Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves

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INTRAMURAL REFORMS: HOW THE U.S. COURTS OF APPEALS HAVE HELPED THEMSELVES*

THOMAS E. BAKER**

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I. INTRODUCTION

"INTRAMURAL reforms" are measures by which the U.S. courts of appeals have adapted the traditional appellate procedures that have historically performed the appellate role and function in our federal system. These reforms amount to procedural shortcuts, resulting in an abbreviated appellate process, justified primarily by the press of docket. For convenience, the various intramural reforms have been grouped here by appellate function: oral argument, briefing, opinion writing, case management techniques, and staffing arrangements.

The federal appellate system has been under pressure from a crisis of case volume. Like a living organism, the system has adapted to

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The author is grateful for the suggestions and comments of: The Honorable Levin H. Campbell; The Honorable John C. Godbold; Professor Arthur D. Hellman; The Honorable James C. Hill; Professor A. Leo Levin; The Honorable Richard A. Posner; William K. Slate, II, Esquire; The Honorable J. Clifford Wallace; and The Honorable Joseph F. Weis, Jr. Thanks are owed to Diana Nichols and Michael S. Truesdale for their able research assistance.
meet those stresses. Without such adaptations, the system would not have survived. The evolution, however, has already resulted in serious compromises in the ideals and traditional function of the federal appellate courts. Furthermore, "intramural reforms," the judge-made changes discussed in this Article, appear to be exhausted. This is to suggest, at the outset, that whatever added efficiency or additional appellate capacity that might be realized from intramural reforms has already been achieved in most courts of appeals.

One final introductory note concerns the approach taken in this Article to identify and to summarize almost all of the reforms that have been implemented over the years. The regional courts are separate and designedly distinct institutions, and are likely to remain so, unless Congress enacts some major structural or extramural reform. The First Circuit, with a handful of judges and a small geographic area, functions quite differently from the geographically large Ninth Circuit. The Second Circuit has a docket concentrated in one city. The Fifth Circuit bore the responsibility of dismantling de jure segregation and continues to deal with its aftermath. The Eleventh Circuit must deal with many petitions for relief in state death penalty cases. The District of Columbia Circuit presides over a docket originating in the federal seat of government that is dominated by difficult and complex issues of administrative law.

Indeed, a case could be made that each of the courts of appeals has something of a unique social and judicial culture. Hence, the point must be made explicit that generalization is not always appropriate. Not all the problems noted here are found in every court of appeals, and the reforms that have been or might be successful in one court of appeals would not necessarily transfer to others. Still, there is some value in collecting these intramural reforms to better understand what the problems are, what solutions have been tried, and what might be done further to solve the problems facing the U.S. courts of appeals.1

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Internal operating procedures have been used by the federal courts for decades but became the object of study in the 1980s. These procedures serve three functions: (1) to codify appellate court practices; (2) to achieve some uniformity in how appeals are processed; and (3) to inform the bar about the court's internal practices. Any overall evaluation of internal operating procedures in the various circuits is problematic for two reasons. First, usually there is little, if any, data collected about the effect of a new procedure within a particular circuit. New experimental procedures are always being proposed and implemented but rarely are they evaluated empirically. Second, the general lack of information renders any attempt at comparative analysis across cir-
II. Oral Argument

The external stress of caseload has changed oral argument practices dramatically. The theory for this change was ably stated in a syllogism by then-Chief Judge Godbold of the Eleventh Circuit. First, appellate cases are not fungible, and courts can articulate and apply differentiating standards and procedures. Second, judicial resources are finite, and caseload demand outstrips supply and will continue to do so. Thus, the logic goes, an appellate court should be conceded the discretion to choose not to hear oral arguments in some appeals.

Following the recommendation of the Commission on the Revision of the Federal Court Appellate System, Federal Rule of Appellate Procedure 34 was amended in 1979 to provide for oral argument "in all cases" unless, under a local rule, a three-judge panel unanimously agrees it is not needed after examining the briefs and record. The local rule must articulate a standard that establishes oral argument as the norm. Three situations justify a departure from the norm: (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. This national rule is an improvement over some preexisting local rules that had provided a bald power to deny oral argument whenever the "case is of such character as not to justify oral argument." Such a stan-

cuit lines almost wholly speculative or subjective. Thus one critical need of the federal appellate system is for comparative study of how different courts of appeals go about handling appeals. See generally William K. Slate II, Internal Operating Procedures — The World of Possibilities, 1993 National Workshop for Judges of the U.S. Courts of Appeals in Washington, DC (Feb. 7-10, 1993) (Author has transcript of speech).


3. Id. at 864.


5. FED. R. APP. P. 34(a). The amendment codified the practice that already prevailed among the courts of appeals. The Fifth Circuit had begun to experiment with a nonargument summary calendar in the late 1960s as one means of coping with its burgeoning caseload. See generally Charles R. Haworth, Screening and Summary Procedures in the United States Courts of Appeals, 1973 Wash. U. L.Q. 257, 265-69. See also STANDARDS RELATING TO APPELLATE COURTS § 3.35 (1977) (denial appropriate "if the court concludes from a review of the briefs and record of the case that its deliberation would not be significantly aided by oral argument. . . . [But] it should permit the parties to submit a written statement of reasons why oral argument should be allowed.").


dardless approach permitted a panel or a judge, on their own or on the recommendation of a law clerk, to deny oral argument by intuition. Still, the current national rule for departing from the stated norm of oral argument amounts to an empty set of words. Its logic is hopelessly circular. The first reason—that the appeal is frivolous—is duplicated by the second reason—that the dispositive issue has been authoritatively decided—which is merely an example of a frivolous appeal and which, in turn, is merely one of an indefinite number of examples of the third reason—that the decisional process would not be aided—which finally and merely states a conclusion and ultimately provides no guidance. This is not a standard at all. The underlying drafting problem may be that any formulation necessarily would amount to the circular statement that there should be oral argument when oral argument would be helpful to the court. Perhaps it would be better to admit this and to draft a rule with a stated preference for oral argument under which either the judges or one of the parties could opt for an oral argument. Such a rule would change the contemporary reality that the parties may request oral argument but it is up to the judges to decide whether to grant the request based on the judges’ conclusion about the helpfulness of argument in the particular appeal.

Perhaps because a denial of oral argument runs against the American appellate tradition, local practices typically place further limits on the panel’s discretion to deny argument. Eleventh Circuit Local Rule 34-3 is fairly typical. Under this rule, a screening panel (three judges assigned together for a year) must unanimously classify a case for the nonargument calendar. At any time before decision, any one of the three judges can reclassify the appeal for the oral argument calendar, without explanation. Additionally, the decision on the merits must be unanimous and without special concurring or dissenting opinions unless all the parties agree to nonargument.

Nationwide, between 40% and 50% of the appeals decided on the merits by the courts of appeals in recent years are being decided without oral argument. In 1990, this ranged from the high of the Fifth Circuit (69.9%) to the low of the Second Circuit (24.2%). Today fewer than half of the courts of appeals hear arguments in half of the

8. Id.
10. 11TH CIR. R. 34-3. See generally Godbold, supra note 2.
appeals they decide. Furthermore, when oral arguments are allowed, they are abbreviated; several courts routinely give some cases fifteen minutes of argument per side. The available data likewise only suggests that argument rates vary considerably across the subject-matters of appeals. Appeals on commercial issues, for example, antitrust and securities regulations, are almost always given argument. Other issues are less likely to receive the full attention of oral argument; for example, immigration and nationalization issues and social security appeals are granted oral argument less than half the time. The regional differences among the circuits make such generalizations quite tenuous, however. In some circuits, for example, the rate of oral arguments in criminal appeals far exceeds the rate in civil appeals, while in other circuits arguments are afforded civil appeals at a much higher rate. Some circuits from time to time have followed a compromise practice of assigning several additional cases to an argument panel for decision without oral argument. Then the panel will discuss these appeals at their conference and either decide them along with the orally argued appeals or order an oral argument to be held before another panel. Such a procedure provides an opportunity for judge-to-judge argument, if not advocate-to-judge argument. There has been some informal experimentation to allow judicial law clerks to sit in on the panel conferences about the nonargued cases as surrogates for counsel. Whether or not an oral argument is held in an appeal does seem to be related to outcome: cases not argued are likely to be affirmed and are affirmed at a higher percentage than cases afforded an argument.

The savings in judicial resources and private litigants’ resources supposedly are apparent. Then-Chief Judge Godbold concluded:

In a simple case in which the result is clear and no close or significant issues of law are involved, transporting counsel to the place of holding court and paying them for attendance is a waste of societal assets in a world where there are other priorities. Perhaps most important of all, the appellate court’s function and value are demeaned by requiring it to carry out acts merely ceremonial, while pretending the facade is real.

12. Robel, supra note 1, at 47-48.
13. Id. at 48.
14. Id.
15. Id.
16. Id.
17. Id.
18. See Godbold, supra note 2, at 865.
Arguably, in some cases an appeal involving settled principles may get even closer attention during the screening determination, when the judges determine if cases can be decided summarily, without oral argument. Each judge will consider the issue seriatim in chambers by focusing on a draft opinion, rather than the alternative of participating in what could amount to only a cursory discussion after a truncated, ritualized argument.

Even such an enlightened procedure, however, must generate some public policy concerns for the appellate ideal. Oral argument is not necessary in all cases, but is it not almost intuitive that it should be permitted in more than half of the cases or, looking at the statistics in the Fifth Circuit, in more than one out of four of the appeals? Several reasons support this intuition.

