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SEEKING BEST PRACTICES AMONG INTERMEDIATE COURTS OF APPEAL: A NASCENT JOURNEY

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I. INTRODUCTION

In early 2006, a small group of appellate court judges, law school faculty, and law students in Oregon endeavored to research whether there were identifiable "best practices"[1] among intermediate courts of appeal. The Oregon Court of Appeals faces the same challenges as many of its sister courts across the country, trying to be as productive and efficient as possible with a limited budget[2] and an increasing case load.[3] If best practices for courts similar to Oregon could be identified, the court could adopt some of these practices to maximize its performance.

Thus, we decided to form the Willamette Court Study Committee.[4] The authors (and several of their academic colleagues) committed to conduct the necessary research on best practices and write this report while the appellate court judges agreed to consult with the researchers on survey design and encourage participation among similar courts. Unfortunately, as

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contributed to the research website, http://www.willamette.edu/go/appellate_courts, and Professor James Friedrich and Greg Henselman, both of Willamette University College of Liberal Arts, for their assistance with statistical design, review, and analysis. Finally, we note that first-person pronouns in this article generally refer only to the authors and not to the judges from the Oregon Court of Appeals who were members of the Willamette Court Study Committee.

1. "Best practices" is a management concept that there are certain methods that have proven more efficient and effective over time and across large numbers of people.

2. *See generally Executive Summary: State Judicial Branch Budgets in Time of Fiscal Crisis* (Natl. Ctr. for St. Cts. 2003) (noting, among other things, that "[m]any state court systems are currently experiencing deep budget cuts, court closures, suspended jury trials, layoffs and hiring freezes") (available at http://cosca.ncsc.dni.us/WhitePapers/2003white paperExecSumm.pdf) (accessed Nov. 14, 2007; copy on file with Journal of Appellate Practice and Process) [hereinafter *Judicial Branch Budgets*].

3. From 1984 to 2003, mandatory filings in intermediate appellate courts increased thirty-four percent while discretionary filings increased 114 percent during the same period. National Center for State Courts, *Statistical Data Regarding State Courts*, 8 J. App. Prac. & Process 37, 62, 64 (2006). Presumably, Oregon was no exception to this trend. *See e.g.* Norman J. Weiner & Ky Fullerton, *Does Oregon's Appellate Court System Need Fixing?* 81 Or. L. Rev. 477 (2002).

4. The Willamette Court Study Committee was formed in January 2006 with representatives of the Oregon Court of Appeals and Willamette University College of Law to research and identify best practices that would help increase court efficiency and productivity. The Willamette Court Study Committee is composed of Judge Brewer, Judge Landau, the Honorable Walter I. Edmonds, Presiding Judge of the Oregon Court of Appeals, Professor Jeffrey C. Dobbins, Willamette University College of Law, Courtney L. Quale, J.D. candidate at Willamette University College of Law, and the authors of this article.

is true with so many questions in the field of law, we were frustrated to find that the answer to the question of whether identifiable best practices exist among intermediate appellate courts is an inherently ambivalent maybe.

The frustration starts with a review of the existing literature on intermediate appellate court performance. Although much of the relevant literature is highly impressive and serves useful purposes,[5] very little focuses expressly on best practices, or even on state intermediate courts of appeal. Moreover, we found no research that reports (1) the performance of courts during all phases of the appellate process, (2) across multiple courts, (3) according to the courts' own data, while (4) recognizing and integrating court innovations that might be influencing court performance. Rather, much of the existing literature is relatively discrete, focusing on, for example, time on appeal,[6] the role of court staff,[7] the influence of "court culture,"[8] or the adoption of specific performance mechanisms in individual courts.[9] Thus, we hope that this research will serve as a small, first step in filling this gap in the literature.

Our study builds on a recent multi-state study of intermediate appellate courts[10] by using a larger sample size (thirteen courts rather than four). By examining a larger number of courts and gathering data from all phases of the appellate

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5. *See* Carol Flango, Roger Hanson & Randall Hansen, *The Work of Appellate Court Legal Staff* (Natl. Ctr. for St. Cts. 2000) (available at http://www.ncsconline.org/WC/Publications/Res_AppSta_AppCtLegalStaffPub.pdf) (accessed Nov. 14, 2007; coy on file with Journal of Appellate Practice and Process).

6. *See* Roger A. Hanson, *Time on Appeal* (Natl. Ctr. for St. Cts. 1996) (available at http://www.ncsconline.org/WC/Publications/KIS_AppManTimeonAppeal.pdf) (accessed Nov. 14, 2007; coy on file with Journal of Appellate Practice and Process).

