PLRI Public Law Research Institute

Reducing The Costs Of Litigation

Appeals

by Kim Tung

Overview: Events of Litigation

What are the costs of litigation? David M. Trubek the author of *The Costs of Ordinary Litigation* breaks down litigation into "events" to answer this question. Through a study that randomly sampled civil cases from federal district and state courts, data has been complied and broken down into categories or stated differently into "events of litigation." [1]

The study's data focuses on an attorney's time spent on a case from pre-trial, to trial, and if applicable, through appeal. The data analyzed has been put into the "events of litigation" in average percentage terms as follows:

Average Percentage of Lawyer Time Devoted to Activities:

(Average of all cases sampled.)

Conferring with Client	16%	Discovery	16.7%
Factual Investigation	12.8%	Settlement Discussion	15.1%
Pleadings	14.3%	Legal Research	10.1%
Trials and Hearings	8.6%	Appeals/Enforcement	.9%
Other	5.5%		

The Trubek study suggests that lawyers spend most of their time on conferring with their clients, discovery, settlements, and pleadings. If the assumption that the amount of time devoted to an event is directly related to the cost of an event, then logically, efforts to reduce the costs of litigation should focus on these areas. Therefore, following this assumption, a significant focus on the costs of trials and/or appeals may not be effective because these activities do not make up a large portion of an attorney's time.

My paper focuses on the appeals "event." Even though Trubek's article suggests that appeals are not a significant part of an attorney's time, the appeals section is still significant in reducing litigation costs because the proposals raised significantly reduces other costs not associated with an attorney's time. Therefore, hopefully the papers will provide catalysts for debates and solutions.

Court of Appeals

What is wrong with the appellate system? Why does it cost so much, but run so slowly? "The traditional appellate process in America involves the presentation of an appeal by counsel through extensive briefs followed by formal oral argument. This method is both expensive and time consuming for counsel and the court." [2]

Before pursuing any changes to the appellate system, one must ask if the appellate system is the area desired or necessary to effectuate the goal of lowering litigation costs. The Trubek article, Costs of Ordinary Litigation, outlines in percentage terms the average time spent by an attorney on each activity of the litigation process. [3] Trubek's study suggests that the greater percentage of time spent on an activity is directly correlated to its costs. [4] If one follows his line of reasoning then the need to change the appellate system may seem unnecessary because under his research the appeals activity only encompasses .9% of an attorney's time. [5]

But stepping back and looking at the system as a whole, Trubek's study only applies to the time devoted by an attorney. It does not encompass: court fees, court resources, court time, transcript costs, cost to the litigants, and costs that will be saved in the long run due to the multiplicity effects of today's changes (and other costs). The goal in change is to hopefully reduce litigation costs across the board and not to limit it to an attorney's time spent on a case. Therefore, Trubek's article does provide an interesting point, but the point cannot be well taken due to other areas in which costs can be saved.

In order to find cost saving solutions, one must look to the problems of the appellate system. Studies have found that the greatest problem in the delay of an appeal is the case backlog faced by many of the state appellate courts. [6] The primary reason for backlog was the increase in the number of appeals filed. Other reasons were the short staff that was not ready for such and increase in case load. [7] Faced with increasing case loads, courts have sought ways to eliminate or to compress steps in the appellate process in order to achieve greater efficiency. The following will discuss some of the more popular proposals aimed at speeding the appellate system, and in turn, hopefully to reduce the costs associated to the appellate process. These proposals include the elimination of oral argument, a limitation on court briefs, and a program for settlement conferences.

Elimination of Oral Argument?

In the past, most appellate judges had desired the use of oral argument is every case, but today, oral arguments have been shortened and even eliminated in some cases to foster judicial expediency. The elimination of oral argument is a proposal aimed to cure the "bottlenecks" of the appellate court system. The simple logic in reducing costs is that if time is reduced then costs are reduce. So, if oral arguments are eliminated then the increase in time due to its elimination can be allocated to decide more cases and reduce costs. The following arguments point to why oral arguments should be eliminated or at least modified to expedite the appellate process.

Before one can eliminate the oral argument process, one must ask what is the value of oral argument in the system today? [8] The view that oral argument is a valuable and essential part of the appellate process is being questioned by an increasing number of commentators. [9] If the value does not out weigh the cost benefits then should oral argument be eliminated from the appellate process? One such commentator is Robert J. Martineau the author of *The Value of Appellate oral argument: A Challenge to the Conventional Wisdom*. Like his fellow commentators, he believes "[t]he heart of the criticism is a realization that, in many if not most cases, oral argument adds little or nothing to the judge's understanding of a case" that has not been presented in the briefs or record. [10] "Simply stated, oral argument is not cost-effective" because it is a repetitive [11]device.