First, the court-time saved by eliminating oral argument is relatively small. The relative amount of time an appellate judge spends preparing for and conducting oral argument is not great, even when multiplied by three to account for the hearing panel. Practices vary from court to court and from judge to judge, of course, and this generalization admittedly is speculative. In some chambers, preparation for oral argument and the week away at the sitting take up a substantial portion of the judge's monthly schedule when there is a panel hearing. Briefs are read. Additional research may be done. Bench memoranda are prepared. Being away from the judge's home station can make working on other matters more difficult during the hearing week. Travel itself is a burden. However, the overall impression from many chambers is—at least, relatively speaking—that a judge spends considerably more time performing other judicial duties unrelated to the specific task of the fifteen- or twenty-minute oral argument. This speculation is incremental during a month with an argument and over the entire year. A smaller generalization may prove less controversial: the judge-time expended to decide an appeal with an oral argument is only incrementally greater than the judge-time expended to decide the nonargued appeal. However, the missed opportunity to test and confirm a theory of the case face-to-face with counsel and colleagues may conceivably result in a longer decision time for some appeals.

Second, the government should be reluctant to step in to preempt private ordering of litigants' affairs to save private resources. The in-


visible hand of the market is more trustworthy than a robed planner. Nonargument could remain a private option when the appellant chooses or if the parties agree. Of course, even if the parties waived oral argument, the court could always require it when appropriate or necessary or even when the court concluded it might possibly be helpful. That would be more of a market allocation. It may be that the percentage of orally argued appeals would not change if the attorneys were given an option to demand an oral argument. Perhaps, members of the appellate bar would succumb to what can be perceived to be the contemporary de-emphasis of the oral argument. Perhaps, appellate attorneys would discount time at the podium because of changes in the economics of the legal profession. Perhaps, they would waive oral argument more often than not because of their underlying confidence in the nonargument procedure and their willingness to take their best chance at written persuasion in the briefs. At the very least, such an experiment in market allocation would be one way to test some of the judicial assumptions behind the nonargument calendar.

The real systemic costs of the lost oral argument are felt in terms of legitimating the judicial function, establishing communication between bench and bar, and allowing judges the opportunity to ask questions and to focus thoughtfully on the major issues. An important value of oral argument lies in the legitimating function of allowing the litigants to address the decisionmaker face-to-face. A related value is the opportunity for the advocates to encounter and respond to whatever filtering of the record and the law that may have been performed for the judges by otherwise unseen staff, either in the clerk’s office or in chambers. In these ways, the increasingly wholesale denial of oral argument represents a serious threat to the achievement of the appellate ideal.  


Both the problem and its solution are unattractive. In a majority of appeals, a practice of central importance to the appellate function has been eliminated, at least in part, to preserve its use in other appeals in which it is deemed more critical. In the process, the federal court system has moved farther away from the ideal. Oral argument should not be an absolute right, but the denial rate seems to have outgrown the announced justification for denial. Not surprisingly, an inverse proportion has developed between the reversal rate and the growth in the nonargument calendar. Furthermore, when Congress has added judges to a circuit in the past thus presumably easing somewhat the docket pressure, the nonargument calendar has remained constant. One possible explanation could be supposed that, under Federal Rule of Appellate Procedure 34(a), almost half of the federal appeals are "(1) frivolous" or "(2) unauthoritative." A more likely explanation, however, is that the catch-all "(3) adequate briefing and insignificant for oral argument" is being used to establish a docket median below which expediency permits below average appellate process in an individual case. This suggestion is troubling. The experience of the Second Circuit, which alone among the courts of appeals provides oral argument as a matter of course in three-fourths of its appeals despite a large docket, may be a final counter-example, and suggests that the other Federal courts of appeals appear to have been too hasty in eliminating oral arguments in so many cases.

The position of criticism taken here is not to insist that the judges should act irresponsibly to guarantee oral argument in every appeal, and thereby create undue appellate delay. It must be conceded that "even if there were no caseload pressures, there would still be a place for the [screening program] to get the junk out of the system." The concern expressed here is that the design of the system has been compromised, severely and profoundly, and possibly irremediably, by such proportionally high rates of denial of oral argument.

23. Wasby, supra note 21, at 342, 353.
25. See J. Woodford Howard, Jr., Courts of Appeals in the Fed. Jud. System 23-27 (1981); Oakley, supra note 24, at 863-64. This argument must be qualified by the admission that more than three-fourths of the docket comes from New York City so that only a taxi ride to the courthouse is involved and then the oral argument often is a 10- or 15-minute exchange. See Wilfred Feinberg, Unique Customs and Practices of the Second Circuit, 14 HOFSTRA L. REV. 297, 303-07 (1986).
The importance of oral argument to the appellate function is conceded by the judges themselves. The American Bar Association adopted a resolution in 1974 (that in 1995 sounds like a plea for the preservation of some endangered species) criticizing the trend then just beginning to develop in the courts of appeals to dispense with oral argument and urging that this important appellate tradition be preserved. No less an advocate than Solicitor General Kenneth W. Starr more recently expressed the continued dismay of the bar. Besides appellate practitioners, the drastically reduced rates of oral arguments have been the target of sustained criticism from academic commentators, as well.

The Federal Judicial Center has sponsored two studies of case screening and the reduction in oral arguments. The first compilation described the various procedures used by the courts of appeals. The second, more important, study, presented a thorough evaluation and comparison of the actual screening practices in the Third, Fifth, Sixth, and Ninth Circuits. Although the second study confirmed that circuit judges continue to view oral argument as important in the abstract, the study reached several other interrelated conclusions about how screening procedures and the summary nonargument calendar are administered in the circuits: (1) screening procedures are designed in the abstract for flexibility to allow the individual judge to balance appellate procedural values in particular appeals; (2) screening procedures in practice reflect the range of individual judicial attitudes toward oral argument; (3) there is no direct correlation between the formal written procedures and the rate of oral argument; (4) the circuit judges' attitudes toward oral argument override the particular features formally stated in the screening protocol; (5) there are substantial, seemingly inexplicable, variations among the circuits (for example, the Third Circuit decided a substantially higher percentage of appeals without

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28. See Cecil & Stienstra, supra note 26, at 12.
30. See Richman & Reynolds, supra note 1, at 631.
32. Id.
33. "Each judge differs in the weights he [or she] gives to [the various] purposes [of oral argument], resulting in a broad range of opinions among judges concerning the need for oral argument." Cecil & Stienstra, supra note 26, at 160.
oral argument yet did not rely on central staff attorneys); (6) many judges share a concern that there is a kind of judicial peer pressure in screened appeals making them reluctant to state a preference for oral argument; (7) notwithstanding the judges' assertions that nonargued cases are carefully studied and fully decided, parties often are not convinced that their appeals are being thoroughly reviewed; (8) generally, the role of staff attorneys is greater in summary calendar, nonargued appeals; (9) generally, the perceived savings of time in screening programs derives primarily from the additional time and resources provided by staff attorneys and is not a direct consequence of the screening procedures; (10) at the time of the study, the rate of nonargument dispositions had been growing and continued to be on the rise.\(^3\) The study raises many more critical questions about the assumptions underlying the summary nonargument calendar procedures in the courts of appeals and suggests several directions for further study, which still deserve to be pursued. The relevant overall explanation offered by the study is that the nonargument procedures are first developed and then grow in importance and usage when a court of appeals "is in crisis and searching for a way to solve its problems."\(^3\)  

This "solution," however, represents a profound threat to a critical part of the appellate function:

Although oral argument may be thought of primarily as a method for obtaining information about a case, this is only a threshold purpose for many judges. Judges also rely on oral argument to demonstrate to the parties that the members of the panel have attended to the issues raised on appeal, to permit interaction with members of the bar, to provide a forum for the presentation of issues of public concern, to acknowledge the court's responsibility for resolving such disputes, and to provide an opportunity for the judges to confer and hear each other's views.\(^3\)  

Deciding an appeal without oral argument "reduces the judges' involvement in the case, makes them less accountable to litigants, and decreases the visibility of the appellate process."\(^3\) And even if the best of our judges somehow can otherwise achieve these goals, an appeal decided without oral argument, by definition, makes it less likely that the panel will focus on the case at the same time, which is a critical

\(^{34}\) *Id.* at 1-5, 159-68. The seriatim list in the text is a simplification of a sophisticated study.  
\(^{35}\) *Id.* at 165.  
\(^{36}\) *Id.* at 159-60.  
\(^{37}\) Robel, *supra* note 1, at 49.
part of the *raison d'être* of designating a panel of judges to review the work of a single trial judge in the first place.\(^{38}\) As is so often the case, a central feature of collegial decision making is traded off for efficiency.

The promise in Federal Rule of Appellate Procedure 34, echoed in the local rules of the courts of appeals, has been rendered rather Orwellian by the circuit judges' collective response to the caseload crisis, which in effect has reversed the presumption in favor of oral argument in every appeal to what amounts to a de facto presumption that most appeals can be decided without oral argument. Furthermore, this diminution of oral argument may have resulted in lowered expectations and lesser performances from the bar, which in turn create additional momentum against oral argument. Ultimately, this de facto reform rejects the received tradition for the federal appellate ideal. After conceding that oral argument is still the ideal, one circuit judge was heard to say, "I'll be frank about it, it is not possible with this caseload to practice the ideal."\(^{39}\)

### III. Briefing

As has just been described, the federal appellate courts have reduced oral argument dramatically as part of their effort to cope with increased filings. In making that choice, the judges have necessarily afforded greater emphasis and importance to the written presentation to the court. Written briefs have several inherent advantages.\(^{40}\) Written submissions have an "absorption advantage" over the evanescent oral presentation, which is said and gone.\(^{41}\) In a process with a written opinion as an end product, the briefs serve as critical input. Briefs also are portable and convenient. Moreover, a common attitude exists among lawyers and judges that the brief generally is better prepared than the oral argument.\(^{42}\) In the appellate ideal, the briefs would fully present the litigants' positions and would anticipate all of the judges' doubts, questions and confusions. In the appellate reality, that ideal is "seldom realized" because mere mortals write and read briefs.\(^{43}\) Attorneys need the appellate

\(^{38}\) *Id.*

\(^{39}\) *Cecil & Stienstra, supra* note 26, at 133.

\(^{40}\) *Carrington et al., supra* note 22, at 25-27.

