A Prescription for the Appellate Caseload Explosion

Ben F. Overton
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BEN F. OVERTON*

I. INTRODUCTION

When a litigant loses a well-publicized case in the trial court, the response to a reporter's question is: "We will appeal to the supreme court." The appeal, however, will in all likelihood be to an intermediate appellate court panel of three judges, whose identity will not be known until just before the case is heard. It is the perception of the public, and even some members of the legal profession, that they are entitled to have their appeals reviewed by the court of last resort in their state. Regrettably, there is no realistic understanding of the numerical impossibility of every case being reviewed by that court.

There has been an appellate caseload explosion in this country commencing in the early sixties. In the decade from 1973 to 1982 the number of appeals increased by 101% in forty-three states.¹ Five of the most populous states have intermediate appellate court caseloads exceeding eight thousand cases annually, and two of those have caseloads in excess of thirteen thousand.²

In the past twenty years, twenty-two states have established intermediate appellate courts, and, at present, thirty-six states have intermediate appellate courts.³ Litigants in many instances do not perceive a three-judge panel of an intermediate appellate court as a place of finality, and it appears that the creation of such a court

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² A questionnaire was sent to the chief justices of the ten most populous states (California, New York, Texas, Pennsylvania, Illinois, Ohio, Florida, Michigan, New Jersey, & North Carolina) in August of 1983. A compilation of the statistical information is contained in Appendix A (for courts of last resort) and Appendix B (for intermediate appellate courts).

³ National Center, supra note 1, at 2.

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initially increases appellate caseloads. These courts are, however, necessary to respond to the increasing demands on the system.

As these intermediate appellate courts add judges to meet expanding caseloads, the resulting increased number of three-judge panels cannot help but increase the number of inconsistent and conflicting decisions. When there is a general rotation among the total court, the multiple combinations of judges that will comprise each three-judge panel compounds the problem. With a twelve-member court, the number of possible different panel combinations is 220, with fifteen the number is 455, with twenty the number is 1,140, and with twenty-three the number is 1,771. Further, it is not unusual for these appellate courts to decline to write definitive opinions with reasons, either because they do not have the time or because the issues are not perceived to be of significant precedential value. Memorandum opinions or summary decisions are now used in over seventy-five percent of intermediate appellate court decisions. The public and the legal profession criticize the large two-tier appellate structures for creating courts that speak "through multiple voices" and that produce decisions that are without reason or explanation. They complain that these intermediate appellate courts are used as a means to deny access to the court of last resort and only increase the cost of appellate litigation. These criticisms reflect some justifiable concerns about how the two-tier appellate structure has responded to large caseloads, and they have necessarily affected the credibility of the involved appellate courts.

This article will address the problems created by appellate caseload growth and will suggest some new administrative techniques designed to address these problems in a manner that will increase the uniformity of appellate decisions, provide a forum,

4. Id. at 17.
6. See Appendix B.
other than the court of last resort, to address issues of significant precedential value, and provide a means to aid courts of last resort in obtaining important issues for resolution. The following are three appellate administrative procedures which should be implemented in a two-tier appellate structure: (1) en banc proceedings in intermediate appellate courts to help avoid conflicts and ensure harmonious decisions within those courts and to provide a forum to address important issues of first impression; (2) the creation of semipermanent administrative divisions within intermediate appellate courts, with the selective assignment of certain categories of cases to the divisions under a subject matter assignment plan to limit the multiplicity of panels that must decide various legal issues; and (3) the use of certified questions propounded by intermediate appellate courts to aid a court of last resort in screening cases to determine the important issues it should resolve. Before discussing these procedures, it is appropriate to review the specific functions of intermediate and final appellate courts and examine the present status of the appellate court structure of the ten most populous states.

II. Present Status and Functions of Appellate Courts

To determine the present status of the appellate structure of the ten most populous states, a questionnaire was sent to the chief justices of the courts of last resort of those states. Their responses are reflected in the charts of Highest Appellate Courts and Intermediate Appellate Courts contained in Appendix A and Appendix B, respectively. The National Center for State Courts has recently prepared a draft study concerning state appellate caseload growth, concentrating on growth during the last decade. The responses to the questionnaire and the National Center study show graphically how appellate structure has grown to meet the challenge of the caseload explosion. This information will be referred to throughout this article.

The two primary and distinct functions exercised by appellate courts are (a) error-correcting and (b) policy- or law-making. The primary responsibility of an intermediate appellate court is to exercise the error-correcting function. In this function, the appellate court reviews the trial court proceedings to determine (1) whether

10. The functions of appellate courts are more fully expressed in P. Carrington, supra note 5, at 2-7.
there was sufficient evidence to sustain the judgment, (2) whether proper trial procedure was used, and (3) whether the settled law was applied to the facts as reflected in the record.\textsuperscript{11}

The primary responsibility of courts of last resort is to address questions that concern legal principles of statewide importance. This task is ordinarily identified as the law- or policy-making function. In carrying out this function, courts of last resort should be considering cases to (1) resolve conflicts and thereby maintain doctrinal harmony; (2) provide authoritative construction of the state and United States constitutions; (3) determine the validity of state statutes; and (4) establish or modify legal principles of statewide importance.\textsuperscript{12} In limited instances, courts of last resort also exercise error-correcting functions in those cases appealed directly to them, for example, the direct appeal of death penalty cases or the validity of state statutes.

The public and, to some extent, the bar do not completely understand these distinctive functions of the intermediate and final appellate courts. Further, many believe there is a denial of access when all cases decided by an intermediate appellate court are not subject to review by the state supreme court. To understand the operations of the two-tiered appellate process, it is important to know how these functions are carried out in the thirty-six states which utilize this process. Also, it is important to recognize that the larger the overall appellate caseload, the less a court of last resort exercises any error-correcting function and the more an intermediate appellate court must assume some of the policy- and law-making functions of the court of last resort.

California grants to its supreme court discretionary authority to review its approximately fourteen thousand intermediate appellate court decisions,\textsuperscript{13} and as a result approximately twenty-five percent of the losing litigants in California courts of appeal exercise that opportunity to petition their supreme court for review.\textsuperscript{14} This broad discretionary review appears, however, to limit the number of published opinions which that court is able to render on the merits.\textsuperscript{15} Other jurisdictions have placed limitations, other than

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\renewcommand*{	hefootnote}{\alph{footnote}}
\footnote{11. Id.}
\footnote{12. R. LeFlar, \textit{Internal Operating Procedures of Appellate Courts} 4-5 (1976).}
\footnote{13. \textit{See} Cal. Const. art. VI, §§ 10, 12.}
\footnote{14. Of the approximately 4,000 matters filed annually in the California Supreme Court, over 3,200 are petitions for hearing in cases previously decided by courts of appeal. \textit{See Judicial Council of California, 1984 Annual Report} 93.}
\footnote{15. In 1982 the California Supreme Court published 132 opinions, one of the lowest}
\end{footnotesize}
mathematical quotas, on the review of decisions of intermediate appellate courts with the intent that most of these decisions should be final. They restrict the review of intermediate appellate court decisions to certain identified classes of cases. One example is Florida, in which the intermediate appellate courts, when created in 1957, were intended to be final appellate courts for most cases. The present constitutional provision limits the Florida Supreme Court's review primarily to those district court of appeal decisions in which there is a written opinion that reflects conflict with another district court of appeal or in which the district court of appeal certifies a question for resolution. The Supreme Court of Florida does render a large number of published opinions on the merits in comparison with other states.

