁴¹ The operation and results of the experiment are described in Jacobson & Schroeder, *Arizona's Experiment with Appellate Reform*, 63 A.B.A.J. 1226 (1977). Judge Jacobson and I served as co-chairmen of the Arizona Appellate Project.

⁴² *CAB Judiciary Section's Proposed Expedited Appeal Process*, 6 COLO. LAW. 1133 (1977).

and places that oral argument shortly after the trial when the case is freshest in the minds of counsel. It permits the court itself to confer after the argument and to decide whether the case is ripe for disposition or whether additional work on the part of staff, counsel, or judges is needed. In other words, it permits the court itself to screen the cases. At the same time, it allows utilization of staff both to summarize the case for the court prior to argument and to work at the court's direction after the judges have evaluated the case in the light of the written submissions and argument. This emphasis on interchange between court and counsel and between judges themselves is in sharp contrast with the invisible justice to which modern practice is tending.

IV. CONCLUSION

This is an era of ferment. As we continue adapting our appellate procedures to the demands of a more crowded, a more complicated, and a more litigious age, we must assess not only the gains which we are achieving in efficiency, but the losses we suffer in terms of visibility and responsibility. Volume must not be allowed to reduce the judge to a kind of anonymous traffic manager for cases, a squad leader for an unknown staff. We must be able to see what judges are doing before we can know that we are achieving justice on appeal.