\(^{41}\) *Id.* at 25. While most courts record oral arguments, one may question whether the judges replay the tapes or whether the practice is designed chiefly to aid the absent law clerk in later drafting an opinion. The tapes become significant, if at all, on the issue of concessions or stipulations. Undoubtedly, some judges who still draft their own opinions use the tapes themselves, particularly in complex and difficult cases. See 5th Cir. R. 34.7 (tape recordings are for the exclusive use of the court).

\(^{42}\) See *Wasby, supra* note 21, at 352-53.

\(^{43}\) *Richman & Reynolds, supra* note 1, at 632.
argument to supplement their presentations and to seek to persuade the court; judges need the appellate argument to understand the issues and to decide the appeal collegially, face-to-face with the advocates and with each other. Thus, briefs are an essential part of the received appellate tradition, and written presentations to the court continue to perform a critical role in the appellate function.  

Some commentators would de-emphasize briefs, however, because they believe that oral argument is more conducive to appellate procedural imperatives.  

The idea of dispensing with briefs goes too far, although that is the English tradition and was the early American experience. More realistically, the idea of a separate oral calendar would allow for short written submissions. This would produce true "briefs."  

The Ninth Circuit experimented with such a program on a voluntary basis. With this approach, written submissions are very short and filing time is greatly reduced. The oral argument session becomes the arena for presentation, advocacy, and decision. While this approach seems theoretically feasible, experience is limited. This may be largely due to the rejection of experimenting with a briefing de-emphasis already implicitly made in the nonargument calendar, which chooses instead to de-emphasize orality, and which has been much more common in the courts of appeals.  

Perhaps not enough has been done to test this implicit choice. The chief worry for these experiments is whether such a truncated briefing procedure would give the parties adequate opportunity to present argument in written form. A program of deciding federal appeals with reduced reliance on written argument, presumably, would place greater reliance on oral argument. Of course, some litigants would be willing to trade some of the traditional trappings of appellate procedures for a less expensive and more expeditious procedure. Any such program ought to be optional with the litigants, not the court, and ought to allow

45. Carrington et al., supra note 22, at 26.
46. Id. at 27-28.
49. Standards Relating to Appellate Courts, supra note 5, § 3.31.
the parties to "submit either summary briefs (which outlining the argument and briefly summarizing the holdings in cases relied upon) or conventional briefs, with a page-length limitation of ten to fifteen pages." This may be one of the few areas of intramural reform that has not been explored sufficiently by the courts of appeals.

IV. OPINION WRITING

Besides oral argument and brief writing, the appellate opinion is a third highly visible component of appellate procedure. There are various ways of dealing with delay and backlog through intramural reforms to improve opinion writing, to eliminate some opinions altogether, and to restrict the publication and citation of opinions in some appeals. The approaches are related because, for example, the unpublished opinion frequently is shorter than the published variety. How this appellate function is performed is decidedly important in the allocation of judicial resources because nearly one-half of an appellate judge's time involves opinion preparation. This reality attracts reformers to the opinion writing process.

A. The Purposes of Written Opinions

Although the art of good opinion writing should be encouraged, admittedly not every record on appeal presents a canvas deserving of a masterpiece. Too much of the appellate process is lost, however, unless the artist is obligated to apply at least a few brush strokes beyond the signature. The ultimate integrity of the appellate process requires that courts state their reasons. This is part and parcel of the common law tradition of deciding appeals. Quantity/quality tradeoffs are frequently argued and, properly, have been pursued, because opinion writing is the most labor intensive feature of the appellate process.

An opinion serves three critical purposes. First, litigants and the public are assured the decision is the product of reasoned judgment and

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52. Much has been written on the subject. For a selective bibliography, see generally C. E. BOLDEN, APPELLATE OPINION PREPARATION — A SELECTIVE BIBLIOGRAPHY AND SURVEY 17-21 (1978). See also infra notes 52-120.  
53. See Haworth, supra note 7, at 867-68.  
55. CARRINGTON ET AL., supra note 22, at 31.  
thoughtful evaluation rather than the mere exercise of whim and caprice. Second, the very writing of an opinion reinforces decisionmaking and ensures correctness. Third, appellate opinions are the life stream of the common law, for they create precedents.57

The first purpose arguably may be served without a written opinion in every appeal. Granted, there needs to be sufficient writing in a sufficient percentage of appeals to assure the general public that the appellate courts are not acting altogether arbitrarily or casually.58 But neither the general public nor the particular litigants would have that assurance in any given opinionless decision. The litigants themselves are especially deserving of some formal explanation.59 Of course, arbitrariness can always be hidden with a pretextual opinion, but to be that cynical obliges a belief in affirmative deceit on the part of the judges, not just arbitrariness. A writing requirement does by definition serve, at least, to constrain arbitrariness.

The second purpose for requiring a written statement in all appeals is to ensure an important discipline for decision. A decisionmaker who must reason through to a conclusion in print has reasoned in fact. Misconceptions and oversights of fact and law are discoverable in the process of writing. Everyone familiar with the appellate process has heard and used the expression, "It will not write that way," to mean that a tentative vote will not withstand the careful discipline of record reading, legal research, and opinion drafting. Yet, without a writing requirement some tentative votes would escape such scrutiny. Theoretically, opinion writing prolongs the process and, on occasion, a correct decision that has been unduly delayed may be as detrimental as an incorrect decision.60 The appropriate response for the appeal where time is of the essence, however, is to expedite the exceptional case for quick hearing and decision with a brief opinion.61 Indeed, on occasion it might be appropriate to announce a decision with an opinion to follow. In the balance of interests involved, the value of self-restraint provided by writing deserves greater weight than the value of efficiency gained through decision by edict. Reasoned decision is possible, but is sufficiently less likely without writing that the writing requirement should be preserved at al-

57. Id.
58. Id. at 435.
59. This is not to suggest that litigants have a constitutional right to a written opinion, but, after all, a decision on the record and a statement of reasons are both part and parcel of the procedural due process that courts routinely impose on the other branches as a general matter of hornbook law. See John E. Nowak et al., Constitutional Law 451-52 (3d ed. 1986); Henry J. Friendly, "Some Kind of a Hearing", 123 U. Pa. L. Rev. 1267, 1279-95 (1975).
60. Merrill, supra note 56, at 435.
61. See, e.g., 5TH Cir. R. 34.5 (expediting appeals).
most all costs. Furthermore, the courts of appeals should avoid spending more marginal resources in deciding when to write than in giving each decision its writing due.

The third purpose of writing is most important because of the value of precedent and the role stare decisis plays in our legal system. A deciding panel participates in a dialogue that is both backward and forward looking, both inwardly and outwardly directed, and both upwardly and downwardly important. A decision builds on past decisions and shapes future decisions. An appellate judgment decides a particular controversy and guides the resolution of later controversies. The court of appeals reviews the district court and is reviewed, in turn, by the Supreme Court. In all these relationships, the court of appeals must record and communicate its reasoning to perform its essential role. An expression of reasoning will always contribute to the body of precedent or usefully inform the other courts, including the Supreme Court.

B. Deciding Appeals without an Opinion

The received tradition always has been that litigants are entitled, as a matter of policy, to some statement of reasons for a decision on appeal. The courts of appeals have violated this tradition by providing for and rendering judgments without any opinion. A Fifth Circuit "innovation," the practice is anathema to the appellate ideal and the tradition of the federal courts. Avowedly never used to finesse or hide a difficult issue, an affirmance without opinion typically is authorized by local rule if: (1) the findings of fact are not clearly erroneous; or (2) the evidence supporting the jury's verdict is not insufficient; or (3) substantial evidence on the record as a whole supports an agency's order; and (4) "the Court also determines that no error of law appears and an opinion would have no precedential value. . . ."

63. See id. at 712-13, 731-34.
64. Merrill, supra note 56, at 435. The Supreme Court is hampered in the performance of its role when forced to review an opinionless decision. See Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972), vacating 457 F.2d 796 (5th Cir. 1971).
66. Baker, supra note *, at 14-30. See also STANDARDS RELATING TO APPELLATE COURTS, supra note 5, § 3.36.
67. Amalgamated Clothing Workers, Local 990, 430 F.2d at 972.
68. 5TH CIR. R. 47.6; see FED. R. APP. P. 47.
Initially justified solely as a necessary form of self-defense against the perceived impending threat of a Fifth Circuit docket disaster, the number of affirmances-without-opinion has decreased over the years, and the judges now seem to use the technique differently. Judges in the court of origin and in the other courts of appeals have apparently receded from their initial enthusiasm and the technique remains most useful in cases in which oral argument confirms that no issue is in doubt. In these cases, a notice is sent to counsel after argument that for all intents and purposes classifies the appeal as frivolous, nunc pro tunc.

Nevertheless, the appropriate accommodation of the competing interests requires some form of written opinion. Insufficient attention has been given to what might be called the "abridged opinion," a written opinion primarily addressed to the parties, which identifies the issue on appeal, announces the court's disposition, and gives the principled basis for the ruling. Given the narrow audience, the facts and procedural history can be omitted. Less important and less complete, these opinions would naturally have less precedential impact, but not by the artifice of declaring them "nonprecedential precedents." Standards for nonargument calendar selection and for affirmance without opinion disposition have already been articulated. Strangely, similar criteria and a uniform practice concerning the simple, traditional per curiam opinion are nowhere to be found. Such a protocol and practice would provide a "useful economy" in the majority of federal appeals. Criticisms of long opinions come not just from the ivory tower, but from the bench as well. For example, the late Judge Rubin of the Fifth Circuit challenged his fellow circuit judges to spend less time worrying about the scholarly nature of their opinions:

American judicial opinions surpass in verbiage, in length and in citation those written anywhere else in the world. Occasionally each of us may render a decision, perhaps in a highly significant case, that demands exposition of the full palette of our talents, but I fear that much of our time and the time of our clerks is spent merely in

69. These trends are fully described in George K. Rahdert & Larry M. Roth, Appeals to the Fifth Circuit Manual ch. 2 (1991-93).
71. Id.; see also Carrington et al., supra note 22, at 33-35.
73. Carrington, supra note 20, at 559.
seeking felicitous expression, adding citations and attempting to produce works of art. It would be worthwhile for judges to experiment with much simpler opinion models. We will succeed, however, only if we de-institutionalize the demand for scholarly opinions. A good motto for us might be: Sufficient unto the case is the decision thereof. 74

As a D.C. Circuit Judge, Ruth Bader Ginsburg likewise urged her colleagues to exercise greater restraint before writing separate opinions. 75 She insists that if judges exert more effort to balance collegiality and individuality, the clarity and predictability of the law will be improved. 76

Admittedly, a shorter opinion is not always easier to write, and many a wag has made the point. 77 The memorandum per curiam should be the standard, with the scholarly exegesis saved for the truly deserving decision. The time and resources saved by this judicial self-discipline would not be limited to the initial drafting, but would also lessen the future efforts at drafting briefs and opinions, as well as everyone’s efforts to stay abreast of the law.