Courts of last resort in this two-tier appellate structure are required to first perform a screening function in which the court must decide the issues that are appropriate for review. This is an important time-consuming responsibility that does not ordinarily exist for intermediate appellate courts. As the caseload expands, this screening function of courts of last resort can effectively reduce the judicial time available to consider and author opinions in those cases heard on the merits. There are just so many cases a court of last resort is able to consider and decide on the merits with an opinion. The Supreme Court of the United States renders opinions on the merits in 150 to 175 cases a year. Similarly, seven of the courts of last resort of the ten most populous states render totals of published opinions for courts of last resort in the most populous states. See Appendix A.

16. See, e.g., ILL. CONST. art. VI, § 4. The Illinois Supreme Court possesses substantial discretionary jurisdiction and provides by rule for review of appellate court decisions. Thus, the court may control its caseload by the appropriate exercise of its rulemaking authority.

17. See generally England, Hunter & Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. FLA. L. REV. 147 (1980); England & Williams, Florida Appellate Reform One Year Later, 9 FLA. ST. U.L. REV. 223 (1981); Overton, District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities, 35 U. FLA. L. REV. 80 (1983). According to the Second Annual Report of the Judicial Council of Florida (1955), "[i]n order to avoid any possibility that the creation of these courts would simply afford an additional appeal, the Council thought that it was wise to have the jurisdiction of the Supreme Court clearly defined and restricted." Id. at 3.

18. See generally Overton, supra note 17, and England, Hunter & Williams, supra note 17.

19. In 1982 the Florida Supreme Court published 342 opinions on the merits. See Appendix A.

opinions on the merits in 250 cases or less. Three of the ten states render opinions in 340 to 400 cases.

In some instances, courts of last resort have no real control over the issues they will decide. Most courts have some form of mandatory jurisdiction, such as where a statute is declared unconstitutional or the death sentence has been imposed. One of the more interesting systems of mandatory jurisdiction is that of the Court of Appeals of New York, where a single judge has the authority to accept a case for review which that court must then consider on the merits. The American Bar Association (ABA) standards and other commentators agree that courts of last resort should have almost total control over the issues they will decide in order to assure proper utilization of the limited time available on that court’s calendar.

All of the ten most populous states have intermediate appellate courts. In seven of these states the courts serve specific geographic areas. In the other three states the courts are unitary and serve the entire state. The number of geographic districts varies substantially. For instance, Texas has fourteen, Ohio twelve, California seven, Florida five, and New York four. Pennsylvania has a modified unitary system consisting of two intermediate appellate courts of statewide jurisdiction, each having distinctive subject matter jurisdiction.

The reasons for the particular caseload levels for the ten most populous states are not easily determined. For instance, California and Florida have intermediate appellate court caseloads of 14,699 and 13,924, respectively, while New York and Texas have substantially lower caseloads of 8,630 and 7,440, respectively. In the past

21. See Appendix A.
22. Id.
23. For example, the New York Court of Appeals has no control over approximately 75% of its calendar. Most of these appeals as of right are in civil cases. Appeals as of right are regulated by the state constitution and thus cannot be regulated by court rule. See N.Y. Const. art. VI, § 3(b); R. MacCrate, supra note 5, at 69-86.
24. See Appendix A.
25. The chief judge of the court of appeals must designate a single judge to determine an application for leave to appeal in a criminal case. The judge may, in his discretion, either grant or deny such application. See N.Y. Crim. Proc. Law § 460.20 (McKinney 1983).
26. See P. Carrington, supra note 5, at 150-51; ABA Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.10(c) (Approved Draft 1977).
27. See Appendix B.
28. Id.
29. Id.
30. Id.
ten years intermediate appellate court caseloads have increased by approximately nine percent per year, and each new trial judge adds to that percentage growth rate by approximately eleven cases per judge per year. There is, however, some indication that this annual growth rate is now declining.

There is also a substantial variance in the assigned caseload responsibility for judges of intermediate appellate courts. It varies from 94 cases per judge in Texas to 384 in Michigan. A majority of the ten most populous states have a caseload per judge of less than 200. It has been recommended that there be no more than 100 cases assigned per judge for which he has primary responsibility. There have, however, also been suggestions that the recommended level be as high as 250 cases per judge.

All the intermediate appellate courts render published opinions in only a limited percentage of the cases they consider on the merits. For example, out of a caseload of more than fourteen thousand cases, the California courts of appeal published only 1,146 opinions. Florida's intermediate appellate courts, which publish more opinions than any other state, 4,287, still render written opinions in less than one-third of the cases heard on the merits. With the exception of Florida, all of the intermediate appellate courts of the ten most populous states utilize the nonpublished memorandum opinion process. All use either a memorandum opinion or a summary affirmance process. The use of a summary memorandum opinion or the per-curiam-affirmed opinion is considered necessary to cope with the burgeoning workload and avoid a flooding of the reporter system with opinions which have no jurisprudential value. However, the failure of all litigants to receive written opin-

32. Id. at 7.
33. See Appendix B.
34. Id.
35. See P. Carrington, supra note 5, at 230.
36. See Report of the Supreme Court Commission on the Florida Appellate Court Structure, 53 Fla. B.J. 274, 276-77 (1977) [hereinafter cited as Report]. See also In re Florida Rules of Judicial Administration (Determination of Need for Additional Judges), 446 So. 2d 87, 88 (Fla. 1984); In re Certificate of Judicial Manpower for District Courts of Appeal, Circuit Courts & County Courts, as Required by Article V, Section 9, Florida Constitution, 446 So. 2d 79 (Fla. 1984).
37. See Appendix B.
38. Id.
39. Id.
40. Id.
41. See, e.g., Whipple v. State, 431 So. 2d 1011, 1012-16 (Fla. 2d DCA 1983) (court explained in detail why intermediate courts were unable to write full opinions in each case
ions with explanatory reasons for the decision has raised serious credibility problems for the intermediate appellate courts.  

The caseload of courts of last resort is relatively uniform among the ten most populous states. With the exception of California (4,056), New York (3,296), and North Carolina (1,238), the remaining states had caseloads ranging from about 1,500 to 2,100 in 1982. There appears to be no direct correlation between the total caseload and the number of opinions published. For example, California, which has the largest caseload, came close to publishing the least number of opinions (132). On the other hand, Florida, which had a caseload of 1,465, published 342 opinions. A majority of the states publish less than 240 opinions per year.

III. THREE ADMINISTRATIVE PRESCRIPTIONS FOR APPELLATE COURTS

The expanding appellate caseloads and resulting additional judiciary needed to cope with these caseloads require both the courts of last resort and the intermediate appellate courts to collectively seek a means to assure consistent, expeditious decisions that the public will accept as credible and final. The administrative techniques and procedures discussed below are suggested as means to provide more effective appellate structure under the strains of an ever-increasing appellate caseload.

A. En Banc Proceedings in Intermediate Appellate Courts

Although it presently has limited use in state appellate structures, the en banc process can be a viable means to address the problem of intermediate appellate courts speaking with multiple voices. The authorization of an intermediate appellate court to sit en banc allows that court to act as a whole to assure uniformity of its decisions and thereby eliminate the responsibility to resolve those conflicts that now rests in courts of last resort. In addition to

decided on the merits; requiring full opinions in every case, the court concluded, would greatly delay justice and, in certain cases, would make no contribution to the body of case law).

42. Id. at 1015. See also P. CARRINGTON, supra note 5, at 31-42; Anstead, Selective Publication: An Alternative to the PCA?, 34 U. Fla. L. Rev. 189, 203-04 (1982).

43. See Appendix A.

44. Id.

45. Id.

46. Id.

47. Meador, supra note 7, at 474.
resolving conflicts among panels of the same court, this process also provides the intermediate appellate court with a means to speak with a strong voice on issues of importance within that court's jurisdiction. There can be an incidental benefit in that the process can provide a forum for relief to the litigant who believes he has an important issue for resolution but finds, for all practical purposes, the door to the court of last resort closed.