Martineau's article states that the "[d]iminution of the value of oral argument is based on two separate but related contentions. [12] The first is expressed by Chief Judge Ruggero Aldisert of the Third Circuit. [13] "He compares the time judges and their staffs work with briefs in an individual case with the time spent hearing the oral argument--usually less than an hour for both sides combined--and concludes that briefs have a far greater impact on the decisional process than oral argument." [14] A second point is that if the briefs are poorly prepared then the justices must look to oral argument to understand the case. But the attorneys who wrote the briefs will not be able to better explain their case any better orally. Therefore, oral argument "will be a waste of time." [15]

The second contention which has been recently expressed by several appellate justices is that "oral argument has no significant effect in most cases, and that there is no substantial difference in the outcome of cases argued orally and those decided only on the briefs." [16] Since justices study briefs and preargument memoranda in hopes of deciding cases without the aid of oral argument, oral argument in its present form of practice is not a persuasive tool in decision making.

The above logic may point to the devaluation of the oral argument, but it is too extreme to say that oral argument is not an effective tool to change a justices' decision. Undoubtedly, oral arguments have persuaded justices before to change their ruling.

Another issue in determining the value of oral argument must also be considered in light of an attorney's ability to make an effective oral argument. Some judges have pointed out that "many, if not most, appellate attorneys do not use the opportunity for oral argument [effectively]. There are many possible explanations for this including that they have not been trained properly, they are not aware of the different nature of oral argument today compared to several decades ago, and they do not handle a sufficient number of appeals to become expert at it." [17] If this is true, then oral argument is a tool that attorney's do not know how to use, and without the knowledge to use the tool, oral argument is just a cumbersome and costly procedure of the appellate process. Yet before this extreme view is accepted, on a realistic plane should one expect the average attorney to effectively respond to unanticipated questions from memory? Justice Jackson who is generally recognized as one of the best appellate advocates of his time gave a realistic picture of the hard facts of oral argument:

I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I planned--as I thought, logical, coherent, complete. Second was the one actually presented--interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night. [18]

The author of this article believes that this statement gives insight to the role that oral argument should play in deciding cases. His criticism of that role follows:

Should the parties' rights and the development of the law turn upon a precise phrasing of a question and the attorney's understanding of that question, or upon the attorney's ability to recall relevant portions of the record or of statutes or cases, or upon the attorney's immediate response and the judges's understanding of the reply? In all likelihood, there is bound to be misunderstanding of the question or the response, or the attorney will fail to recall the precise portion of the record or the precise language of a statue or opinion that would supply the best answer to the question. [19]

"Consequently, oral argument, *rather than being an excellent means of communication, is in fact a highly unreliable one, at least in its present format*." [20](Emphasis

added.) Logically, it follows that the lack of clear communication between attorney's and the justices are highlighted to point out the inefficiencies of the system. Because such training, human error, and differences in interpretation are difficult to correct, one might suggest that elimination of oral argument will correct the system at a lower costs than trying to improve the system through training and both attorneys and justices alike. Therefore, to advance the saving of court costs, the analysis points to the fact that oral argument should be eliminated from the appellate process. Of course, to preserve fairness, the system may opt to adopt a screening system similar to the one above in which provides oral arguments only when "necessary" to administer justice in a fair fashion.

The arguments are not all one sided. There have been efforts to keep oral argument in the appellate process. Yet the advocates of oral argument do not disagree with the points stated above, but they feel that oral argument provides a sense of fairness and the fulfillment of "your day in court." [21] Therefore they feel that changes should be implemented in the system to accommodate the existing problems.

"One proposal would provide unlimited or lengthy oral arguments and eliminate briefs or replace them with short typewritten memoranda. Another proposal would eliminate the written opinion, in favor of an oral opinion from the bench. The final proposal would also eliminate the written opinion, but instead of an oral opinion, it would be replaced by an order of affirmance." [22]

Because of the need for efficiency balanced with the need for fairness an alternative to eliminating oral argument has been proposed. This alternative may simply be described as a discretionary oral argument. The "alternative would be to have the case assigned to a panel of judges. The panel would read the briefs and record with the intent of deciding the case based only on the written material." The panel would then grant oral argument to the case only if the justices concluded that oral argument was necessary to decide the case properly and fairly. By using such an alternative, "oral argument would often be decisive, but the number of cases requiring oral argument would be substantially reduced," [23]and would therefore would shift the saved time to decide more cases.