For expediency, memorandum opinions could even be dictated in open court with only a little extra preparation in those cases in which oral argument confirms that no issues are in doubt. 78 This procedure might not save much time over the memorandum opinion. Yet, the Second Circuit has used the oral per curiam opinion in a useful way for those cases in which the court is performing only a dispute resolution function and not a law generation function. The Sixth Circuit still uses this technique in upwards of 100 appeals each year. 79 However, the Second Circuit experience is not readily transferable, because oral argument is guaranteed in most every case and substantial central staff resources are used to settle appeals and monitor case flow, but are not used in the


77. “I have made this letter longer than usual because I lack the time to make it shorter.” Blaise Pascal, Provenzial Letters at xvi, quoted in Hayes v. Solomon, 597 F. 2d 958, 986 n.22 (5th Cir. 1979), cert. denied, 444 U.S. 1078 (1980).


decisional process. Furthermore, this Second Circuit practice reportedly has diminished markedly, and apparently for good reason. If the appeal can be decided, even tentatively, in advance, it may be a better candidate for the nonargument calendar. The courts of appeals should avoid turning oral argument and opinion writing into mere facades or empty appellate rituals. An opinion from the bench can have an embarrassing effect on the losing attorney and party, but the real problem with this drive-through-window approach is that the decision is rendered without the fullest judge-to-judge discussion intervening. A few seconds of whispered asides, if they take place at all, may do more harm than the procedure saves in terms of the appellate tradition. When an oral per curiam is delivered, the other members of the panel may be reluctant to suggest changes, corrections, or additions. Circulation of a written opinion allows more of an opportunity for give and take. There is greater appellate dignity afforded the appeal and the parties.

At bottom, the process of deciding an appeal without an opinion suffers because no standard or rule effectively limits the practice to appeals in which none of the three purposes of a written opinion is served. The reality is that some of the courts of appeals are silently deciding appeals that twenty years ago would have been thought to merit a full opinion. The suspicion is that some appeals are being decided without an opinion despite the legitimate expectation of the litigants, without regard to the importance to the court of the writing process, and in spite of the lost precedential value that results. If so, that reality is at odds with the appellate ideal and the proper concept of the role of the courts of appeals. This is one example where the courts of appeals seem to have pursued efficiency at too high a price. The practice deserves to be formally abolished, rather than just being allowed to fall into disuse.

C. Nonpublication and Noncitation

Whether to publish the proposed memorandum per curiam opinions and if not, whether to allow citation to unpublished opinions are two distinct but related questions. These are not new questions, unique to the burdened Federal courts of appeals. As long as common law courts have decided appeals, debate has probably persisted concerning limited publication of opinions. In a time of docket growth, however, the rheto-

80. Michael S. Oberman, Coping with Rising Caseload: A New Model of Appellate Review, 46 Brook. L. Rev. 841, 851-52 (1980). Some court-watchers suggest that the Second Circuit does use staff resources in the decisional process in certain categories of appeals. Two examples are habeas corpus and prisoner petition cases. Oral argument is rare in such cases even in the Second Circuit.
81. Edwards, supra note 11, at 895.
ric becomes more shrill. In proper perspective, the published opinion is the centerpiece in the courts of appeals’ performance of their role and the systematic function of precedent. Historically, limited publication has been the rule both in England and in this country, with control of selection and content in the hands of private concerns. Today, West Publishing Company routinely publishes all opinions provided under the publication policy established in each circuit. The modern issue is whether judges should have control over the selection of opinions for publication and citation, and, if so, by what standards should they choose?

Each of the circuits has its own limited publication/non citation protocol, all of which share a common purpose but vary in their particulars. Limited publication means just that: the panel decides not to

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82. [U]nlimited proliferation of published opinions constitutes a burden and a threat to a cohesive body of law... [T]here are limits on the capacity of judges and lawyers to produce, research, and assimilate the sheer mass of judicial opinions. Those limits are dangerously near at present and in some systems may already be exceeded... Common law in the United States could be crushed by its own weight if present trends continue unabated.


85. Reynolds & Richman, supra note 83, at 576-77.


The California Supreme Court practice of "depublication" — disposing of an appeal by an order that an opinion of the state intermediate court not be published — is uniquely Californian and quite controverted. See, e.g., Paige M. Baker, Comment, Depublication: The New Star-chamber, 18 W. St. U. L. Rev. 313 (1990). The closest thing to depublication in the federal courts is the practice of vacatur, by which an appellate court vacates the judgment and opinion of the district court, upon the motion of the parties as part of a settlement agreement. This is common practice in the Federal Circuit, although there are some unsettled questions about the
publish some opinions beyond communication to the litigants. Noncitation is just as literal a component of the typical protocol. Once some opinions go unreported, the inevitable next question is whether the unpublished opinion may be cited to the court or by the court.88

The circuit judges themselves do not agree on the propriety of selective publication and citations.89 Commentators likewise are divided.90 The arguments for and against the policy are telling.91 Proponents of a noncitation rule argue the following: (1) unpublished opinions are written for the litigants only and would require substantial refinement to merit wider distribution; (2) if citation were permitted, a black market in unreported opinions would develop, which would frustrate part of the reason for nonpublication; (3) access would necessarily be unequal, as for example, between institutional litigators who could maintain an opinion bank and private persons; (4) properly unpublished opinions represent mere applications of settled principles, adding nothing but volume to the stream of precedents. Opponents of a noncitation plan argue that permitting citation is necessary to the rule of stare decisis. Today's practice in the Federal courts of appeals decidedly follows the proponents' view that a noncitation rule is part and parcel of a limited publication plan. If the purpose of the limited publication rule is to lower the costs of producing and consuming appellate decisions, arguably a noncitation limitation logically should follow. The more difficult question is whether the nonpublication approach is appropriate in the first place.

Federal developments concerning nonpublication may be summarized briefly.92 In 1964 the Judicial Conference of the United States formally


89. Compare, e.g., Richard A. Posner, The Fed. Courts: Crisis and Reform 121-23 (1985) (suggesting that any efficiencies or savings may be offset by the loss of potential precedents) and The Honorable Phillip Nichols, Jr., Selective Publication of Opinions: One Judge's View, 35 AM. U. L. REV. 909, 916 (1986) (suggesting that the number of appeals, including the number of unworthy appeals, makes these devices necessary).

90. Compare, e.g., Render, supra note 87 (expressing the traditional concern for lost precedents) with Reynolds & Richman, supra note 83, at 609 (arguing that the problem is poorly considered rules of law, not loss of precedent).

91. CARRINGTON ET AL., supra note 22, at 37; STIENSTRA, supra note 87, at 5-15.

92. This summary is based on Reynolds & Richman, supra note 83, at 577-79. See also STIENSTRA, supra note 87, at 5-15.
resolved that publication would be reserved for those opinions having "general precedential value." In 1972 the Federal Judicial Center and the Judicial Conference requested each court of appeals to develop a limited publication/noncitation plan. Little has changed about this arrangement since the establishment of each circuit as its own laboratory. In 1978, after a period of reporting and gathering data, a subcommittee of the Judicial Conference of the United States concluded in its final report:

Initially [the] committee hoped that it would be possible to distill five years of experience under eleven different circuit opinion publication plans into one model that might be adaptable throughout the Federal Judiciary. That desire has not been attained and perhaps at present is unattainable . . . .

At this time we are unable to say that one opinion publication plan is preferable to another, nor is there a sufficient consensus on either legal or policy matters, to enable us to recommend a model rule. We believe that continued experimentation under a variety of plans is desirable.

Since then, the larger debate over limited publication/non citation plans has centered on three assumptions: (1) full publication is not a necessary element of the appellate function; (2) the costs of full publication outweigh the benefits; and (3) judges can and will properly distinguish between the publishable and the not publishable. Each of these assumptions merits closer examination.

Every appellate opinion performs double duty. As a mandate, an opinion adds substantially to the finality of the judicial resolution of the particular dispute between the party litigants. It represents the law of the case. As a unit of precedent, an opinion makes law for other cases. Some appellate decisions perform only the first and not the second duty, or so the argument goes, when the appeal merely calls for the application of well-settled principles. In a practical way, the side one takes reflects one or another philosophy of law. On one level, courts of appeals generate headnotes arranged under key numbers. The decision is then catalogued under the key number for some future invocation. The prin-

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95. See generally Reynolds & Richman, supra note 83, at 578-79.
97. Reynolds & Richman, supra note 83, at 579.
ciple is the thing. On another level, actual applications of earlier established principles demonstrate those principles and describe their effective content more broadly and in a more lasting way than what the opinion expressly says. The application is the thing. How one answers the question, "Which is the real thing?" decides whether the appellate presumption ought to be for or against publication; in other words, whether full publication is an essential aspect of deciding appeals.98 Appellate decision making involves more than merely articulating and applying doctrine. Law, and appellate decision making as a pure form of law, is and always will be more an art than a science. To understand fully what is being decided and why, one must know how and why the court's political power is being exercised. The court should feel obliged to explain itself to a candid reader.