Of the ten most populous states, only Texas, Pennsylvania, and Florida utilize an en banc process in their intermediate appellate courts. Michigan has the en banc authority but its court of appeals does not utilize the process. The remaining states, California, New York, Illinois, Ohio, New Jersey, and North Carolina, do not allow their intermediate courts to sit en banc and leave to their courts of last resort the sole responsibility of resolving conflicts that arise among the intermediate court panels.48

The federal circuit courts of appeals now have a fully developed en banc process49 which to a limited extent has been used as a model for state intermediate appellate courts. The en banc process in the federal system was first initiated in the Third Circuit Court of Appeals as a needed judicial administrative tool without any express statutory or rule authority.50 Their action was approved by the United States Supreme Court in its decision in Textile Mills Securities Corp. v. Commissioner,51 in which the Supreme Court upheld the inherent authority of the Third Circuit Court of Appeals to establish a procedure for that court to sit en banc. In construing the statutory provision establishing the circuit courts of appeals, it concluded that the proviso that there should be a circuit court of appeals in each circuit "which shall consist of three judges" did not prohibit an en banc process and that the quoted phrase did not restrict the court to deciding cases only with three judges.52 It expressly approved the en banc process as a means of "more effective judicial administration" and determined that "[c]onflicts within a circuit will be avoided. Finality of decision in

48. See Appendix B.
49. See infra notes 55-57.
50. The Third Circuit established the right of the court to sit en banc by promulgating Rules 4 and 5, which were effective March 1, 1940. The Third Circuit upheld the validity of the rules and detailed the history of en banc proceedings in Commissioner v. Textile Mills Sec. Corp., 117 F.2d 62 (3d Cir. 1940). Thirteen years later the Third Circuit published a statement which outlined the procedure and explained its operation. Hearing & Rehearing Cases In Banc, 14 F.R.D. 91 (3d Cir. 1953).
51. 314 U.S. 326 (1941).
52. Id. at 332-33.
the circuit courts of appeal will be promoted.” In a subsequent case, the United States Supreme Court reaffirmed that view and held that the en banc process was an expression of the court's power rather than a party's statutory right. While holding that a litigant does not have a right to an en banc hearing, the Supreme Court did find that a circuit court of appeals must consider a litigant's request for such a hearing.

The en banc process in the federal circuits is now controlled by both federal statutes and Federal Rule of Appellate Procedure 35, in addition to the adoption of local rules not in conflict with those provisions. The process is also controlled by case law which

53. Id. at 335.
54. Western Pac. R.R. v. Western Pac. R.R., 345 U.S. 247 (1953). The court of appeals, in denying an application for rehearing en banc, held that the responsibility for determination of the en banc request rested with the division of the court that had heard the appeal on the merits. The United States Supreme Court found that the determination of an en banc question was a matter within the discretion of the court and either the division or the full court could make the determination. Id. at 267.
55. Federal statutory authority for en banc hearings is found in 28 U.S.C. § 46(c) (1982), which provides:

Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.
56. FED. R. APP. P. 35(a) provides for the determination of when a court will order an en banc proceeding:

When hearing or rehearing in banc will be ordered.—A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.
Rule 35(b) also provides authority for the litigants to suggest to the court that an en banc proceeding is appropriate in a given case:

Suggestion of a party for hearing or rehearing in banc.—A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.
57. While some circuits have not promulgated specific en banc rules, and instead rely
prevents one panel from overruling another panel's prior decision on the same point of law.\textsuperscript{58} It appears that at least seven circuits have expressly adopted the view that only the court of appeals en banc, and not a panel, may overrule another panel's decision in a prior case.\textsuperscript{59} The Chief Justice of the United States Supreme Court would like to carry that rule a step further and has advocated that a three-judge panel of one circuit should be prohibited from reaching a result contrary to that reached on the same point of law by a three-judge panel of another circuit. To reach a contrary result, the Chief Justice would require a circuit court to hold an en banc hear-

upon Fed. R. App. P. 35, others have consistent local rules regulating en banc proceedings. The Ninth Circuit, for example, has 9TH CIR. R. 12, providing for the suggestion of appropriateness of rehearing en banc, which reads as follows:

Where a suggestion of the appropriateness of a rehearing en banc, made pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is made as part of a petition for rehearing, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the combined petition and suggestion; and unless this is done the Court shall not be required to consider such suggestion.

The Ninth Circuit also has a local court rule which delineates the composition of the en banc court. Rule 25 provides:

Rule 25. Limited En Banc Court.
The en banc court, for each case or related group of cases taken en banc, shall consist of the chief judge of the circuit or the next senior active judge in the absence of the chief judge and ten additional judges to be drawn by lot from the active judges of the Court.
The drawing of the en banc court will be performed by the Clerk or a deputy clerk of the Court in the presence of at least one active judge and shall take place on the first working day following the date of the order taking the case or group of related cases en banc.
If a judge whose name is drawn for a particular en banc court is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the chief judge who will direct the Clerk to draw a replacement judge by lot.
Notwithstanding the provision herein for random drawing of names by lot, if a judge is not drawn on any of three successive en banc courts, that judge’s name shall automatically be placed on the next en banc court.
In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.

58. See, e.g., Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981); Ingram v. Kumar, 585 F.2d 566, 568 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979); Timmreck v. United States, 577 F.2d 372, 376 (6th Cir. 1978), rev’d on other grounds, 441 U.S. 780 (1979); Doe v. Charleston Area Medical Center, Inc., 529 F.2d 636, 642 (4th Cir. 1975); United States v. Lewis, 475 F.2d 571, 574 (5th Cir. 1972); United States ex rel. Reed v. Anderson, 461 F.2d 739, 740 (3d Cir. 1972); Charleston v. United States, 444 F.2d 504, 506 (9th Cir. 1971). See also Annot., 37 A.L.R. Fed. 274, 293-94.

59. Annot., 37 A.L.R. Fed. 274, 293-94. The following circuits permit panel decisions to be overruled only by en banc decisions: Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh.
The purpose of the Chief Justice’s proposal is not only to avoid conflict among panels within the same circuit but also conflicts between panels of different circuits.

The Florida Supreme Court, following the lead of the United States Supreme Court, construed the Florida constitutional provision establishing its district courts of appeal and held that the language “three judges shall consider each cause” is not a limitation on those courts sitting en banc. The court, exercising its constitutionally established rulemaking authority, proceeded to authorize its intermediate district courts of appeal to sit en banc, although it limited their authority to the resolution of intradistrict conflicts.61

The en banc process in the state appellate structure, as previously stated in this article, is not presently used extensively, but as the appellate caseload grows, and the number of judges on intermediate appellate courts increases, the opportunity for panel conflict increases substantially. This process provides a more accessible forum to resolve these conflicts because there are only so many cases that can be accepted by courts of last resort. Clearly, an alternative judicial administrative means to resolve some of these conflicting decisions is necessary.

Although the en banc procedure is a judicial administrative tool to maintain doctrinal harmony, there is no question that it adds judicial labor and may create the administrative problem of how a court can effectively sit en banc when it consists of more than twelve judges. Probably the most significant disadvantage to the en banc process is the amount of judicial labor required. Even to consider the initial request for a hearing takes a considerable amount of judicial time because of the number of judges who must vote on the petition. When a three-judge panel renders a decision and a petition for rehearing en banc is filed, all judges will ordinarily, and may be mandated to, consider the petition for the en banc hearing in a proceeding in which only three are familiar with the record in the case. It can also be difficult for a large court to expeditiously respond to an en banc petition. Presently, the federal process provides for all judges of the circuit courts of appeals to receive a copy of a petition for rehearing en banc.