7. *See* Flango, et al., *supra* n. 5.

8. *See* Brian J. Ostrom, Roger Hanson & Matthew Kleiman, *Examining Court Culture*, in 11 *Caseload Highlights: Examining the Work of State Courts* 1 (May 2005) (available at http://www.ncsconline.org/D_Research/csp/Highlights/Vol11No2.pdf) (accessed Nov. 14, 2007; coy on file with Journal of Appellate Practice and Process).

9. *See e.g.* Susan Wawrose, *"Can We Go Home Now?" Expediting Adoption and Termination of Parental Rights Appeals in Ohio State Courts*, 4 J. App. Prac. & Process 257 (2002); Joel Schumm, *Expedited Appeals in Indiana: Too Little, Too Late*, 4 J. App. Prac. & Process, 215 (2002); Terry Bach, *To Expediency and Beyond: Vermont's Rocket Docket*, 4 J. App. Prac. & Process 277 (2002).

10. Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices and Procedures Can Work to Reduce Delay?* 35 Ind. L. Rev. 467 (2002).

process, we hope to advance the identification of courts' best practices based upon comparative data. Although the sample size of our study is significantly larger than the Hoffman and Mahoney study, it is still small enough that one should be careful not to overstate the validity and reliability of the results. Caution is especially critical here because we are seeking normative systems and standards. After all, the concept of "best practices" is based on the belief that there are certain methods that have proven to be more efficient and effective over time and across large numbers of people and organizations.

Our study differs from previous studies also in that we tried to minimize the filtering of data provided by the courts. We did not conduct site visits or ask court staff to choose among pre-set survey responses.[11] Instead, our survey relies heavily on numerical and narrative responses directly from the courts. Not surprisingly, this approach leads to definitional and interpretive issues.

For example, we compare court performance by measuring "efficiency" and "productivity" based primarily on self reported data. We measure a court's "efficiency" by how quickly the court processes cases from the filing of the notice of appeal to final disposition, as well as during the individual stages in the appellate process (as defined in section IV.B below). We measure "productivity" by the number of "opinions" issued by a court. We recognize that not all opinions are created equally and that appellate courts dispose of cases by methods other than issuing opinions. However, opinions and pre-argument dismissals continue to be dispositive at intermediate appellate courts, and thus, we believe that the number of opinions issued by a court is a leading, but not sole, indicator of the court's "productivity."

Because our research largely leaves to the courts the discretion to define "opinion" from their perspective, we are compelled to remind the reader of the flaws inherent in any research that relies heavily on self definition, assessment, and reporting. Participants may not have the same understanding of a term as the researchers or even one another and even if they do, an unintentional oversight may convey inaccurate data that

11. *See* Flango, et al., *supra* n. 5, at 4.

skews the results reported. Thus, one should be highly cognizant of the fact that much of the data presented here is self reported by the courts and has not been filtered, verified, or manipulated by us, except where expressly stated. Although this approach may create a risk of inconsistencies and even errors in some instances, we believe that narrative responses from courts are more likely to yield descriptions of court innovations. Because we were more interested in discovering effective and efficient practices among courts rather than ranking the courts in a competitive hierarchy, we sacrificed the authority of the rankings (which are interesting, but should not be overvalued since the comparisons are not always "apples to apples" as any court who participated in this survey will immediately recognize) for the opportunity to identify nascent best practices among the participating courts.

Despite all of the caution and limitations necessary with this approach, the results of this study demonstrate that it was well justified. The responses from the participating courts indicate that across the nation, intermediate appellate courts are actively innovating new systems for processing more appellate cases more efficiently. Courts are expanding their use of summary disposition methods, increasing the categories of cases being expedited, reformulating panels, adopting new technologies, reducing oral argument, issuing a majority of unpublished opinions, and in some cases, questioning court culture. We believe that these innovations will give rise to a nascent set of best practices that, once identified, can be adopted by courts to improve their performance even in the face of limited resources.

Analysis of the more routine data such as budgets, staffing, and case processing also proved revealing. For example:

We were unable to identify any significant statistical relationship between a court's total budget and (1) number of filings, (2) court efficiency, (3) court productivity, (4) number of legal staff, or (5) number of judges. Thus, we are left wondering what court-related data, if any, legislatures (or executives) use to determine the size of budget appropriations for courts.

We also found no correlation between court efficiency and productivity.

As a group, the courts were able to meet the ABA Standards for case processing at only one stage in the appellate process: from oral argument to issuing a decision.[12] What is interesting about this phenomenon is that this is the stage that is most within the direct control of the judges.