In regard to the second assumption, the advocates of a limited publication/noncitation plan argue that the costs of full publication are so high that selective publication is preferable. Admittedly, the resource costs of opinion preparation are increased marginally for publication editing. Some pride of authorship is eliminated with a nonpublished, noncitable opinion. These costs are difficult to quantify, however, and seem somewhat speculative.99 Furthermore, the memorandum opinion device—"sufficient unto the case"—described in the previous subsection, at least would avoid these costs, if only as a matter of judicial self-restraint.

Concerns for costs to captive readers and purchasers also gain the attention of nonpublication proponents.100 Library expenses increase with volume. Readership includes judges and courts who must apply precedents, scholars who must perform as critics, and advocates who must advise clients and write briefs. On balance, these concerns are not convincing because the system overload is not apparently imminent, and because unprincipled nonpublication poses a more pronounced threat to the appellate ideal. The "flood of opinions" argument has been around

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98. Id. at 579-80.
99. One empirical study of one state's nonpublication protocol concluded that the state's judges were free to write an extra 1,465 decisions in one year, at a purported savings of over $5 million. Keith H. Beyler, Selective Publication Rules: An Empirical Study, 21 Loy. U. Cm. L.J. 1, 2-3 (1989). But see supra note 87 (states).
100. See Merrill, supra note 56, at 471.

We must not make the loads these captives bear an unbearable one or the system will surely collapse. It is on the critical appraisal of the scholar that the public must largely rely for an impersonal and knowledgeable assessment of the work of the courts. It is upon the discriminating briefing of the lawyers that we ourselves depend. We should strive to relieve these people from waste of time in reading that which really adds nothing to the substance of the law.

Id.
for decades, yet private sector accommodations and specializations continue to cope. ¹⁰¹

Even if all the arguments in favor of nonpublication are accepted, the practice has grave consequences for the federal appellate tradition. The appellate ideal contemplates such a central role for the published opinion that to have a two-tracked system is to have an altogether different system. In a profession that judges itself by the appearance of impropriety, limited publication appears at odds with accepted appellate tradition. Suspicions and accusations that judges are being less than diligent or are giving some appeals less than their due spring to mind, if not to reality. ¹⁰² Stare decisis is twice diminished. First, the decision itself is freed from the responsibility to reason within full view. Second, an increment of precedent is rendered unusable. Nonpublication could allow arbitrary and unreasonable decisions to go unnoticed and unremedied, substituting a rule of men for a rule of law. First impressions might go unchecked. Judging in such cases might degenerate into an administrative-style case processing. One of the major means of holding Article III judges accountable would be lost. The parade of possible horrors marches on and on.

Little can be said of the actual experience of the courts of appeals with the nonpublication rules. Critics and champions alike have fought armed only with speculations. The commentary has largely been negative, much of it intensely so. ¹⁰³ In 1985, the Federal Judicial Center published a study by Donna Stienstra that reviewed the history of the nonpublication/noncitation protocols in the courts of appeals. ¹⁰⁴ That study explained the trade-offs courts accepted with nonpublication and the resulting problems of assuring equitable access to unpublished opinions. It concluded that:

[A]ny combination of restrictions or freedoms with regard to distribution and citation leads to problems for either the courts or the bar. If both distribution and citation are restricted, unpublished decisions may be used without acknowledgment. If distribution is restricted while citation is permitted, those who have the resources to find the unpublished decisions have an unfair advantage. Yet, if

¹⁰². Reynolds & Richman, supra note 83, at 581.
¹⁰⁴. STIENSTRA, supra note 87.
distribution is freely made while citation is restricted, the problem of unacknowledged use again arises. Finally, if both distribution and citation are unrestricted, free and fair access and use are ensured, but the savings in resources are lost. The issues in the publication debate are complex and the choices before the courts are difficult.105

Various empirical studies have sought to evaluate how these nonpublication/noncitation protocols actually operate in the courts of appeals. A few of their more noteworthy findings deserve to be mentioned here. One study of the Federal Circuit found that the appellate decision is more likely to be published if it reverses the district court.106 A second study surveyed how institutional litigants, primarily government agencies, have adapted to acquire and maintain "unpublished" appellate opinions under nonpublication/noncitation protocols and therefore called into question the fairness of such limitations for those litigants who do not appear repeatedly in the courts of appeals.107 A third study of state practices tried to estimate the costs of the nonpublication/noncitation protocols in terms of the percentage of unpublished opinions that were of precedential and publishable importance (15%) and the portion that appeared to be poorly reasoned or deficient and hidden (1%).108 A fourth study took a more philosophical and qualitative approach to discern the true status of unpublished opinions and concluded that for most purposes they were law and should be citable.109 A fifth study analyzed all of the 1986 decisions of the Eleventh Circuit and expressed serious doubt whether the very broad, general language of the Court's protocol provided any meaningful guidance to the judges in determining whether to publish an opinion.110

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An article published in 1981 stands out, however, for having evaluated the nonpublication/noncitation protocols in terms of the federal appellate tradition and ideal and thus merits further attention here. Professors Reynolds and Richman attempted an empirical assessment of the various nonpublication plans in the courts of appeals.111 Expected benefits from the nonpublication/noncitation plans included swifter justice and increased productivity. The study found that appeals decided with unpublished opinions were resolved much more quickly, although Professors Reynolds and Richman found it impossible to determine just how much of the time saved was attributable to the nonpublication designation and how much was the simple result of less judicial effort required for these less difficult decisions.112 While their study found no support for the hypothesis that limited publication enhances productivity, the researchers were careful to explain that any conclusion on productivity was impossible because of the number of variables that affected judicial output.113

The study focused on two costs of nonpublication: diminished opinion quality and suppression of precedent. The study divided all of opinion writing into three parts: reasoned opinions, decisions based on the opinion below, and decisions without discernible justification.114 At minimum, the principal investigators preferred an opinion that identified the appeal and went on to declare and give reasons for the ultimate result. Although most of the unpublished opinions did this, the authors were somewhat critical of decisions that merely referenced a trial court opinion. The decision-by-reference was criticized because of the lack of access by those not parties to the litigation and the appearance that the decision on appeal was merely a rubber stamp.115 These criticisms are not persuasive. Unpublished opinions are not designed to serve a constituency beyond the actual litigants, and a “reasoned opinion” that merely parrots the opinion below would do little to dissuade the extreme cynic. The third category, decisions with no discernable justifications, marks only a difference in opinion typology (is this word correct?) between the present author and Professors Reynolds and Richman. They criticized the nonpublication plans for including the option to decide an appeal without an opinion previously discussed and rejected here. Certainly, the ad hoc use of the boilerplate opinion that recites simply "af-

111. Reynolds & Richman, supra note 83; see also Reynolds & Richman, supra note 72; William L. Reynolds & William M. Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 807.
112. See Reynolds & Richman, supra note 83, at 593-95.
113. See id. at 595-97.
114. See id. at 599-604.
115. See id.
ter due consideration" or "upon a review of the record and the briefs of
the parties" is no better than the formal provisions that allow for a one
word judgment "affirmed." Those are not unpublished opinions, how-
ever, not because they are not published, but because they are not opi-
nions.

The second cost Professors Reynolds and Richman addressed was the
opinion that should have been published but was not, that is, the prob-
lem of suppressed precedent. Although they did not discover wide-
spread suppression of precedent, the authors found opinions they
concluded should have been published. Examples of such holdings in-
cluded novel state law questions, defective administration by an agency,
inadequacies of national statutes, and district court mistakes. Addi-
tionally, they suggested that nonpublication was inappropriate, although
actually rare, when judges articulated concurring or dissenting opinions
or when the judgment was reversed.

On balance, Professors Reynolds and Richman concluded that the
suppressed precedent is less significant a problem than what they called
the "shoddy" opinion. Their ultimate conclusion that any proposed
rule must maximize the "benefits of limited publication while avoiding
as many of its costs as possible is the correct one. Their intermediate
reasoning, however, is not fully persuasive. Although a satisfactory
method for selecting which opinions to publish may not exist, the pres-
ent patchwork system is unsatisfactory and has been tolerated too long.
Standards are necessary. Both the Advisory Council on Appellate
Justice and the American Bar Association Commission on Standards

116. See id. at 606-21.
117. Id. at 606-12.
118. See id. at 612-20.
119. See id. at 621.
120. Id. at 626.
121. At the behest of the Federal Judicial Center, a group of lawyers, law teachers, and
judges joined with the National Center for State Courts to form the Council, which promulgated
standards for the publication decision:

1. Standard for Publication

   An opinion of the (highest court) or of the (intermediate court) shall not be design-
   nated for publication unless:
   a. The opinion establishes a new rule or law or alters or modifies an existing
      rule; or
   b. The opinion involves a legal issue of continuing public interest; or
   c. The opinion criticizes existing law; or
   d. The opinion resolves an apparent conflict of authority.

2. Opinions of the court shall be published only if the majority of the judges partici-
   panting in the decision find that a standard for publication as set out in section (1)
   of this rule is satisfied. Concurring opinions shall be published only if the major-
   ity opinion is published. Dissenting opinions may be published if the dissenting
of Judicial Administration have drafted model rules. Since 1978 the courts of appeals have been left to their own devices. The time has come for rigorous evaluation and adoption of a single uniform national standard. The variety of existing rules provides a menu, and experience under them provides a data base. An optimum uniform rule would create a presumption in favor of publication and would require that a nonpublication choice be panel-unanimous. It would also list an objective set of criteria for mandatory publication. The specifics of the proposal are left to other drafters. 

1. Judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order any unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.

3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.

4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case at the conference on the case before or at the time the writing assignment is made, and at the time, if appropriate, they shall make a tentative decision not to publish.