There are some administrative solutions that can reduce to some

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61. See In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So. 2d 1127 (Fla. 1982); In re Florida Rules of Appellate Procedure, 374 So. 2d 992 (Fla.), modified, 377 So. 2d 700 (Fla. 1979). See also FLA. R. APP. P. 9.331.
degree the amount of judicial labor expended in the en banc pro-
cess. Florida, in adopting its en banc rule, expressly eliminated the
requirement that judges other than panel members must review
petitions for en banc consideration. Under the Florida procedure,
nonpanel members are not mandated to consider an en banc re-
hearing petition. If one active judge on the court asks for a vote on
the petition, however, then all active judges must vote on the re-
quest. Therefore, any active judge may initiate a vote of the entire
court on the petition. While not necessarily mandating that all
judges participate in each decision on an en banc petition, this pro-
cedure allows active judges not on the panel to take an interest in
questions they believe are important for resolution by the court as
a whole.62

The en banc authority also creates an administrative manage-
ment problem when large intermediate appellate courts consisting
of more than twelve judges are required to sit en banc to consider
matters on the merits. The judicial man-hours necessary to become
prepared to participate in a merit consideration of a case in these
circumstances are substantial. The large number of judicial man-
hours consumed may not be fully warranted or necessary to main-
tain harmonious decisions within the court.

One solution to that problem has been the utilization of a special
en banc panel composed of less than the entire intermediate appel-
late court. In this process, the special en banc panel’s decision
binds the entire court the same as a full en banc decision. The
Ninth Circuit Court of Appeals, now composed of twenty-three
judges, has a local rule which allows it to sit en banc in an eleven-
member panel consisting of the chief judge and ten active judges
who are drawn by lot.63 In this circumstance a manageable eleven-
member court is provided to resolve conflicts within the circuit.
Another reduced en banc panel procedure exists in the Pennsylva-
nia Superior Court, which consists of sixteen judges. It is author-
ized to sit en banc with an en banc panel of seven judges selected
by the chief judge.64 Some authorities believe that when a court
becomes large in number the en banc procedure becomes not only
ineffective, because it is wasteful in terms of judicial manpower,
but that it also becomes counterproductive.65 The upper limit of

62. See Fla. R. App. P. 9.331. For a full discussion of the procedural operation of the
Florida en banc rule, see Overton, supra note 17, at 89-93.
63. See supra note 57.
65. See P. Carrington, supra note 5, at 156-63.
effectiveness appears to be twelve judges.

The Chief Justice of the United States Supreme Court opposes the use of reduced en banc panels of less than the total number of judges on the court and advocates that when a circuit court of appeals becomes too large to efficiently sit en banc, the court should be split into two circuits so that it can operate with a manageable en banc process. With regard to the Pennsylvania procedure, most experienced appellate judges and lawyers would recognize that this reduced en banc panel has the distinct disadvantage of providing the chief judge with the opportunity to singly determine the result of the en banc proceeding by selectively choosing who will sit on the panel.

It must be recognized that intermediate appellate courts are not established just to meet the optimum size criteria for an en banc panel. There are large intermediate appellate courts that serve just one limited geographic area. For example, the second district in California, which serves Los Angeles, is presently composed of twenty-six judges. There are also large unitary courts that serve an entire state, for example, Michigan's with eighteen judges. These courts do need a means to resolve their intracourt conflicts, and the en banc process can provide at least a partial solution to that problem.

A reduced en banc panel is a viable solution, although it is extremely important that the procedure for selecting the panel not only be fair in practice, but also that it be perceived as fair and authoritative by the judges on the subject court, the legal profession, and the public. The Ninth Circuit process of selection by lot appears to provide a reasonable method of selecting a reduced en banc panel. Another alternative would be to divide the active judges of an intermediate appellate court into three equal categories consisting of the one-third most junior in time of service, the one-third most senior in time of service, and the one-third in the middle with regard to seniority. Assuming the intermediate appellate court consists of fifteen active judges, there would be five judges in each category. A reduced en banc panel could consist of three judges selected from each category by lot. If it is determined that the chief judge should always preside in all en banc cases, then he would take a position within his respective category on the

66. See Remarks by Chief Justice Warren Burger, supra note 60.
68. See supra text accompanying note 63.
Another consideration which should be given to any reduced en banc panel is whether the members of the original panel should automatically be part of the panel that considers the case en banc. The Ninth Circuit apparently rejected any special consideration for the original panel members.

Probably the best solution to the problem of a large intermediate appellate court is combining a reduced en banc panel procedure with the implementation of subject matter organization and assignment of judges to administrative divisions. Under this scheme, the administrative divisions established to handle special assignments under a subject matter organization plan could sit en banc in their assigned categories of cases. When a broader en banc hearing is necessary, a reduced en banc panel, consisting of judges selected by lot from each division, could be established. For instance, if the court has a total of fifteen judges and is organized in three divisions of five judges each, each division would sit in its assigned category of cases. If the legal issue had broad implications, a reduced en banc panel could be selected from the entire court by having three judges selected from each division to constitute a nine-member en banc panel. One of the major criticisms concerning a reduced en banc panel is that a decision is made by less than the entire court. A proper response to this criticism is that the number of judges who will actually consider the issue is probably the same or greater than the number which would hear it if the matter were heard by the court of last resort. The most important factor is that the panel must be representative of the court as a whole and must be able to speak authoritatively to harmonize the decisions of that court.

Although the en banc process primarily provides a suitable means to assure uniformity of decisions within a particular court, it can also provide other benefits to the judicial system. The process can be utilized to allow intermediate appellate courts to speak forcefully on issues of significant precedential value. When an intermediate appellate court has the authority to act on issues of exceptional importance, its actions may relieve the court of last resort of the responsibility of having to address that issue. A court of last resort can decide only a limited number of cases, and with increasing frequency, because of expanding caseloads, some impor-

69. See Meador, supra note 7, at 473-81.
70. See Remarks by Chief Justice Warren Burger, supra note 60.
tant issues may be rejected simply because of a lack of space on its calendar. The en banc proceeding can provide an important forum for definitive precedential decisions on these types of issues.

The en banc process provides an important forum for an intermediate appellate court to work as a unified collegial body to achieve the objectives of both finality and uniformity of the law within the court's jurisdiction. This avoids the perception that the court consists of separate independent panels speaking with multiple voices with no apparent responsibility to the court as a whole. Acting in this manner should enhance the credibility of the intermediate appellate courts.

Clearly, if intermediate appellate courts are given the responsibility to be courts of finality in certain areas of the law, they should be able to resolve their own conflicts and address issues which they deem important in their jurisdiction. There is nothing that can discredit the courts and the judicial system more than the public perception that the courts are inconsistent. If the facts are the same, the law should be the same, and there is no logical or reasonable way that a direct conflict between panels of the same court can be justified. To achieve credibility, our appellate process must be able to efficiently and expeditiously resolve inconsistent decisions. As we expand our intermediate appellate courts by adding more judges, and thereby establishing more three-judge panels to address this growing caseload, attaining this goal becomes even more important. The en banc process, even with its disadvantages, appears to be a useful tool to resolve conflicts and help provide doctrinal harmony.

B. Subject Matter Organization Plan

An innovative judicial administration proposal to reduce conflicting decisions and improve doctrinal harmony within intermediate appellate courts is the concept of selective assignment of cases by subject matter organization to designated court divisions. This is a new and promising judicial administration proposal advocated by Professor Daniel Meador.71 Although it is untried in this country, it is fully utilized in West Germany.72

71. See Meador, supra note 7, for a general discussion of subject matter organization. Professor Meador also discussed subject matter organization as implemented by the courts of West Germany in Meador, Appellate Subject Matter Organization: The German Design from an American Perspective, 5 Hastings Int'l & Comp. L. Rev. 27 (1981). See also P. Carrington, supra note 5, at 174-84.