The article, *The Value of Appellate Oral Argument* by Robert J. Martineau, has offered a structured proposal on how a court should effectively carry out a new system which screens cases for oral argument (or discretionary oral argument): [24]

"The threshold question is not whether oral argument is necessary, but whether the judges to whom the case is assigned need any additional information from counsel concerning the facts, the relevant law, or counsel's view on matters relating to the case." [25] "Since only the judges assigned to decide each case on the merits can determine this threshold question, there is no need for preliminary screening of cases for oral argument by a screening panel or staff." [26] The judges assigned to the case should read the briefs from the standpoint of whether the briefs contain everything necessary for a "reasonable and fair" decision on the merits or whether anything additional is necessary from counsel. [27] The briefs should also contain a section in which the attorney states his or her view on whether oral argument is necessary or desirable, and if so, the reasons why.

If the initial reading of the briefs "or subsequent work on the case indicates that there are questions, ambiguities, or general concerns that the judges want counsel to address, then a decision should be made as to how that information can best be obtained." [28] The justices would have the options to solicit written comments or some type of oral presentation such as telephone or in person meetings. "The written response could be a letter, a memorandum, or even photocopies of portions of the record or other documents. Once initial response has been reviewed, a decision should be made as to whether a session with both counsel and justices is necessary." [29] After such requests the judge deciding the case will either grant or deny oral argument from the briefs and responses before him. As long as, the justice believes that a fair decision can be obtained without oral argument the case will be decided on such material presented. The author believes that the advantages of first seeking responses as stated above are twofold:

First, the information can be obtained in a short period, usually no more than seven to ten days, and it does not involve the delays inherent in scheduling cases for oral argument. Second, the procedure avoids one of the major weaknesses of oral argument (i.e., spontaneous responses) by the attorney without time to prepare a well-though-out response to the query. [30]

The above arguments if implemented correctly in the appellate court system would provide a lesser turn around time due to the elimination of oral argument.

Finally, this article has also presented a proposal for revised format for oral argument. The author believes that the highly formalized format of oral argument may have been appropriate in the past, he feel that such is no longer suitable for today's high-volume appellate courts. [31] The author starts off by describing the format of a highly structured and typical oral argument. [32] For oral argument to play a meaningful role in today's courts, "its format must be revised to reflect the purpose it now serves, which is to allow the judges to question counsel about the case." [33] The article points to Judge Albert Tate of the Fifth Circuit in describing today's oral argument. In advising attorneys for oral argument, the judge suggests that the attorneys view oral argument as a "court conferences in which counsel has been invited to assist the judges in deciding the case." [34]

The revised format would follow Judge Tate's view of conferences rather than an adversarial system of argument. The author states that the arrangement would be revised where the "judges would sit on one side of a large conference table with the attorneys seated across from them. Both the judges and attorneys would have their files, records, and books on the table or nearby for easy consultation." [35] The article suggests that this new arrangement would be conducive to a "free-flowing" discussion between the judges and the attorneys. The judges could address questions to either attorney. When needed the attorneys could respond immediately to the case at point. This study estimates that this discussion due to advance preparation and its argument structure would in most cases not exceed thirty minutes in each case. [36]

To create more structure in the conferences, the proposal allows the judges to provide an advance sheet to the attorneys of the questions to be asked. "Even twenty-four hours advance notice would be preferable to the present system in which the attorneys are presented with questions for the first time in court. A far more meaningful

discussion can take place if the attorneys are prepared for the issues the judges intend to raise." [37] The format proposed above would be more suitable than today's formal format because it is "a relic of a bygone era when oral argument served a totally different purpose than it does today." [38]

Not only does the elimination of oral argument save time and resources of the courts, but it also saves travel expense for attorneys to travel to and from the court. Again, the question comes down to whether saving costs is more important to the value of fairness and "your day in court." Or is there a middle ground that can be reached as in the above proposal, but unless oral argument is eliminated or restructured as the articles suggests, the traditional role of oral argument in the appellate process will continue to be no more than a waste of time and resources of the courts and attorneys alike.

Brief Limitation

Another idea that has been "thrown around" is the limitation of briefs. The following is a case study of an experimental program to expedite appellate trials in Sacramento's third district court of appeal where limitations on briefs to the current system was tested in the program. [39] Sacramento's program believes that one approach to streamline the appellate process is to reduce both the maximum permissible length of briefs and the time allowed for briefing. Because of these limitations, the court also schedules the case for accelerated handling which involves a decreased emphasis on oral argument. The court's system also encourages waiver or eliminates oral presentations entirely to expedite the processing of cases. (oral argument analysis is referred to above.) The expedited features that the Sacramento court decided to adopt were:

Each party's opening brief was limited to ten pages, double spaced, exclusive of the statement of facts. No reply brief was permitted. Appellant's brief was due twenty days from the date of the scheduling order placing the appeal within the expedited procedure. Respondent's brief was due within twenty days of the filing deadline for appellant's brief. [40]