COMM. ON USE OF APPELLATE COURT ENERGIES, ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUD. OPINIONS, quoted in Walther, supra note 88, at 582 n.7.

122. See REPORT OF THE FED. COURTS STUDY COMMITTEE, 130 (Apr. 2, 1990). Although their proposal is not without its flaws, Professors Reynolds and Richman have developed a model rule that also merits consideration:

Rule ____. Opinions.

1. Minimum Standards:
Every decision will be accompanied by an opinion that sufficiently states the facts of the case, its procedural stance and history, and the relevant legal authority so that the basis for the disposition can be understood from the opinion and the authority cited.

2. Publication of Opinions:

a. Criteria for Publication: An opinion will be published if it:

(1) establishes a new rule of law, or alters or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

(2) applies an established rule of law to facts significantly different from those in previous applications of the rule;

(3) explains, criticizes, or reviews the history, application, or administration of existing decisional or enacted law;

(4) creates or resolves a conflict of authority either within the circuit or between this circuit and another;

(5) concerns or discusses a factual or legal issue of significant public interest;

(6) is accompanied by a concurring or dissenting opinion;

(7) reverses the decision below, unless:

(a) the reversal is caused by an intervening change in law or fact, or

(b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

(8) addresses a lower court or administrative agency decision that has been
V. CASE MANAGEMENT TECHNIQUES

As part of their response to caseload pressures, several courts of appeals have experimented with civil appeals management plans, often acronymically known as CAMP. Although these plans differed in their particulars, they had common goals, albeit with varying emphases: (1) encouraging the resolution of appeals without court action; (2) accelerating the consideration and disposition of those appeals that go to argument; (3) clarifying the issues and improving the quality of briefs and arguments; and (4) resolving motions and procedural matters informally and expeditiously. Techniques include appeal tracking forms that allow processing to begin before filing of the record on appeal and briefs, staff monitoring and adjustments of the briefing schedule, case weighing and early assignment to panels and, most importantly, a prehearing conference.

The prehearing conference typically takes place before briefing. A staff attorney usually administers the conference. It is attended by attorneys for both sides who discuss the issues on appeal, freely and in confident published; or

(9) is an opinion in a disposition that
(a) has been reviewed by the United States Supreme Court, or
(b) is a remand of a case from the United States Supreme Court.

Publication Decision: There shall be a presumption in favor of publication. An opinion shall be published unless each member of the panel deciding the case determines that it fails to meet the criteria for publication.

3. The court recognizes that the decision of a case without oral argument and without publication is a substantial abbreviation of the traditional appellate process and will employ both devices in a single case only when the appeal is patently frivolous.

Reynolds & Richman, supra note 83, at 626-28 (citations omitted). See also Hon. Bruce M. Selya, Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age, 55 Ohio St. L.J. 405 (1994).


125. See generally Goldman, supra note 124.
ence from the judges. During that conference, the staff attorney explores the possibility of a nonjudicial resolution, develops possible stipulations, narrows the issues, and attempts to anticipate and resolve any procedural issues by agreement, such as a request for a stay or a dispute about the content of the joint appendix. Although encouragement of a nonjudicial resolution, achieving a settlement, is the main emphasis, other features of the case management plans advance those appeals that do not in fact settle.

Because the regional courts of appeals have developed separate and individual approaches, the feasibility and effectiveness of case management plans that use a prehearing conference as a principal mechanism must be considered circuit by circuit. Two considerations dominate the evaluation. First, in a court with a backlog of cases awaiting argument, attorney readiness need not be accelerated, although enhancement of presentation quality still remains important. The prospect of long delay in those courts of appeals may in fact increase settlement pressures although no studies have been done. Second, geography becomes a severe logistical problem in larger circuits because of the difficulty in arranging face-to-face conferences. Distances and expenses have been overcome, however, by telephone conferencing in some circuits and it has been suggested that staff attorneys might "ride circuit."

Circuit-by-circuit evaluations suggest some positive consequences of case management plans. Plans characterized by a prehearing conference reduced the number of motions the judges had to decide, shortened

126. See generally Anthony Partridge & Allan Lind, Fed. Jud. Ctr., A Reevaluation of the Civil Appeals Management Plan (1983). In June 1993, the Standing Committee on Rules of Practice and Procedure recommended an amendment to Fed. R. App. P. 33 to the Jud. Conference of the United States. The amendment would authorize appeal conferences, presided over by a judge or other designated person, to address any matter that might aid the disposition of the appeal or might simplify the issues for decision, as well as the possibility of settlement.

127. In some circuits, modern internal operating procedures of courts of appeals without formal plans and conferences do include monitoring and facilitating by central court staff. See Don Johnson, Time Delays in the Fifth Circuit — From Docketing to Decision — Civil and Criminal Cases, 2 Fifth Cir. Rep. 345 (1985).


129. Eaglin, supra note 124, at 41.

130. Partridge & Lind, supra note 126, at 10.

131. See generally Eaglin, supra note 124, at 5-9 (Sixth Circuit); Goldman, supra note 124, at 42-43 (Seventh Circuit); Partridge & Lind, supra note 126, at 10-11 (Second Circuit). CAMP procedures must be distinguished from two alternative approaches: the bygone view of treating every appeal alike and the summary calendar system already discussed. CAMP has both strengths and weaknesses. Volume continues to exert pressure. Many cases are treated very peremptorily in a CAMP circuit under heavy docket pressure. A staff attorney handling the conference might not always review the record and carefully study the issues. Under the summary calendar approach, the judges seem to be more in control.
the joint appendix, reduced the delay between briefing and argument, and reduced the overall time from notice of appeal to termination. Although briefs were not significantly shorter, there was a general impression that their quality improved. Interestingly, the impact on the settlement rate is unclear. In the experience of some circuits the plan had a substantial effect on the settlement rates, and in others no substantial differences were discernible. The literature on the plans generally concludes that their benefits outweigh their costs even without considering the effect on settlement rates; but their long-term potential and ultimate justification most assuredly will rest on settlement impact.

A Federal Judicial Center study of the pre-argument conference program in the Sixth Circuit, published in 1990, concluded as follows: (1) these programs do result in cases being settled that would otherwise proceed through the full appellate procedure; (2) those appeals that do not settle often are rendered more manageable through simplification and clarification of the issues; (3) appellate delay and expense are reduced; (4) the practicing bar has come to value the program; and (5) telephone conferencing can be a viable alternative to more costly and more difficult to arrange in-person conferences. The study estimated that the Sixth Circuit conferencing plan was reducing the overall annual workload of that court by a factor of 1.06 judges. According to another study, the Eighth Circuit's program concentrates on settlement and relies on voluntary telephone and personal conferences to achieve that goal in more than one hundred appeals each year. The full long-term potential of improving the likelihood of settlement remains uncertain and merits further evaluation and study. This task will be difficult, but developing a profile of the appeal with a high probability of settlement is a worthy endeavor. Scarce resources and extra efforts could then be spent more judiciously than in an approach that treated all appeals as fungible, for that is the objection that launched these experiments in the first place.

132. See Rack, supra note 124, at 934 ("a substantial number of settlements"). Compare Goldman, supra note 124, at 42-43 (Seventh Circuit — no difference) with Partridge & Lind, supra note 126, at 10-11 (Second Circuit — substantial difference).

133. Eaglin, supra note 124, at 41-42.

134. Id. at 30-31.


137. "After trying for almost a year to select cases with high settlement potential, the [Sixth Circuit] program staff could discern no factors reliably predictive of settlement. . . ." Rack, supra note 124, at 926.

138. See American Bar Assoc., Jud. Administration Division, Standards Relating to
Finally, the point should be made that these case management programs have an assumption in common with screening protocols for the nonargument summary calendar, discussed above. The assumption again is that all appeals are not fungible. The idea is that an early investment of resources to evaluate and sort appeals by categories and then assign them to different procedural tracks is justified by qualitative differences in appeals and will save scarce judicial resources in the long run. By comparison, it seems that summary calendar screening techniques today are more refined and have developed more judicial confidence than settlement programs. Both might be enhanced if each was understood as a variation on the same theme. There needs to be greater coherence and coordination in the administration of these two related programs, within the circuits and among circuits.

VI. STAFFING ARRANGEMENTS

As one barometer of change in the federal judicial institution, consider that over the decades of the 1960s and 1970s, when dockets exploded, the number of support personnel nearly tripled. These trends continued unabated in the decade of the 1980s. Support personnel in the offices of the clerks of court and in the judge's chambers represent the first line of defense against oppressive dockets. The actual management of an appeal involves a number of people in the clerk's office. Court reporter management schemes call for day-to-day management and supervision of an efficient court reporting service. The case manager handles all case management functions from docketing to final issuance of the mandate. Staff attorneys conduct prescreening assessments of the appeals. Administering oral argument, filing, word processing, handling the voluminous mail, and library maintenance, all demand substantial personnel resources. Circuit executives and their staffs facilitate nonjudicial responsibilities of the court. In chambers, law clerks and secretar-


139. David S. Clark, Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century, 55 S. Cal. L. Rev. 65, 144 (1981). Judicial personnel, both article III and article I, also have increased dramatically.

140. Jonathan P. Nase, The Growth of the Federal Jud. Labor Force: A Budget-Based Perspective, 70 Judicature 157, 157 (1986). "An analysis of the budget of the federal judiciary indicates that both court staffs and court system administrative structures have grown substantially. These developments have important costs and benefits, and careful analysis should precede a decision to expand the judiciary's labor force further." Id.

141. The position names change, but the responsibilities are the same, from circuit to circuit. Fifth Circuit terms will be employed here. See generally Johnson, supra note 127, at 246-50.

ies aid the judge. The appellate court family is large, indeed. For purposes of this discussion, administrative personnel will be distinguished from decisional personnel. While commentators have largely ignored the former group, the latter group, made up of staff attorneys and law clerks, has received a fair amount of attention because of its direct involvement in the decisionmaking process. Two related responses to the press of heavier caseloads have been to provide judges with more law clerks and to delegate some judicial responsibilities to staff attorneys. During the docket crisis, both law clerks and staff attorneys have assumed a greater prominence.