72. See Meador, Appellate Subject Matter Organization: The German Design from an
The procedure provides a means of specialization for the appellate judiciary, but avoids almost all the major disadvantages of court specialization. The procedure is designed to provide more uniformity of decisions by channeling each category of legal issues to a limited number of three-judge panels, thereby avoiding the conflicts that necessarily occur when a substantial and growing number of three-judge panels decide all categories of cases. Proper implementation of subject matter organization can result in a better informed judiciary which, in turn, can provide continuity in specifically assigned areas of law.

In West Germany, where there is considerably more access to the judicial system than in this country, the procedure is necessary for effective judicial administration. The West Germans are able to administer huge caseloads with a large number of judges by using this specialized subject matter assignment plan in all their intermediate appellate courts. West Germany has nineteen intermediate appellate courts with a total of 1,382 judges. Each court, consisting of from 17 to 149 judges, is divided into divisions of 4 or 5 judges each who sit in panels of 3 to hear the specifically assigned cases. Although there are specialized assignments of a limited nature to each division, each division has areas of assignment in various parts of the law such as contract, tort, commercial, and environmental matters. The assignments are narrow on the one hand but provide a substantial variety of the law on the other hand.73

This proposal challenges the intermediate appellate judiciary of this nation to examine a totally new approach to the problem of conflicting decisions caused by an expanding judiciary. Some opponents may argue that this is the specialization wolf dressed in sheep's clothing. For very good reasons, the creation of specialized courts has not been favored for addressing the problems created by expanding caseloads. Committees and commissions established to develop plans or proposals to address the growth of the judicial system have unanimously rejected specialized courts as a proper solution74 as has the ABA Standards for Appellate Courts.75 There are well-supported reasons for this rejection, including (1) special-

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73. *American Perspective, 5 Hastings Int'l & Comp. L. Rev. 27, 44-49 (1981).*
74. *Id. at 44-47.*
76. *See ABA Commission on Standards of Judicial Organization, Standards Relating to Court Organization (1974).*
ized judges tend to view cases with a very narrow "tunnel vision" perspective; (2) a specialized court becomes incestuous between the bench and the very limited specialized bar that practices before that court; (3) these specialized courts develop their own procedure and legal principles unconnected with other segments of the law; (4) the judiciary, because of its limited area of responsibility, is more likely to be subject to the influence of the special interests of the subject matter over which it presides; and (5) a specialized court's limited jurisdiction by its nature results in a loss of prestige to this type of court. The reasons against specialization of courts were best articulated by Simon Rifkin when he wrote:

[A] body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law.

Once you complete the circle of specialization by having a specialized court as well as a specialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the exclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priest-craft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay. 76

What is most significant about this new subject matter organization proposal is that this plan of selected assignment takes advantage of the benefits of specialized courts while minimizing the negative effects of specialization identified above.

There are three essential elements of a subject matter organization plan. 77 First, divisions must be established in each intermediate appellate court. Each court would be divided into semipermanent administrative divisions of from four to seven judges. For

77. See Meador, supra note 7, at 475-81.
example, a fifteen-judge court would be divided into three five-member divisions. These divisions would have a presiding judge and would decide cases sitting in panels of three. Judges would rotate only within the division.

Secondly, each division would be assigned certain specific categories of cases. For example, division one would receive family law, condemnation proceedings, and automobile tort cases; division two would receive general torts, product liability, real property, and probate cases. Division three would receive administrative law, malpractice, Uniform Commercial Code, and general equity matters. It is extremely important that each division be given a variety of subject matters. A division must not be relegated to deciding cases in just one single area of the law, such as workers' compensation. Criminal cases, because of their volume, present a special problem. In most jurisdictions they comprise forty-five percent of an intermediate appellate court's caseload. There is a solution. Each division should be assigned an equal portion of the criminal law calendar. Even with this equal division of the criminal law cases, there could be special assignment of categories of criminal cases to each of the individual divisions. For example, division one could receive all RICO matters; division two, all speedy trial issues; and division three, all issues relating to the validity of drug statutes. The plan of case assignments should be reviewed annually, if not semiannually, to assure an equal division of workload among the divisions. Further, the specific assignments should be made public so that the bar and the litigants would have full knowledge of the division to which their case would be assigned when appealed.

The third essential element of this plan is the requirement that administrative divisions should be semipermanent. The divisions must be permanent enough to assure continuity but, to avoid stagnation, there should be a staggered rotation. For example, one judge in each division could rotate to another division each year.

If the plan is properly implemented, most of the usual problems of specialization are avoided. With the variety of assignments there is no tunnel vision and no incestuous relationship between the bench and a very limited specialized bar. The plan should not cause these divisions to develop their own procedures or principles unconnected with other segments of the law. Further, since judges are available to serve the court as a whole and periodically rotate

78. See National Center, supra note 1, at 2.
to other divisions, the problems of the influence of special interests and loss of prestige should not be applicable.

The implementation of this type of assignment plan can enhance both uniformity and stability of decisions within the jurisdiction of the intermediate appellate courts because it limits dramatically the number of different three-judge panels that could address similar issues.\(^\text{79}\) This is graphically illustrated by the fact that on a fifteen-judge court the number of possible three-judge panels is 455, while the number of possible three-judge panels from a five-man division would be 10.

Implementation of the plan would require judges of large intermediate appellate courts who are accustomed to rotating panels of all judges of their court to accept the limited assignment within a division. Although some personalities may have difficulty adapting, this system places them in essentially the same collegial posture as individuals sitting on courts of last resort. The proposal should, because of the smallness of the division and the regular association of the judges of the division, improve collegial discussions of the legal issues before the court for resolution. Equally important, the judges should, in a relatively short period of time, be familiar with the current state of the law in the specific areas assigned to their division and, consequently, should be able to work more expeditiously and effectively.

Finally, if properly implemented, there is no reason why a modified en banc process as discussed in the prior section could not be utilized to allow the administrative divisions within each court to sit en banc to resolve conflicts in addition to deciding cases of importance in their area of the law. This proposal effectively addresses the problems of conflicts and inconsistencies brought about by the large number of appellate decisions decided by an increasing number of different judicial panels. It particularly warrants serious consideration for use by intermediate appellate courts of fifteen or more judges.

C. Certified Questions as Part of the Screening Mechanism for Courts of Last Resort

The certified question process is a relatively new judicial administrative technique that can be of major assistance to courts of last resort in carrying out their case-screening function.\(^\text{80}\) When prop-

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79. See Meador, supra note 7, at 475-81.
80. Florida is the only jurisdiction fully utilizing this authority, although the federal cir-
erly utilized it can save substantial judicial time and reduce reliance on staff recommendations.

A major function of every court of last resort is to determine which cases it should hear on the merits. The maximum number of cases these courts are able to hear and decide with published opinions is approximately 350 cases.\textsuperscript{81} As indicated previously, the appellate caseload explosion has caused a substantial volume increase in the decisions of the intermediate appellate courts, and it is not possible to have a proportionate corresponding increase in the number of decisions on the merits by state courts of last resort.