The program would be offered to parties after an unsuccessful settlement conference or negotiations. The court did not set any specific criteria to choose which cases would be eligible for this expedited procedure. "Instead, the screening was done on a case-by-case basis by the judge presiding at the settlement conference. Because the court did not have rule making authority to require cases to follow the expedited procedure, the program had to be voluntary, with counsel stipulating acceptance of the limits on briefing." [41] Once stipulations were received, the court set a scheduling order setting the filing dates for the briefs and the date for oral argument. "Expedited appeals were set on special, twice-a-month calendars of not more than six expedited appeals each. The separate calendar facilitated scheduling of the expedited appeals and emphasized the expedited procedure as a separate and distinct alternative track." [42]

Due to the short period of the program, a single attorney was assigned to each case. The attorney's duty was to review the record, read and analyze the briefs, and conduct any additional research. His work product would be a draft memorandum opinion that would be circulated to the panel assigned to the case usually one week before oral argument. [43]

"One of the threshold questions about an expedited program concerns its scope--which cases are considered appropriate for expedited handling and their frequency in a given court." [44] The program in Sacramento was directed to relatively straightforward cases that presented a limited number of issues largely governed by existing law. The court believed that such cases could be fully presented, considered and decided fairly with the limited briefs and informal oral arguments within a short period of time.

During the first year of study, the cases that were expedited covered a wide range of subjects from contracts and torts to tax, but the one common characteristic was not the legal issues involved, it was the number of issue presented (usually one or two issue cases). In that year, fifteen percent of civil appeals were resolved without oral argument. [45]

During the first twelve months, 107 cases were handled under the new program. The counsels were able to fit their briefs in the twenty page limit and filed them on time. The data gathered showed that the average processing time for the briefing process was about 90 days which was a big time saver compared to the old average of 247 days. This result showed an overall reduction in disposition time (time from notice of appeal to decision) of just over eight months (261 days) for the expedited cases as compared to the almost 14 months (406 days) for the old system. [46] (Refer to Chart on the following pages) Therefore, this study clearly shows that such a proposal will decrease the time of an appeal.

One critic of the study believed that such a speedy system would adversely affect the quality of review. "The experience with the Sacramento program suggest that not only was the quality of the process not being sacrificed, but that the procedure may even have enhanced judicial review." [47] According to the members of the court, the "tightness" of the briefs lead to a greater clarity in the presentation of issues. The page limitations forced the attorneys to be more concise and focused on more specific and relevant issues. The limitations weeded out unnecessary and frivolous issue that would be raised without the program. [48]

The study showed that even though restrictions were placed on the length of the briefs, the attorneys were satisfied with their ability to present their cases to the court. Both sides felt that even with the restrictions their key objectives were delivered to the court. Attorneys indicated that their own briefs generally met the objective better than their opponent's briefs. [49] Nevertheless, most of the lawyers saw the opposing side's briefs as meeting basic objectives." [50] The attorneys of the program viewed the limited briefs as "not only achieving basic litigation goals, but also as providing a source of time savings." [51] More than half of the attorneys in the program spent less time in briefing than under the old system, but did not lower the quality of their briefs. [52]

In all the program was a success in lowering the time from notice to decision. So, how did time saving translate to lower costs to the system? The study feels that because

the expedited program was designed to affect a major aspect of case preparation and quicker turn around time the ultimate cost savings would be to litigants and court resources. The study did not reveal specific numbers to the court cost reductions, but data collected from the private attorneys revealed that the "average estimated savings to the litigants was $1053, with a low figure of $100 and a high of $3500." Further data supports the reduction in fees and costs due to the shortened briefs:

The size of the cost savings predictably depended on the overall time saved by attorneys. The greater the overall time that was saved, the greater was the cost savings to the litigant. ***The data also indicated that the ultimate source of the cost savings was the reduced brief writing time.*** Those attorneys who spent "somewhat less" time on briefing as compared to what they would have spent under normal procedures claimed a cost savings of $900. Those who spent "much less" time on briefing claimed an average cost savings of just over $1900. [53](Emphasis added.)

Because of the time saved in writing a shorter brief, the savings of billing were passed onto the litigants. Yet the question would still arise to whether or not attorneys would like to "bill" their clients less. In the conclusion, the study outlines the major consequences after a one year study of the program:

(1) The new method of presenting cases on appeal is feasible. The requirements imposed by the new procedure had been met without any disruption of the court's normal work flow.

(2) The length of time required to resolve cases is considerably less under the new procedure, with overall disposition time thirty-three percent loss for the expedited cases.