Also, although we identified correlations between court productivity and number of staff, as well as judicial salaries, we found few correlations with court efficiency, save for one significant exception: there was a positive correlation between the average time to process a case and the number of senior or retired judges used.

This kind of data begins to lay the foundation for a body of knowledge that can assist judges, court administrators, and others interested in optimal court performance. What should determine budget appropriations for intermediate appellate courts? Do budgets affect court performance? Would paying judges more increase productivity? Would using senior judges less increase efficiency or make matters worse? These are just a few of the questions inspired by the data summarized below. Finding answers to these questions as well as continued study of court systems and innovations may help us to identify best practices that promise to increase court efficiency and productivity in the years ahead.

II. METHODOLOGY

To conduct our research, we identified thirteen intermediate appellate courts with similar structure: Arkansas Court of Appeals, Colorado Court of Appeals, Connecticut Appellate Court, Court of Appeals of the State of Georgia, Kansas Court of Appeals, Kentucky Court of Appeals, Michigan Court of Appeals, Minnesota Court of Appeals, Nebraska Court of Appeals, the Appellate Division of New Jersey's Superior Court, New Mexico Court of Appeals, Court of Appeals of North Carolina, and Oregon Court of Appeals. Each court is in a state where there is one intermediate appellate court with predominantly mandatory jurisdiction and one court of last

12. *See* Sec. IV.B.4, *infra*.

resort with discretionary jurisdiction. Two other courts were invited to participate, but did not.

The courts completed an on-line survey developed by the Willamette Court Study Committee.[13] The survey consisted of forty-two narrative questions covering subjects such as the number of appeals filed, number and kinds of opinions issued, court budget, court staffing, length of case processing at various stages, oral argument practices, disposition of cases, motion practice, panel structure, and statutory periods and internal training, among others. The courts were also provided the opportunity to identify factors they perceive contribute to delays in case processing, as well as innovations the courts have implemented to promote efficiency. The courts were instructed to use data from 2005 in completing the survey.[14] To the extent reliable data from 2006 was also available, the courts were invited to provide it with a clear indication that it was from 2006. We did not include the 2006 data in the analysis unless it was submitted as part of a 2005-2006 fiscal or court calendar year, but all of the raw data is available for review and further study on the Willamette Court Study website.[15]

The Michigan Court of Appeals provided an oral interview instead of completing the survey on-line.[16] The Connecticut Appellate Court and the Court of Appeals of the State of Georgia completed the survey off-line, and each provided the Committee with a hard copy of the court's written responses. The Arkansas Court of Appeals initially provided a telephone interview[17] and then submitted a written survey response. Some

13. The survey instrument used in this study appears as Appendix A to this article. The authors hope soon to make both that instrument and the Survey data cited in this article available at http://www.willamette.edu/go/appellate_courts. In the meantime, all Survey data is on file with author Binford.

14. Several of the courts responded based on their fiscal or court year, rather than the 2005 calendar year. These courts include: Colorado (fiscal year July 1, 2005, to June 30, 2006) Connecticut (fiscal year July 1, 2005, to June 30, 2006), New Mexico (fiscal year July 1, 2005, to June 30, 2006), and New Jersey (court year began Sept. 1, 2005, and ended Aug. 31, 2006).

15. The survey responses provided by each individual court except the Connecticut Appellate Court and the Michigan Court of Appeals should eventually be available at the Willamette Court Study website, http://www.willamette.edu/go/appellate_courts.

16. Telephone interview by authors with William C. Whitbeck, C.J., Mich. Ct. of App. (Feb. 8, 2007).

17. *Id.*

courts, including Arkansas, New Mexico, Minnesota, New Jersey, Oregon, and Kansas, participated in follow-up communications by telephone or email.

Unfortunately, not all of the participating courts were able to provide responses to all of the survey questions. This was especially problematic with questions regarding the amount of time it took the court to process cases because so much of the analysis regarding court efficiency is determined by the time it takes to process cases both overall and at different stages. We considered whether to assign process period lengths based upon applicable statutes or ABA Standards,[18] but decided to limit the analysis to the data expressly provided by the courts and to exclude courts with missing data from any analysis where the relevant data was missing, except where expressly stated. [19] That being said, we intentionally created the survey to avoid asking the courts to collect data that was readily publicly available, as much as possible. Thus, we gathered basic informational data such as the number of judges, judges' salaries, etc., from other reliable sources. We also reviewed secondary sources regarding some court practices and factors to offer a more complete perspective of our study relative to the scholarship that existed prior. All such sources are clearly identified where the data is introduced below.