As the intermediate appellate courts' caseloads expand, the applications for review by courts of last resort increase and the screening function of those courts consumes an increasing percentage of these judges' time. This is time that formerly was used to deliberate, determine, and author cases on the merits. The primary method utilized to recapture this time and reduce the amount of judicial labor expended on the screening function is to delegate responsibility for screening to staff. A number of courts depend upon a central staff to assist the court in this responsibility.\textsuperscript{82} In these circumstances, central staff attorneys screen petitions for review when they are initially filed in the appellate court and prepare recommendations as to whether a case should be considered on the merits and, if so, whether to grant or deny oral argument. These central staff attorneys are responsible to the court as a whole rather than to an individual judge. A law clerk may, of course, be used in the same manner.\textsuperscript{83} Justice John Paul Stevens generated considerable public interest in the delegation of this screening function when he explained in a speech to the American Judicature Society that he must depend almost exclusively on his law clerks to screen petitions for certiorari filed with the United States Supreme Court. Justice Stevens stated:

\textsuperscript{81} This is extending considerably the optimum number of opinions a judge should write since authorities recommend that a judge should not be required to write more than 25 opinions a year. See P. Carrington, \textit{supra} note 5, at 145. For a seven-member court, this requires each court member to author 55 opinions, with the chief justice writing a reduced load of 20 opinions a year.


\textsuperscript{83} See Cameron, \textit{supra} note 82, at 468-69.
I have found it necessary to delegate a great deal of responsibility in the review of certiorari petitions to my law clerks. They examine them all and select a small minority that they believe I should read myself. As a result, I do not even look at the papers in over eighty percent of the cases that are filed.  

When it is recognized that there are over 4,500 petitions for review filed annually in the United States Supreme Court, it must be accepted that it would be humanly impossible for one man to personally review each petition and carry on his other responsibilities on the court.

The use of central staff attorneys or law clerks to make these types of decisions has been criticized as placing substantial power in young and inexperienced lawyer personnel who have no true accountability to the public. The view has been expressed that the central staff is a "cancerous growth" that must be controlled. The chief justice of California has expressed concern about the need to delegate this responsibility to staff whom she describes as the "hidden judiciary" or "shadow court." It should be noted that the California Supreme Court, which has a caseload of over four thousand cases, presently utilizes a central staff of eleven lawyers, and each justice on that court has four lawyer research aides.

Florida decided to address the problem of the substantial increase in the screening responsibilities of its state supreme court in a different manner. It recognized that the supreme court could not realistically provide discretionary review to a significant portion of the more than thirteen thousand cases filed in the Florida intermediate appellate courts in addition to providing a mandatory review in certain categories of cases. Florida determined it wanted to avoid any substantial delegation of this screening function to staff and, in a reform of its supreme court's jurisdiction, limited supreme court review of intermediate appellate court decisions on the one hand but, in exchange, substantially broadened the authority of the intermediate appellate court to identify and certify im-

84. Stevens, Some thoughts on judicial restraint, 66 JUDICATURE 177, 179 (1982).
85. See McCree, supra note 82, at 787.
86. See Bird, supra note 82, at 4-5.
87. See Appendix A.
88. This information was derived from a questionnaire sent to the chief justices of the ten most populous states.
89. For a full explanation of this new constitutional scheme, see England, Hunter & Williams, supra note 17; Overton, supra note 17.
important issues to the supreme court for its resolution. The hope was that, under this new constitutional scheme, part of the screening responsibility would be exercised by the intermediate courts of appeal under the broadened certification authority. This process has been relatively successful. In 1982, over one-half of the decisions of the district courts of appeal of Florida which were accepted by the supreme court for review came to the supreme court through the certified question process. In fact, all questions certified by the district courts were accepted. The process has also proved to be an excellent means of having the supreme court review state court policy decisions that may have become obsolete.

Under Florida's certification process, the intermediate appellate courts may certify three types of matters to the supreme court: (1) a question of great public importance; (2) a decision which is in direct conflict with the decision of another district court of appeal; and (3) a judgment of a trial court pending before a district court of appeal that is of great public importance or that has a great effect on the proper administration of justice throughout the state and thereby requires immediate resolution by the supreme court. The first two categories require the district court to render a decision on the merits, while the latter, referred to as the "pass-through" provision, provides a method for direct supreme court consideration without a district court decision.

The majority of cases certified have been certified as being of great public importance. The term "great public importance," rather than "great public interest," was used in order to allow judges to make a determination that it is an important issue that requires supreme court resolution. It was previously argued that "public interest" required the public to actually know of and be interested in the matter in order for it to be certified. The present phraseology was intended to allow Florida's intermediate appellate courts to certify any question which they believed presented a sig-

90. See Overton, supra note 17, at 84-86. See also the comparison chart in Appendix C.

91. Some subjects which have been certified to the Florida Supreme Court for reconsideration are interspousal immunity and family immunity. See, e.g., Dressler v. Tubbs, 435 So. 2d 792 (Fla. 1983); Hill v. Hill, 415 So. 2d 20 (Fla. 1982); Ard v. Ard, 414 So. 2d 1066 (Fla. 1982); Roberts v. Roberts, 414 So. 2d 190 (Fla. 1982); West v. West, 414 So. 2d 189 (Fla. 1982).

92. The provision of the Florida Constitution providing for district court certification is contained in art. V, § 3(b)(4). This provision reads as follows: "May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal."
significant jurisprudential issue.93

The second type of certified question allows Florida’s district courts of appeal to put the supreme court on notice that a district court decision conflicts with a decision of another district court or with a decision of the supreme court on the same question of law. This allows the intermediate appellate courts of Florida to directly suggest a resolution of the conflict when they disagree with a sister court on a principle of law which they understand applies to a similar set of facts.

The third type of certification method operates through a “pass-through” provision that provides a means for the supreme court to expeditiously consider cases that need immediate resolution without first having the cases proceed to a decision by the intermediate court of appeal. This pass-through provision is intended to be used sparingly; it has been effectively used by the intermediate courts in Florida to certify a few important issues.94 One 1982 case concerned the removal of a constitutional amendment from the 1982 general election ballot because of misleading language.95 The entire process, from the filing of the complaint through the circuit court trial and the rendering of a supreme court written opinion after oral argument, took a total of thirty-six days. In 1983, the “pass-through” provision was used to determine the constitutionality of a state excise tax on liquor sales. The trial court had declared the tax unconstitutional and stayed the collection and deposit of the funds. At the time, the state had over $1,250,000 in collected funds which could not be deposited. The intermediate appellate court certified the case to the supreme court for immediate resolution. The issue was resolved within 117 days.96

The total certified question process provides a means by which a court of last resort can identify issues which the judiciary of the intermediate appellate courts believe are important for the court of

93. See Overton, supra note 17, at 86 & n.41.
94. “Pass-through” certification is permitted by Fla. Const. art. V, § 3(b)(5). This provision reads as follows:
   May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.
   For a more complete explanation of this provision, see Overton, supra note 17, at 86-88.
95. Askew v. Firestone, 421 So. 2d 151 (Fla. 1982).
96. See Rutledge v. Chandler, 445 So. 2d 1007 (Fla. 1983). Plaintiffs filed the initial complaint in the circuit court on August 12, 1983. The Florida Supreme Court rendered a summary opinion on December 6, 1983. A full opinion explaining the court's rationale was rendered on February 16, 1984.
last resort to resolve. The process is not intended, however, to be
the exclusive means to determine which cases should be considered
for review nor is it intended to make review of such questions by
the court of last resort mandatory. Most importantly, this process
allows three appellate judicial officers, who are familiar with the
case, as well as other matters within their court, to make a recom-
mendation of what they believe is an important issue for resolution
by the state's highest court. In effect, instead of the supreme court
having to depend on the recommendation of a central staff, or an
individual staff member who may be young and inexperienced, the
court has the opportunity to receive the advice and recommenda-
tions of experienced judges who are familiar with the record in the
case.