(3) The attorneys view the program positively. They saw several advantages--speedy case resolution, less time required by counsel in and out of court, and monetary savings to litigants. [54]

By looking at the case time, modification to current procedure of briefs and of oral argument as seen above provide practical solutions in lowering costs and clearing the "bottlenecks" of the appellate system.

Settlement Conferences

Another proposal has been to implement a mandatory settlement conference program into the California appellate court system. Case studies in Missouri and California have been done on the appellate settlement conference program that will shed light on the topic.

California's Appellate Study [55]

A study closer to home by Sheila Prell Sonenshine point to the success of an appellate settlement program in Division Three, of the Fourth Appellate District of California. Her article *Real Lawyers Settle: A Successful Post-Trial Settlement Program in The California Court of Appeal* outlines the success of the program.

This division of the appellate court began operation in 1983 with 353 cases awaiting decision. The backlog and work load far exceeded the projections of the court. The court tried aimlessly to reduce its backlog, but in spring of 1988 the court finally concluded that "the demand for justice" was for more than the court could supply. [56] In response to the backlog, the court implemented an aggressive settlement program. The settlement program implemented had no set rules or forms. The program just followed an overall policy of trying to settle pending civil cases with the use of the judge as an mediator and as the instrument to foster settlement. Even though some settlement conferences were voluntary, the majority of cases that went to settlement were advanced by the judges discretion. The judges increased involvement and flexibility due to the lack of rules in the process of the settlement conferences proved to be very effective.

The following outlines the success and positive outcomes of the aggressive settlement program:

Originally, approximately one-third of our civil cases participated in settlement conferences; some were voluntary, others were mandatory. As the program continued, only one aspect changed significantly: More cases were ordered to settlement conferences. As the programs' success became apparent, the guidelines were expanded to accept more unilateral requests for conferences. We also increased the number of post-briefing mandatory conferences. Eventually, nearly 95% or the civil cases participated in a settlement conference. [57]

The court felt that the results were "startling." In the program's first three years, the court settled 40% of the cases which was approximately 400 that participated in a settlement conference. [58]

The chart below shows the progress of the program from before its inception till now.

Short Chart of Success:

Appeals Pending (all per authorized justice)

Fiscal Year Basis	Number Pending	Cases Settled
June 30, 1988	170	
September 30, 1988	169	
(in state next highest was 130)		
December 31, 1988	165	
March 31, 1989	163	104
March 31, 1990	125	130 ('89-'90)
July 1990	109	109 ('90-'91)
July 1991	113	45 ('91-8/31)

Since the program's inception in the spring of 1988, the number of appeals have increased, but due to the success of the settlement program the number of pending appeals have decreased significantly.

The settlement program was first unwelcome by the lawyers and judges who simply felt that the program would not work. They felt that a settlement conference would not be laudable due to questions such as: Why would people settle when success was already theirs? Or Why would anyone compromise a summary judgment or a multimillion dollar jury verdict? Or "How could a settlement take place before briefing, without the record in place--or after the briefs were paid for and the positions cast in concrete?" [59]

The court's program provided answers to these questions. The court felt that it did not matter whether the case was fully briefed, or whether it was a pre- or post-trial judgment. The type of case was also of little significance. "What does matter is the individual conducting the conference. There is a direct relationship between the judicial officer serving as the settlement judge and the chances for success." [60] But in a short time, the concerns of the program were vanished as the success the of the program became known.

What caused the success of the program? The court felt there were a "myriad of reasons" which lead to their success, but the most important factor found by the court was their effort in insisting that the lawyers meet together "with either a justice from our court or a pro tem trial court judge." [61] But unlike other programs, the court was more aggressive in its conferences. The conferences required mandatory attendance of the litigants' and that of the insurance carrier, if applicable. [62] Through this aggressive approach the court further found that "in many instances this was the first time the litigants felt they had an opportunity to tell their story and actually communicate with the judge." [63] The court was also not shy in calling all other necessary or relevant persons of the case to a conference. This approach lead to more efficient process because such conferences "many times [had] resulted in settling companion cases not yet filed or matters still pending in the trial court." The judges got "down and dirty" in trying to make the program work. The court's involvement was further described:

We went behind the actual appealed judgment to examine the underlying issues. For example, we might scrutinize the chances of success for retaining a summary judgment and then examine the chances for victory if the summary judgment were reversed. [64]

Yet, even with such involvement within a case, the court did not loose its posture because the court was "mindful not to encourage settlement for settlement's sake." [65] In answering another one of the above doubts of the system, the program did not reward totally unmeritorious claims just because a notice of appeal was filed. Even under this aggressive program, many cases were settled simply with the dismissal of the notice of appeal.