Much has been written about the origins and development of the law clerk from clerical assistant to an institution in itself. The experience in the federal courts of appeals may be briefly described. Until relatively recently, each circuit judge had only one law clerk whose role was "testing the judge's work" by criticizing opinion drafts and arguments, and acting generally as a sounding board. Second and third law clerks were added as in-chambers assistants and central staff attorney positions were established and their ranks enlarged. Today's ratio of authorized decisional personnel to circuit judges is approximately four to one, a dramatic increase from the 1969 level of about one to one. An appellate judge's principal efforts take place in chambers: reading briefs,


146. For a consideration of comparable state court developments, see generally Daniel J. Meador, Appellate Courts — Staff and Process in the Crisis of Volume 31-137 (1974).

147. McCree, supra note 44, at 786-87.

studying records, considering arguments, deciding, and writing opinions. Judging is deciding; that is the exercise of the Article III power. There is no denying, however, that both the role and the influence of the law clerk in the decisional process have grown dramatically and that this increased delegation has been primarily the result of the growth in the caseload. Otherwise, the circuit judges would not be so preoccupied with recruiting and selecting the best and the brightest prospects.\textsuperscript{149}

The worry of several commentators is that the law clerk’s role in the reading, studying, considering, and writing has encroached significantly on that of the judge.\textsuperscript{150} Most certainly, practices vary from chambers to chambers, and within a particular chamber from case to case. Judges have responded generally to argue that the opinion writing process demands some trade-off among functions.\textsuperscript{151} They explain that the core function—the actual deciding—still resides with the judge, but that it has been necessary to delegate more and more of the opinion preparation function to the law clerk. The workload, they contend, has forever changed the respective roles of clerk and judge. Judges decide the result and sketch a rationale. Law clerks prepare a draft opinion. Judges edit the draft. In all honesty, this has become the federal appellate paradigm.\textsuperscript{152} Appellate judges have joined the ranks of “senior partners, high government officials, and professors” who “scrupulously review and edit” the preliminary work of their junior associates.\textsuperscript{153} What is most troublesome about this new order, however, is that supervision and delegation are in inverse proportion.\textsuperscript{154} The workload has dramatically changed the relationship between judge and law clerk, at least in most chambers. Thus, once again, a particular response to workload has taken the courts of appeals that much further away from the appellate ideal and the received tradition.

A return to the days of one law clerk, having a negligible role, is not feasible. By one judge’s own estimate, an able judge single-handedly re-

\begin{itemize}
  \item \textsuperscript{150} See McCree, supra note 44, at 785-87; Vining, supra note 54, at 252-53.
  \item \textsuperscript{152} Robel, supra note 1, at 41 n.158; see Mahoney, supra note 145, at 332-34; Posner, supra note 148, at 769; Wald, supra note 70, at 778.
  \item \textsuperscript{153} See Wald, supra note 70, at 778.
  \item \textsuperscript{154} Supervising and coordinating a tripled staff of assistants necessarily places additional demands on judicial resources. Posner, supra note 148, at 767-68.
\end{itemize}
searching and writing each opinion could produce a dozen or so opinions a year, and the courts of appeals quickly would be overrun.\textsuperscript{155} The increases in number of clerks should, however, be halted. Although the limits of delegation and supervision may not have been surpassed in all chambers, they have certainly been reached in most.\textsuperscript{156} Multiplying judicial clerkships any more would jeopardize the tradition that federal judges are respected and respectful because they do their own work.\textsuperscript{157}

Even defenders of law clerks admit that increasing the number of law clerks would result in diminishing marginal returns. The judge who remains a judge becomes something of a bottleneck as appeals move through the chambers only as fast as the judge can review, evaluate, and act on recommendations and drafts.\textsuperscript{158} Staff attorneys, as an alternative, work for the court as a whole rather than for an individual judge. There is something of a paradox in this arrangement, however.\textsuperscript{159} Unless the

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\item \textsuperscript{155} See Wald, supra note 70, at 777. Even outside Judge Wald's District of Columbia Circuit, with its purportedly large and complex cases, judicial output could not be expected to be much higher.
\item Consistent with the overall effort in this Article to question contemporary assumptions, the word "purportedly" in the preceding sentence needs explanation. While the District of Columbia's docket is relatively unique, given its jurisdiction over the seat of Government and the consequent additional administrative agency reviews, some court insiders are skeptical of the Circuit's often-repeated claim of a burdensome and disproportionate number of large and complex appeals. The jurisdictional fact is that the relevant size and complexity of administrative appeals is subject to exaggeration. Of course, the records on appeals are large and the procedural histories are long in these appeals, but the court of appeals is not reviewing the administrative record de novo. One might alternatively conclude from perusing the length of many of its opinions and the number of separate opinions in administrative appeals, that the District of Columbia Circuit is not overworked, relative to other circuits.
\item The available statistics likewise do not seem to bear out the often-repeated claim of an extraordinary docket burden from administrative agency appeals. In the year ending June 30, 1990, the District of Columbia Circuit decided 172 administrative agency appeals, ranking second among the circuits; the Ninth Circuit had the highest total of 177; the First Circuit had the lowest total of 31; the per circuit average was 100.25 administrative agency appeals. For the interval from the filing of the last brief to hearing or submission, the District of Columbia Circuit's figure of 1.5 months ranked fourth among the circuits; the national median was 3.1 months. For the interval from hearing to final disposition, the District of Columbia Circuit's figure of 2.0 months ranked fourth among the circuits; the national median was 2.6 months. For the interval from submission in non-argued cases until final disposition, the District of Columbia's figure of 0.5 month ranked tied-for-first among the circuits; the national median was 1.1 months.\textsuperscript{160} ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS Table B4 at 120 (1990). The least that can be said is that the court of appeals for the District of Columbia is not falling behind in its effort to cope with the administrative agency appeals on its docket.
\item \textsuperscript{156} "In any event, it seems to me undesirable that we move beyond three clerks." McCree, supra note 44, at 787; see also Kester, supra note 145, at 62.
\item \textsuperscript{157} CHARLES E. WYZANSKI, WHEREAS - A JUDGE'S PREMISES 61 (1965).
\item \textsuperscript{159} See Arthur D. Hellman, Central Staff in Appellate Courts: The Experience of the Ninth
staff attorneys are doing work that otherwise would be done by judges, they do not increase the overall productivity of the court. Yet, if they do perform some of the judge’s duties, the judicial function is usurped. The philosophical resolution of this paradox assigns to staff attorneys tasks that in the past have been, but need not be, performed by judges.160 Such a resolution, however, is not easily accomplished. The various courts of appeals have experimented with the job description of the staff attorney. Many of the results of these experiments represent uncomfortable choices made in the face of the daunting workload.161 One judge explains that it is the staff attorney who

acquires a case at the moment the notice of appeal is filed, shepherds it through each procedural step until the closing brief is in, prepares legal memoranda, drafts a proposed opinion or other disposition, recommends grant or denial of oral argument, and presents the complete package to the judges to be graded pass/fail.162

The key assumption here is that these tasks need not be performed by judges. The motions process, for example, no longer simply sends along the matter for judicial consideration and action. Before the motion reaches a judge, a staff attorney writes a memorandum recommending a disposition and attaches a proposed order.163 Admittedly, these staff attorney evaluations save a substantial amount of judge time. Deciding whether a case deserves oral argument and how a case should be decided, however, lie at the core of the judicial function. The major concern frequently expressed is that the widespread dependence on staff attorneys has created a bureaucratic judicial process.164

The premise of the staff attorney position is that one staff attorney does the work of three law clerks, one in each panel member’s chambers.165 The number of staff attorneys and their duties vary considerably

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160. See Helman, supra note 159, at 940-41.
161. For a circuit-by-circuit review, see generally Ubell, supra note 159.
163. See Helman, supra note 156, at 944.
164. See McCree, supra note 44, at 788.
165. See Ubell, supra note 159, at 263; Richman & Reynolds, supra note 1, at 628-29.
from circuit to circuit. Critics of the general expansion of central staff attorney responsibilities echo the concerns expressed about the expansion of law clerk responsibility in chambers. Both types of legal assistants potentially encroach on the judging responsibility, but the situation is worse with the staff attorney because the supervision characteristic of the in-chambers relationship with the "elbow" law clerk is lacking for the central staff attorney. Proponents, on the other hand, maintain that the harsh reality of caseload pressures prevents judges from doing everything they once did. Staff attorneys perform tasks low on the judicial scale, thus allowing judges to perform the important appellate tasks that require an Article III decisionmaker. Conceding this much departure from appellate traditions, proponents assert that, on balance, the wise use of central staff attorneys does more good than harm. Staff attorneys in most circuits play a prominent role in handling pro se appeals. In some appeals, staff attorneys may be performing the work that the advocates rightly ought to have done, but for whatever reason was not done or was not done adequately. Considered realistically, the capacity reform of central staff attorneys already has lasted too long to be deemed merely an experiment and today is an integral part of the appellate scene:

Central staff attorneys are here to stay, without question. The reasons that gave birth to their existence remain. Filings continue to increase and the prospect for new judgeships is limited by political and economic reality. The only way to deal with that workload is to find more efficient ways to operate so that a judge's productivity may be increased.