Florida is the only jurisdiction to fully utilize this certification
process. The federal courts have the authority to certify questions
to the United States Supreme Court but have rarely done so.97
Florida, on the other hand, has a long history of using certified
questions to identify issues that need resolution by its state su-
preme court. In addition, for over thirty years it has provided a
means for the federal appellate courts to certify questions of Flor-
da law to the Supreme Court of Florida for resolution.98 Prior to

97. Pursuant to 28 U.S.C. § 1254(3) (1982), cases in the courts of appeals may be re-
viewed by the Supreme Court
[b]y certification at any time by a court of appeals of any question of law in any
civil or criminal case as to which instructions are desired, and upon such certifica-
tion the Supreme Court may give binding instructions or require the entire record
to be sent up for decision of the entire matter in controversy.
United States Supreme Court Rules 24 and 25 deal with the court’s jurisdiction of certified
questions. This certification procedure is rarely used. See, e.g., Wisniewski v. United States,
98. Florida has had a statute authorizing the state supreme court to receive and answer
certified questions of state law from federal appellate courts since 1945. Fla. Stat. § 25.031
(1945). This statute was the first of its kind in the United States. The provision was not
used until 1960 when the United States Supreme Court remanded a case to the Fifth Circuit
Court of Appeals with the suggestion that the court certify controlling questions of Florida
Fifth Circuit responded by certifying two nonconstitutional questions to the Florida Su-
preme Court. Sun Ins. Office, Ltd. v. Clay, 319 F.2d 505, 508 (5th Cir. 1963), rev’d on other
grounds, 377 U.S. 179 (1964). Prior to the certification of these questions, the Florida Su-
preme Court adopted a rule of court procedure to implement the statute. In re Florida
Appellate Rules, 127 So. 2d 444 (Fla. 1961). The court construed § 25.031 and Rule of Ap-
pellate Procedure 4.61 (current version Fla. R. App. P. 9.150) and upheld their
constitutionality.

In 1980 the state adopted a constitutional amendment which provided for the express
constitutional authority for the supreme court to consider questions of state law certified by
The language of this provision is the same as that which governed certification under the
1980, a limited means for intermediate appellate courts to certify questions of great public interest was available but had limited utilization.\(^9\)

The utilization of the recommendations of lower court judges to determine what cases should be heard by a higher court has a historical foundation. Our heritage reflects that English appellate procedure provides a judicial screening process whereby a single lower court judge determines the cases in which leave to appeal should be granted and heard by the court of appeals in England.\(^10\)

The Florida experience demonstrates that judicial participation by intermediate appellate courts through the use of the certified question process can be of major assistance in the screening function of courts of last resort and can reduce the reliance on central or individual staff to make important screening decisions.

IV. Conclusion

The en banc rule, the subject matter organization plan, and the utilization of certified questions are each administrative techniques that, if fully implemented, can help provide a prescriptive remedy for the appellate caseload explosion. It must be recognized that the increase in appellate caseload has caused a substantial loss of credibility of the courts as institutions because of inconsistency and lack of finality in our court structure. Courts which decline to consider conflicting decisions or utilize a depublication process of erroneous decisions because they do not have sufficient time to resolve these cases on the merits provide a justifiable basis for criticism of statute and procedural rule.

Florida's certification procedure enables the federal courts to ascertain an undecided question of state law. The question of state law is decided by the state's highest appellate court, thus avoiding the possibility of a redetermination of facts by a state trial court. Use of certification permits the federal courts to avoid both unnecessary determinations of federal issues where state law may control and federal determinations of state law, much like the application of the abstention doctrine.

Since its inception, the Florida certification procedure has been used by both the United States Supreme Court and the federal circuit courts. The clerk of the Florida Supreme Court has estimated that federal courts will continue to certify approximately five cases per year to the Florida Supreme Court. The court may restate the question certified and may consider and address any issues it perceives to be involved. See Coastal Petroleum Co. v. Secretary of the Army of the United States, 489 F.2d 777, 779 (5th Cir. 1973).

99. In 1979, only 23 cases were certified to the Florida Supreme Court as being of great public interest. In 1981, 86 cases were certified to the supreme court under the new constitutional provision. This new provision provides for certified questions of great public importance, certified conflict, and certified judgments of trial courts. See Appendix C.

an appellate structure that requires these actions.\textsuperscript{101} Because of fast changing technology in multiple fields, our courts, even without expanding caseloads, would have difficulty addressing these new issues in a timely manner. We need to use every available tool to assure that the court system operates in an expeditious and definitive manner in this changing era.

More than anything else it must be realized that people, not just rules and procedures, make the system work. Major judicial expansion, with an increased number of judges, has adversely affected the collegiality of our appellate courts. The expansion of judicial manpower has strained the ability, particularly of large intermediate appellate courts, to be truly collegial bodies with desired judge interaction. A judge of an intermediate appellate court has written that every member of an appellate court must realize that all members come to that body with “differing biases, values, and philosophies, but they share the common discipline of the law and a single fidelity—to their court and their joint product, the law it makes.”\textsuperscript{102} The view that one three-judge panel should be independent of other panels on the same court is contrary to the obligation of all judges on one court to work as a collegial body for the benefit of the whole court.

It is essential that the intermediate appellate court judges have an engrained fidelity to their court as an institution—not just to the members of the panel on which they sit—because their work product is law for the court as a whole. In this present era, the intermediate appellate court is the court that is addressing most of the appellate issues of our times. Collegiality of a court is the essential glue that provides a cohesive court structure, and any proposed administrative reforms can be truly effective only if they enhance both the collegiality and the administrative efficiency of the court. The en banc process and the subject organization plan provide intermediate appellate courts with better means to assure consistency of their decisions and a greater opportunity to have a collegial discussion on important legal issues. The ability to certify questions provides a means for independent judicial officers, rather than staff, to identify important issues for resolution in courts of last resort, and, consequently, can reduce reliance on a burgeoning judicial bureaucracy. If properly implemented, these suggested ad-

\textsuperscript{101} Gerstein, "Law by elimination": depublication in the California Supreme Court, 67 JUDICATURE 292 (1984).

\textsuperscript{102} F. Coffin, The Ways of A Judge: Reflections from the Appellate Bench 171 (1980).
ministrative proposals can be a helpful prescriptive cure for the appellate caseload explosion.
APPENDICES


Appendix A is a comparison of the highest appellate courts of the ten most populous states. This chart was prepared from information received in response to a questionnaire sent to the chief justices of the ten most populous states and from information obtained from West Publishing Company. It also contains a comparison with the caseload of the United States Supreme Court.


Appendix B is a comparison of the intermediate appellate courts of the ten most populous states. It was prepared from information received in response to a questionnaire sent to the chief justices of the ten most populous states and from information obtained from West Publishing Company.

APPENDIX C: FLORIDA APPELLATE STRUCTURE STATISTICS

Appendix C is a statistical analysis of cases filed in the Supreme Court of Florida for the year 1979, the last full year under the prior constitutional provision, compared with the year 1981, the first full year under the new constitutional provision. It was prepared by a staff assistant's examination of the records of all cases filed in 1979 and in 1981 and following those cases to their respective conclusions.

This chart establishes that the Supreme Court of Florida decided more cases on the merits on the basis of conflict under the new constitutional amendment than it did under the prior constitutional provision. The total number of cases decided by the supreme court in 1979 on pure conflict, without regard to certified questions, was 50, compared to 83 cases decided in 1981, the first full year under the new constitutional provision. The supreme court also considered more certified questions under the new amendment than it did under the old provision. In 1981, the court accepted 86 cases, compared to 23 in 1979.