In addition to the success of the settlement program, the program also served as an educational process to the legal system. Many lawyers did not realize what was necessary for a successful appeal. The program educated them on the importance of an adequate trial record, and the lawyers were surprised to learn that 93% of the cases up for appeal are affirmed. Once the lawyers learned the concepts of substantial evidence and standards of review, the pending appeal was resolved. In addition, the attorneys learned that an appeal is not a second trial which has led to less attorneys willing to bring suits forward to the appellate level. [[66]]

Another realization for attorneys and litigants were the big costs for an appeal. "Often a party cannot afford to win on appeal because the cost is prohibitive." [67] Because a victory at the appellate level may result in a new trial, the new trial will most likely be followed by another appeal. This process would create a cyclic cycle of unwanted costs. In addition, the awards gained in "a new trial is often less than the amount spent to achieve what is perceived to be victory." [68] Therefore, the "same factors that motivate a pre-appeal settlement induce parties to settle on appeal. The litigants wish to conclude years of costly litigation." [69]

Another factor to the success of the program is found in the court's opinion that a case is easier to settle at the appeals level than at the trial stages of litigation. "At the appellate level, the facts have been decided. The attorneys understand their positions better, or more realistically. The records have been reviewed and the precedent

researched. The bravado associated with the filing of a notice of appeal or responding thereto has given way to an assessment of the reality of prevailing." [70] This logic is the "end game" of the logic found in trial court settlements. At the trial court level, the closer to trial or to "the moment of truth, the better the chance of a realistic compromise" is found. [71] Because the "truth" and the reality of the outcome is known at the appellate level, the parties have already reached "the moment of truth" and are more willing to settle and to lower their costs.

In the conclusion of the study, Division three, of the Fourth Appellate District concluded with some words of wisdom about the settlement program:

There is a time and place for everything. Our appellate courts should not become houses of alternative dispute resolution. However, we should foster settlement as one facet of the process of delivering justice to our litigants. Lawyers, in representing their clients' best interests must appreciate the benefits of settlement and take pride in these results. Real lawyers win; real lawyers settle. [72]

Because of the success of the program, division three conveys the attractiveness of the settlement program, but at the same time, it warns the court system not to rely entirely on one solution. The settlement process is just one tool of the appellate system to foster justice, and the tool may not be the best for every situation as the court here applied it to only civil cases.

The short run of this program is effective, but the long run may be even more effective. The more the judges and lawyers become comfortable with the system the more streamlined the system will become in the future thereby speeding up the process. The study shows that the more the lawyers are educated on the realities of the appellate system the realities and practicality will deter the increasing use of the appellate system. Furthermore, the increased knowledge of the system will lead attorneys to use the appellate system in a more efficient manner.

This study not only helps to reduce the cost of today, but its education of the system will leader to further reductions in the future. In all, the aggressive settlement conference program of shows that with enough effort by all parties (the judges, litigants, and attorneys) the backlog may be reduced and the costs to the court and the litigants can be significantly lowered. Therefore, the legislature should look at this California case study in determining how settlement conferences may be implemented and possibly made mandatory in the system in certain cases ("There is a time and place for everything").

Case Study: Missouri Court of Appeals [73]

Aside from California other forums have also looked towards settlement conferences as a means to reduce their increased case load and backlogs. The case study on the Missouri Court of Appeals further shows that the settlement conference is an effective tool in the fight against increased costs and litigation.

The Missouri Court of Appeals for the Eastern District is located in one of the states largest metropolitan centers, St. Louis. The population is approx. 2.2 million and like most state systems this is an intermediate court. Missouri established the a settlement program due to the problems faced by increased filings.

In the Missouri program, an active judge of the court is released from one-half to two-thirds of the usual case load to administer the settlement conferences and also performs post-conferences follow-up work. Within one week of the filing of an appeal, the settlement judge screens the most recently filed civil cases to determine matters appropriate for settlement. The judge screens the cases by reviewing a one-page statement of the case and either the motion for new trial or a list of issues to be raised on appeal. The one-page statement is required by the state when filing a notice of appeal.

Once a case has been screened for settlement, the judge contacts the parties on record and sets a settlement conferences date in his chambers in 3 to 4 weeks subsequent to the call. The letter points out that clients may come to chambers but cannot participate in the conference. Also, the settlement judge will be disqualified from any further participation of the case if it does not settle. The court may suspend the deadline for the filing of briefs while the settlement is going on.

In the conferences, the judge serves as mediator to facilitate settlement between the parties. The judge may also present acceptable offers and may present his view of how the court is likely to decide the case. The judge may also hold candid discussion with an individual attorney on the side. Most of the conferences lasted one-half hour and the more complex matters where about an hour.