The publicly available information was integrated with the courts' survey responses and a profile was created of each court. We utilized statistical analysis software ("Statistical Package for the Social Sciences" (SPSS)) to determine whether relationships lay beneath the surface of the survey data collected. The

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18. ABA Judicial Administration Division, *Standards Relating to Appellate Courts* (St. Just. Inst. 1994) [hereinafter *ABA Standards*]. For example, Rule § 3.53(a)(i) provides thirty days for preparation of the record separate from the transcript. Rule § 3.54(a) provides fifty days for the filing of appellant's brief and fifty days for the filing of appellee's brief, and permits a reply brief within ten days. Rule § 3.55(a)(i) provides that oral argument should be set within fifty-five days from the filing of appellee's brief. Rule § 3.55(a)(iii) provides that opinions should be prepared fifty-five days from the date of oral argument, or within ninety days if it is a death-penalty case or case of extraordinary complexity.

19. For example, Arkansas does not report an average time for Stage One (as defined in section IV.B *infra*). *See* Arkansas Response to Survey Question 4. We could have substituted the ABA standard of sixty days for this time period. However, it was decided that to do so would misrepresent the data and could skew the results. Thus, we did not conduct analysis of Arkansas's data for this stage, as none was reported.

numerical survey responses were entered into SPSS. We then conducted statistical analysis to identify where correlations existed.

We conducted bivariate correlations investigating the relationships between variables using two-tailed Pearson product-moment correlation coefficients (these are the "*r*" values we report). The Pearson product-moment correlation coefficient describes the strength and direction between the variables compared to determine their value as a linear relationship. Because the sample size was relatively small, it was difficult to identify patterns of occurrence that would establish a correlation. Thus, we decided to utilize the more liberal .10 cut-off level of significance (the error rate we were willing to accept) for two-tailed tests (as opposed to 0.05 or the more stringent 0.01), while taking into consideration the probability that the results obtained would have occurred randomly (these are the "*p*" values we report).[20]

It is important to note that although we found some correlations between factors in our analysis, correlation is not causation, and there is always the potential that when examining a pair of variables, A and B, the resulting correlative relationship is actually caused by another variable, C. Although we did not conduct any regression analysis to try to control for other factors, we believe that certain resources and processes tested in this study may affect court performance, and encourage those interested in creating more productive and efficient courts to consider these correlative relationships in addition to qualitative data in conducting further research or implementing court improvements.

III. PARTICIPATING COURTS

The courts invited to participate in this study were chosen generally for their common structure to ensure that we would be able to draw proper comparisons between similar appellate courts. A general profile of each court that participated in the

20. The level of probability, or "*p*-value" of a correlation that we have selected as our standard is 0.1. A *p* value of 0.1 means that no matter how many data points exist, there is a ten percent chance that a relationship between the variables compared would be found by coincidence.

survey is summarized below. Most of the courts surveyed are relatively new (they were established in the last half of the twentieth century (except the Court of Appeals of the State of Georgia and the Appellate Division of New Jersey's Superior Court)), and relatively small (most courts have fewer than twenty judges). All of the courts are the sole intermediate appellate court for the state where they preside and are predominantly subject to mandatory jurisdiction with a court of last resort above them. As illustrated below, almost all of the judges are elected and sit in panels of three. The challenges and innovations discussed by each court in their survey responses are analyzed in section IV below.[21]

A. Arkansas Court of Appeals

The Arkansas Court of Appeals was established in 1979.[22] The court has twelve judges elected from seven districts around the state. [23] Judges are elected to the court for eight-year terms from each of those districts.[24] The judges sit in three-judge panels.[25] The jurisdiction of the court is determined by the Arkansas Supreme Court.[26]

B. Colorado Court of Appeals

The Colorado Court of Appeals is the state's single intermediate appellate court and was established in 1969.[27] The

21. The complete response of all but two individual courts is expected eventually to be available directly at http://www.willamette.edu/go/appellate_courts. The survey responses of the Connecticut Appellate Court and the Michigan Court of Appeals will not be posted on the website. The Connecticut Appellate Court submitted its response in hard copy and the Michigan Court of Appeals participated in the survey via a telephone interview, so no written survey response was submitted.

22. Arkansas Judiciary, *Arkansas Court of Appeals*, http://courts.state.ar.us/coa/index.cfm?menu=coa&page=index.html (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

23. *Id.*

24. Ark. Code Ann. § 16-12-102 (LEXIS 2007).

25. *See* Ark. Ct. App. Int. R. 1, *Divisions* (2007) (internal, unpublished document providing that "[t]he court functions primarily in four panels...of three judges each") (copy on file with Journal of Appellate Practice and Process).

26. *Arkansas Court of Appeals*, *supra* n. 22.