<table>
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<tr>
<th>State</th>
<th>Number Of Judges</th>
<th>Mandatory Jurisdiction Caseload</th>
<th>Discretionary Jurisdiction Caseload</th>
<th>Total Caseload</th>
<th>Discretionary Jurisdiction (Accepted By)</th>
<th>Published Opinions*</th>
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<td>(population)</td>
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<td>petition is assigned to one judge who may grant or deny*</td>
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<td>Texas</td>
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<td>930</td>
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<td>(Supreme Court)</td>
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<td>(14.2 mill.)</td>
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<td>156</td>
<td>1,054 plus 1,745 H.C.</td>
<td>2,955</td>
<td>concurrence of two justices</td>
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<td>383</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>7</td>
<td>106</td>
<td>1,246 plus 234 misc.</td>
<td>1,586</td>
<td>concurrence of two justices</td>
<td>341</td>
</tr>
<tr>
<td>(11.9 mill.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>367*</td>
</tr>
<tr>
<td>Illinois</td>
<td>7</td>
<td>156</td>
<td>1,462 plus 131 misc.</td>
<td>1,768</td>
<td>majority vote</td>
<td>224</td>
</tr>
<tr>
<td>(11.4 mill.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>199</td>
</tr>
<tr>
<td>Ohio</td>
<td>7</td>
<td>128</td>
<td>1,580 plus 178 misc.</td>
<td>1,886</td>
<td>majority vote</td>
<td>234</td>
</tr>
<tr>
<td>(10.8 mill.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>248</td>
</tr>
<tr>
<td>Florida</td>
<td>7</td>
<td>128</td>
<td>799 plus 538 misc.</td>
<td>1,686-1,465</td>
<td>majority vote</td>
<td>346</td>
</tr>
<tr>
<td>(9.7 mill.)</td>
<td></td>
<td></td>
<td></td>
<td>(1983)</td>
<td></td>
<td>342</td>
</tr>
</tbody>
</table>

 ¹ The highest appellate courts of the top ten states are based on population and caseloads.
<table>
<thead>
<tr>
<th>State</th>
<th>Yearly Cases</th>
<th>Total Filings</th>
<th>Opinions Published</th>
<th>Note</th>
<th>Cases</th>
<th>Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan</td>
<td>7</td>
<td>2,116</td>
<td>2,121</td>
<td>Majority vote</td>
<td>234</td>
<td>134</td>
</tr>
<tr>
<td>New Jersey</td>
<td>7</td>
<td>1,088 plus</td>
<td>1,566</td>
<td>Concurrence of three justices</td>
<td>126</td>
<td>119</td>
</tr>
<tr>
<td>(Sept. 82-Aug. 83)</td>
<td></td>
<td>131 misc.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>7</td>
<td>692 plus</td>
<td>1,238</td>
<td>Procedure is internal to court</td>
<td>187</td>
<td>151</td>
</tr>
<tr>
<td>(5.9 mill.)</td>
<td></td>
<td>546 misc.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>U.S. Supreme Court</td>
<td>9</td>
<td>5,311</td>
<td>rule of four</td>
<td></td>
<td>151</td>
<td></td>
</tr>
</tbody>
</table>

1. State ranking is based on 1980 census figures.
2. The first column under "Published Opinions" indicates the number of opinions published as reported by West Publishing Company. The second column reflects the number of published opinions as reported on the returned questionnaires or as determined by staff records.
4. The New York intermediate appellate court also has the authority to require the Court of Appeals to consider a case on the merits. If one judge in the intermediate court dissents, the Court of Appeals must take the case. In practice, however, these cases are usually disposed of summarily by the Court of Appeals. See R. MacCrate, Appellate Justice in New York 74-77 (1982).
5. The number of opinions published as reported by West Publishing Company is for the calendar year 1982.
6. The New York Court of Appeals also produced 208 memorandum opinions.
7. Of the 367 published opinions, 171 were signed.
### APPENDIX B — APPELLATE COURT STATISTICS: INTERMEDIATE APPELLATE COURTS OF THE TOP TEN STATES (1982)

<table>
<thead>
<tr>
<th>State (population)</th>
<th>Number of Judges</th>
<th>Number of Judges on Panel</th>
<th>Number of Cases Filed</th>
<th>Caseload Per Judge</th>
<th>Administrative Divisions</th>
<th>Memorandum Opinions</th>
<th>Published Opinions</th>
<th>En Banc</th>
<th>Selective Publication</th>
</tr>
</thead>
<tbody>
<tr>
<td>California (23.7 mill.)</td>
<td>77</td>
<td>3</td>
<td>14,699</td>
<td>191</td>
<td>Yes</td>
<td>Yes</td>
<td>1,146</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>New York* (17.6 mill.)</td>
<td>48</td>
<td>3</td>
<td>8,630</td>
<td>179</td>
<td>No</td>
<td>Yes</td>
<td>4,172</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Pennsylvania (Superior Court) (14.2 mill.)</td>
<td>30 (total)</td>
<td>3</td>
<td>9,207 (total)</td>
<td>2017 (total)</td>
<td>Yes</td>
<td>Yes</td>
<td>1,144</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>(Commonwealth Court) (11.4 mill.)</td>
<td>20</td>
<td>3</td>
<td>5,583</td>
<td>279</td>
<td>No</td>
<td>Yes</td>
<td>873</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Illinois (11.4 mill.)</td>
<td>43</td>
<td>3</td>
<td>6,687</td>
<td>156</td>
<td>Yes</td>
<td>&quot;short&quot; opinions may be used</td>
<td>1,365</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Ohio (10.8 mill.)</td>
<td>53</td>
<td>3</td>
<td>8,963</td>
<td>169</td>
<td>No</td>
<td>yes, when case is accelerated</td>
<td>268</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Florida (9.7 mill.)</td>
<td>46</td>
<td>3</td>
<td>13,924</td>
<td>303</td>
<td>No</td>
<td>No</td>
<td>4,287</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Michigan (9.3 mill.)</td>
<td>18</td>
<td>3</td>
<td>6,911</td>
<td>384</td>
<td>Yes</td>
<td>826</td>
<td>Yes (not used)</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>New Jersey (7.4 mill.)</td>
<td>21</td>
<td>3</td>
<td>6,273</td>
<td>299</td>
<td>No</td>
<td>&quot;short&quot; opinions may be used</td>
<td>347</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>North Carolina (5.9 mill.)</td>
<td>12</td>
<td>3</td>
<td>1,119</td>
<td>93</td>
<td>No</td>
<td>No</td>
<td>669</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

1. State ranking is based on 1980 census figures.
3. The top number, 4,172, is the number of opinions received by West Publishing Company for publication in 1982. This figure contains some trial court opinions. The number under the report column reflects the court's opinions for 1980.
<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Certiorari (Changed to “Discretionary Review” in 1980)</td>
</tr>
<tr>
<td>District Courts of Appeal</td>
</tr>
<tr>
<td>Constitutional Construction</td>
</tr>
<tr>
<td>Class of Constitutional Officers</td>
</tr>
<tr>
<td>Conflict</td>
</tr>
<tr>
<td>Certified Question</td>
</tr>
<tr>
<td>Certified Conflict</td>
</tr>
<tr>
<td>Certified Judgment of Trial Courts</td>
</tr>
<tr>
<td>Circuit Court</td>
</tr>
<tr>
<td>Statutory Invalidity</td>
</tr>
<tr>
<td>Constitutional Construction</td>
</tr>
<tr>
<td>County Courts</td>
</tr>
<tr>
<td>Statutory Invalidity</td>
</tr>
<tr>
<td>Public Service Commission</td>
</tr>
<tr>
<td>Industrial Relations Commission</td>
</tr>
<tr>
<td>Appeals (Changed to “Mandatory Review” in 1980)</td>
</tr>
<tr>
<td>(total)</td>
</tr>
<tr>
<td>Death Penalty</td>
</tr>
<tr>
<td>Bond Validity</td>
</tr>
<tr>
<td>Statutory/Constitutional Invalidity</td>
</tr>
<tr>
<td>Public Service Commission</td>
</tr>
</tbody>
</table>

¹ Does not include other appeals, original writs, or Florida Bar matters.
² Indicates pending cases as of October 1, 1983.