After the conference, if the parties orally settled during the conference or if the possibility of settlement exists, the judge retain the case on the settlement docket. If not, the case returns to the regular docket. The judge will follow up by seeing if the attorneys have reduced their agreement to writing. If the case doesn't eventually settle then it is returned to the regular docket.

The purpose of the program is to reduce the number of cases submitted for full appellate review by settlement. Settlement would reduce the time need for a full appeal and reduce the costs of transcripts, briefs, and oral arguments. In turn, the reducing of time and resources needed for such court functions would translate into a saving of costs for the court and the litigants.

The program reached its goal. Missouri's program was a success because 41% of the cases were settled during the time of the study, and the settlement program resulted in a decrease in the time of an appeal from the regular 332 days or ten months to less then half the time at 130 days with the settlement program. Not only did this lessen the time and costs for attorneys, but it also reduced the time needed for Justices to decide a case. The data reveal that most Judges in the program resolved the same

number of cases in about two-thirds or one-half of the time normally required without the settlement process. The above data reveal that the program was a great success in providing efficiency and lower costs to both the parties and the court.

Interestingly, the 41% rate of settlement is very close to the California rate of 40%. Yet, there is a significant difference in the two models. The difference in the Missouri program is that there is no client presence during the settlement conference. Their study reveals that at the appellate level, the exclusion of clients from participation in the settlement process are not necessary because the issues usually involve more technical legal questions than at trial. Such understanding of legal technicality is best served by attorneys and not clients.

But the two studies do point to the same factor as part of the success of the program. The Missouri program also felt that the Judge's increased involvement in promoting and controlling the settlement conferences between the attorneys did foster an increase toward settlement. In all, the 41% settlement rate has decreased the backlog of the Missouri system and have lowered other court costs in the process. Most importantly, the two studies have shown that settlement conferences work as long as the Judge or Justice has a substantial role in the process. The solution to a successful settlement program is quite obvious.

Conclusion

The above proposals should be looked at carefully. The American system of justice is not a stagnant one, but one made up of dynamic rules and dynamic people. It is the duty of the people of the system to change the rules to fit the changing times. The above suggestions and cases studies have concluded that oral argument, brief limitations, and settlement conferences are viable solutions for California's goal in trying to lower litigation costs. Such reduction of time, costs, and a 40% settlement rate is nothing to laugh at. In addition, one important lesson has been learned. For all of the above proposals to work effectively, the justices must take a more aggressive attitude in implementing, improving and enforcing such change. No system is perfect, but the above ideas are a good start in reducing the immense backlog of California's Appellate system. If the proposals above are used, then they will provide a strong base in which future change may be built upon. In any case, changes must occur to correct the problems of today. Of course there are dangers to changing the rules, but nothing risked is nothing gained.

Reducing the Costs of Civil Litigation
Appeals

Bibliography

1) Joy A. Chapper & Roger A. Hanson, *Expedited Procedure for Appellate Courts: Evidence From California's Third District Court of Appeal*, Symposium: The Appellate Judiciary, Maryland Law Review, (1983).

2) David A. Churchill, *Report of the Federal Contract Claims and Remedies Committee on Ways of Expediting Appeals Before the Boards of Contract Appeals*, Public Contract Law Journal, (August 1986).

3) Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, Iowa Law Review, 1986, p.22.

4) David M. Trubek, Austin Sarat, William L.F. Felstiner*, The Costs of Ordinary Litigation*, UCLA Law Review Vol. 31:72 (1993).

5) Harry N. Scheiber, *2020 Vision: A Plan for the Future of California's Courts*, Southern California Law Review, July (1993).

6) Susan A. FitzGibbon, *Appellate Settlement Conference Programs: A Case Study,* Journal of Dispute Resolution, (1993).

7) Sheila Prell Sonenshine, *Real Lawyers Settle: A Successful Post Trial settlement Program in the California Court of Appeal*, Loyola of Los Angeles Law Review, Vol 26:100 (June, 1993).