While nearly everyone agrees that law clerks are necessary, there still is considerable disagreement over their proper role. The A.B.A. Standing Committee on the Federal Judiciary, for example, recently urged that if staff decisional personnel were inevitable, they should be made a

166. Robel, supra note 1, at 42.
168. See Gammon, supra note 158, at 464; Hellman, supra note 159, at 1003.
169. Donald P. Ubell, Evolution and Role of Appellate Court Central Staff Attorneys, 2 COOLEY L. REV. 157, 166 (1984); see also David J. Brown, Facing the Monster in the Judicial Closet: Rebutting a Presumption of Sloth, 75 JUDICATURE 291 (1992); Joseph R. Weisberger, A Profile of Appellate Staff, JUDGES' J., Summer 1985, at 31, 32-3.
formal and public part of the process so that the attorneys could review and respond to staff recommendations. 171

Judges have gone to great lengths to defend the level of delegation that already has taken place. 172 Every study has concluded that the increases in law clerks over the years have "helped the circuit courts deal with the increasing volume of appeals without sacrificing the fundamental imperatives of appellate justice." 173 The proponents of further expanded use of staff attorneys and law clerks, however, rest their arguments on an unstable foundation. With three law clerks and one staff attorney for each appeals judge, the judges are at the limit of their ability to supervise subordinate decisional personnel. 174 Until recently, this was the official position of the Judicial Conference of the United States. The Judicial Conference had adopted guidelines in 1981 limiting the number of central staff attorneys in a circuit to the number of active judgeships authorized for that court. Then, in 1991, the Judicial Conference revisited the issue of limiting staff attorneys and adopted a more complex mathematical ratio for increasing the number of staff attorney positions in relation to the number of authorized judgeships, based on the computation of case filings in the court of appeals divided by full time equivalents of judgeships. 175 Thus, adding more law clerks or more staff attorneys to the current deployment of decisional personnel no longer is as acceptable a method of coping with the caseload. Certainly,

171. A.B.A. STANDING COMMITTEE, supra note 136, at 36-38. See also Thompson & Oakley, supra note 21, at 68-78.
172. See supra note 145.
174. See CARRINGTON ET AL., supra note 22, at 48 (arguing that two law clerks and one central staff attorney should be the limit).
175. 1981 JUD. CONFERENCE REPORTS, supra note 144, at 69; REPORTS OF THE PROCEEDINGS OF THE JUD. CONFERENCE OF THE UNITED STATES 63 (1991); see also STANDARDS RELATING TO APPELLATE COURTS, supra note 5, Standard 3.62. Such limitations serve other ends as well: meeting fiscal limitations; respecting relations with Congress; and achieving parity among the circuits. In some of the larger circuits, which lately have resisted the creation of additional judgeships for various reasons, the number of staff attorneys was allowed to exceed the number of active judges, but was limited by the number of hypothetical judgeships the court would have been authorized under the Administrative Office's formula. The 1991 formula authorizes the total sum of the number of baseline positions, plus the dividend of the projected filings minus base filings, over the base number of filings per full-time equivalents. This allocation is subject to budgetary restrictions and is administered by the Administrative Office. The Judicial Conference has agreed to reevaluate the formula in five years.
if not exceeded, limits have been reached for decisional staff in the courts of appeals.

So far it has been established that law clerks have multiplied to the limit of the capacity of a circuit judge in chambers to supervise them adequately. Likewise, the judges' own concern for the adequacy of their supervision of central staff attorneys has resulted in Judicial Conference limits on the staffing ratio. What is left to be done, besides giving law clerks their own para-judicial assistant—a law clerk's law clerk?176

Why not consider following the established practice of most nisi prius courts to allow the prevailing party's attorney to "draft the court's order"? At first blush, this may seem far-fetched, but district judges have long followed this practice without untoward results and the procedure has been upheld on appeal.177 If the hearing panel is unanimous and sufficiently confident in its decision, arguably the opinion is merely a matter of drafting detail that in a less important appeal could be delegated to the prevailing attorney, at the oral argument. It could be outlined orally from the bench, with a short deadline, perhaps with a page limitation, with a requirement for service to opposing counsel and an opportunity for an equally brief and quick response.178 This "ghostwriting" proposal has the benefit of adding to the writing productivity of the court without adding costly additional staff who would require ongoing supervision.

The obvious concerns with this proposal may be briefly stated. First, an appellate court performs a function very different from a trial court; an appellate opinion has a larger, more important lawmaking function. District courts do not write primarily for precedent and their decisions, by definition, are subject to one review of right in the courts of appeals. Decisions by the courts of appeals, more often than not, are not reviewed further. Second, the potential for overreaching by an advocate primed to decide in favor of the particular client and motivated to salt away language in the law books for future clients and cases likely would be too great to resist and would prove difficult to police. In short, this "ghostwriting" proposal may be one idea that is not worth the trouble,

176. A past Solicitor General, in fact, suggested that programs be developed so that law student interns could provide "research assistance capacity and fill the more prosaic, yet important, responsibilities of cite-checking and the like." Starr, supra note 29, at 7. These student extern programs are widespread and well-developed in many parts of the country. See generally Oakley & Thompson, supra note 145, at 27-29. It is not unusual to find several law students working in some circuit judges' chambers.

177. See In re Dixie Broadcasting, Inc., 871 F.2d 1023, 1029-30 (11th Cir. 1989); In re Colony Square, 819 F.2d 272 (11th Cir. 1987).

which may explain why this trial court practice has not spread to appellate courts thus far.

VII. Conclusion

Examining all these intramural reforms leaves the distinct impression that Learned Hand was not describing this generation of circuit judges when he observed that federal judges were "curiously timid about innovations."179 Contemporary courts of appeals, with the grim determination of those under siege, have proved willing to embrace a remarkable variety of reforms and expediencies in the face of the docket threat. Their willingness to experiment, both for temporary expediency and for long-term improvement, quite literally has kept the courts of appeals from being buried in cases. But what of the worry that these expediencies, individually and collectively, have moved the courts of appeals further and further away from the appellate ideal? After summarizing these myriad intramural reforms, the Federal Courts Study Committee offered small comfort to those who share this worry:

Many worry that these palliatives threaten the appellate ideal of individual attention to individual cases. Without them, however, the appellate courts would be in serious difficulty, rather than current, as now. More changes are probably inevitable....

Stop to consider the implications from workload and the overall impact of the coping mechanisms of intramural reforms. There are approximately 250 working days in a calendar year. In 1990, there were 40,898 appeals decided, a ratio of 247 per judge or nearly one per day. But more significantly these figures yield a ratio of 787 appeals per three-judge panel or a little more than three appeals "decided" every working day. And there are numerous other demands on a circuit judge that regularly compete for daily time and attention.181 Are there three

181. A Tenth Circuit Judge made this point:
I must read, or otherwise be responsible for, approximately 500 pages of legal material each day. That is nearly the equivalent of one of the less ambitious Tolstoy novels, although legal writing does not always read so easily. I must decide approximately 400 cases a year — more than one every day, including weekends and federal holidays. Each week I must write at least one full-length written opinion and several shorter opinions or unpublished orders or judgments. On top of that, add a daily diet of reviewing motions and emergency matters, work on judicial committees, preparing for an occasional speech or moot court argument, and the like, and you have a pretty full day.

meaningful votes cast in every federal appeal today? These ratios imply that a great deal of what today passes for merits participations by the individual circuit judge can only amount to rubber-stamping the work of a colleague, as opposed to the more traditional full participation in collegial decisionmaking. Various intramural reforms, in particular the nonargument summary calendar with the attendant reliance on staff attorney work product, make these totals humanly possible.

The conclusion seems inescapable that the courts of appeals already are rationing appellate justice under the regime of intramural reforms described in this Article. This is not necessarily improper, of course, for "[e]qual justice does not require equal time for all appeals, but it does entitle the parties to the attention of a panel of judges, at least in proportion to the merit of their arguments." The real problem with intramural reforms is in their cumulative effect, which has been to "create different levels of judicial involvement, and perhaps different classes of justice, within the mandatory appellate jurisdiction of the circuit courts." The undeniable consequence of all these intramural reforms is that "the most interesting or notorious [cases] will benefit from intense judicial involvement . . . [while] [o]ther cases get very different treatment." How else can one characterize the intramural reforms, taken together and considered against the tradition of federal appeals of only thirty years ago?

For good or ill, whether necessary or appropriate, the federal appellate reality today only remotely resembles the federal appellate ideal. The congressional design of 1891, which survived well past this century's midpoint, has collapsed under the caseload. No longer is it true that every appeal is decided collegially by three judges, after reading the briefs and record, after an oral argument, with a full written opinion. The "crisis of volume" has been survived, but the coping mechanisms have abandoned the received tradition. What is left amounts to this:

The appeal of right guaranteed by statute seems to guarantee only a review by staff working under judicial supervision. Traditional appellate review is reserved for only a select portion of the entire caseload.

182. A.B.A. STANDING COMMITTEE, supra note 136, at 33.
183. Richman & Reynolds, supra note 1, at 642.
184. Id.
185. Id. Part of the reason for this situation is that the courts of appeals have been implementing experiment-as-you-go reforms without ever rationally articulating the choices, trade-offs, and costs of intramural reforms. It has been enough that these measures have kept the courts of appeals current. See William K. Slate II, Getting to Work on Jud. Workloads, LEGAL TIMES, Feb. 24, 1992, at 21. Furthermore, the typical circuit judge does not have a 30-year tenure, and so reforms are experienced in stages. This Article has tried to take a more comprehensive view.
The courts of appeals have reformed their intramural procedures to such an extent as to have re-formed themselves as courts. To believe otherwise, the judges have fooled themselves, according to Judge Stephen Reinhardt of the Ninth Circuit:

I speak primarily about the courts of appeals. Those who believe we are doing the same quality work that we did in the past are simply fooling themselves. We adopt more and more procedures for "expediting" cases, procedures that ensure that individual cases will get less attention. In place of the traditional oral argument and written opinions that we used to provide in most instances, we now all too often give cases second-class treatment. We merely look at the files and then issue unpublished memorandum dispositions or orders.

The use of these makeshift procedures ensures that many cases do not get the full attention they deserve, and the quality of our work suffers. It is a most unsatisfactory way for us to have to do our job.¹⁸⁶

The solutions of this generation have become the problems for the next.¹⁸⁷