Notes

[1] David M. Trubek, *The Costs Of Ordinary Litigation*, UCLA Law Review, Vol. 31:72 (1983). (return to text)

[2] Joy A. Chapper & Roger A. Hanson, *Expedited Procedure for Appellate Courts: Evidence From California's Third District Court of Appeal*, Symposium: The Appellate Judiciary, Maryland Law Review, (1983). (return to text)

[3] David M. Trubek, Austin Sarat, William L.F. Felstiner*, The Costs of Ordinary Litigation*, UCLA Law Review Vol. 31:72 (1993). (return to text)

[4] *Id.* (return to text)

[5] *Id.* (return to text)

[6] David A. Churchill, *Report of the Federal Contract Claims and Remedies Committee on Ways of Expediting Appeals Before the Boards of Contract Appeals*, Public Contract Law Journal, (August 1986). (return to text)

[7] *Id.* (return to text)

[8] The following arguments have been limited to the value of oral arguments to the decision making process. Other values such as the public importance of a case, accountability to the public, 'your day in court', or "perhaps the legitimating aspect of oral argument that dictate that oral argument be held in a substantial number of cases without regard to whether it aids in the decision making process or not." This last issue may encompass the same arguments in this paper's analysis of appeal as leave or as by right. (return to text)

[9] Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, Iowa Law Review, 1986, p.22. (return to text)

[10] *Id.* (return to text)

[11] *Id.* (return to text)

[12] *Id.* (return to text)

[13] *Id.* (return to text)

[14] *Id.* (return to text)

[15] *Id.* (return to text)

[16] *Id.* (return to text)

[17] *Id.* at 24. (return to text)

[18] *Id.* (return to text)

[19] *Id.* (return to text)

[20] *Id.* (return to text)

[21] *Id*. at 25. (return to text)

[22] *Id.* (return to text)

[23] *Id.* at 23. (return to text)

[24] *Id.* at 29-32. The following is a summary of the case selection process and its change of the oral argument structure to fit the selection process. (return to text)

[25] *Id.* (return to text)

[26] *Id.* (return to text)

[27] *Id.* (return to text)

[28] *Id.* (return to text)

[29] *Id.* (return to text)

[30] *Id.* at 30. (return to text)

[31] *Id.* (return to text)

[32] Following describes what the author defines as a formal oral argument: [W]ith little variation regardless of whether the argument is fifteen or sixty minutes per side. The

judges sit at a raised bench while the attorneys sit at tables in from of the bench . . . the two parties are separated by a lectern. The appellant, reserving a small amount of rebuttal time, begins the oral argument with he formal statement 'May it please the court' and an identification of the attorney and the client. The appellant speaks within the allocated time, unusually spending a good portion of it responding to questions from the judges. The appellee then presents an argument following the same pattern. Then a rebuttal is usually made in no more than five minutes. Each attorney concludes by stating the relief. The attorneys address only the court, never each other, and neither speaks while the other is arguing. The only major variable is the number of questions asked by the judges. (return to text)

[33] Martineau, *The Value of Appellate Oral Argument* (Supra.) (return to text)

[34] *Id.* at 31. (return to text)

[35] *Id.* (return to text)

[36] *Id.* (return to text)

[37] *Id.* at 32. (return to text)

[38] *Id.* (return to text)

[39] Joy A. Chapper & Roger A. Hanson, *Expedited Procedure for Appellate Courts: Evidence From California's Third District Court of Appeal*, (supra.) At 702. (return to text)

[40] *Id.* (return to text)

[41] *Id.* at 703. (return to text)

[42] *Id.* (return to text)

[43] *Id.* at 704. (return to text)

[44] *Id.* (return to text)

[45] *Id.* at 705. (return to text)

[46] *Id*. at 706. (return to text)

[47] *Id.* at 709. (return to text)

[48] *Id.* (return to text)

[49] *Id.* at 714. (return to text)

[50] *Id.* at 715. (return to text)

[51] *Id.* (return to text)

[52] The oral arguments used in the Sacramento program were less formal and similar to the one proposed in the oral argument section with the exception that he the setting was still in the courtroom. (return to text)

[53] *Id.* (return to text)

[54] *Id.* at 720. (return to text)

[55] This study is taken from: Sheila Prell Sonenshine, *Real Lawyers Settle: A Successful Post-Trial Settlement Program in The California Court of Appeal*, Loyola of Los Angeles Law Review, (June 1993). (return to text)

[56] *Id.* at 1002. (return to text)

[57] *Id.* (return to text)

[58] *Id.*; this was a big success for the court because 70% of the case load were civil and such cases usually took longer to review. (return to text)

[59] *Id.* at 1003. (return to text)

[60] *Id.* (return to text)

[61] *Id.* at 1004. (return to text)

[62] *Id.* (return to text)

[63] *Id.* (return to text)

[64] *Id.* (return to text)

[65] *Id.* (return to text)

[66] *Id.* (return to text)

[67] *Id.* (return to text)

[68] *Id.* (return to text)

[69] *Id.* at 1005. (return to text)

[70] *Id.* (return to text)

[71] *Id.* (return to text)

[72] *Id.* (return to text)

[73] The following information for this sub-section has been complied from: Susan A. FitzGibbon, Appellate Settlement Conference Programs: A Case Study, Journal of Dispute Resolution, (1993). (return to text)