27. Col. Rev. Stat. § 13-4-101 (referring to Col. Const. art VI, §1, which provides that

Court of Appeals has jurisdiction in areas specified by statute, including initial jurisdiction over appeals from the Colorado District Courts, the Denver Probate Court, and the Denver Juvenile Court.[28] The Court of Appeals also has specific appellate jurisdiction over decisions that originate from state administrative boards and agencies, including the Industrial Claim Appeals Office.[29] The Colorado Court of Appeals consists of nineteen judges who serve eight-year terms.[30] The judges sit in rotating three-member panels.[31]

C. Connecticut Court of Appeals

The Connecticut Court of Appeals was established in 1983.[32] There are ten judges.[33] The judges are appointed by the governor.[34] The judges serve eight-year terms.[35] It is a court of general jurisdiction.[36]

D. Court of Appeals of the State of Georgia

The Georgia Court of Appeals is the oldest court of appeals included in our study. It was established in 1906 and has twelve judges, who sit in four divisions.[37] The court has jurisdiction

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the Colorado General Assembly can establish courts with jurisdiction inferior to that of the Colorado Supreme Court).

28. Colorado Judicial Branch, *Colorado Court of Appeals*, http://www.courts.state.co.us/coa/coaindex.htm (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

29. *Id.*

30. *Id.*

31. *Id.*

32. State of Connecticut Judicial Branch, *Appellate Court History*, http://www.jud.state.ct.us/external/supapp/apphistory.htm (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

33. *Id.* at 3.

34. State of Connecticut Judicial Branch, *Online Media Resource Center*, http://www.jud.state.ct.us/external/Media/faq.htm (indicating, in section entitled "Judges," that "the Judicial Selection Commission seeks and recommends to the governor qualified individuals for nomination as judges," and that "[t]he governor must choose a candidate from the approved list") (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

35. *Id.*

36. *Id.* ("Administration, Organization & Responsibilities").

37. Court of Appeals of the State of Georgia, *History of the Court of Appeals*,

over all appeals except those involving constitutional questions, land-title disputes, the construction of wills, murder, election contests, habeas corpus, extraordinary remedies, divorce and alimony, and cases where original appellate jurisdiction lies with the superior courts.[38] In 1996, the Georgia legislature provided that in cases where there is a dissent, the case will go to a seven-judge panel composed of the assigned division, the next division in succession, and a seventh, assigned judge.[39] Panels are rotated on an annual basis.[40]

E. Kansas Court of Appeals

The Kansas Court of Appeals is the state's single intermediate appellate court established in 1977.[41] It has jurisdiction over all appeals—both criminal and civil—from the district courts as well as original actions in habeas corpus.[42] The twelve judges sit in panels of three in locations throughout the state including a regular rotation through Hays, Garden City, Wichita, Chanute, Kansas City, Olathe, and Topeka.[43] Each judge serves a four-year term.[44]

F. Kentucky Court of Appeals

The Kentucky Court of Appeals was established in 1976 as a court of general jurisdiction.[45] However, criminal case

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http://www.gaappeals.us/history (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

38. *Id.*

39. *Id.*

40. *Id.*

41. Kansas Judicial Branch, *History of the Kansas Appellate Courts*, http://www.kscourts.org/kansas-courts/general-information/history.asp (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

42. Kansas Judicial Branch, *Kansas Court of Appeals—Purpose, Authority, and History*, http://www.kscourts.org/kansas-courts/court-of-appeals/history.asp (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

43. *Id.*

44. Kansas Judicial Branch, *Kansas Court of Appeals—Judges*, http://www.kscourts.org/kansas-courts/court-of-appeals/judge-bios/default.asp (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

45. Kentucky Court of Justice, *Courts in the Commonwealth*, http://courts.ky.gov/courts (noting that the state's four-tier court system was established by the legislature in 1975 and became effective in 1976) (accessed Nov. 26, 2007; copy on file with Journal of

acquittals and divorces are not reviewable by the Court of Appeals.[46] The court consists of fourteen judges; two judges are elected from each of the seven appellate court districts.[47] Each judge is elected to a term of eight years.[48] Judges sit in panels of three to review and decide cases.[49]

G. Michigan Court of Appeals

The Michigan Court of Appeals is the state's single intermediate appellate court created in 1963.[50] Twenty-eight judges[51] sit in panels of three on the court.[52] Each panel rotates to hear cases in the state's four different districts and there are permanent offices set up in three of the districts.[53] Judges are elected by district for six-year terms.[54] Final decisions resulting from a circuit or probate court hearing may be appealed to the Court of Appeals.[55]

Appellate Practice and Process).

46. Kentucky Court of Justice, *Courts in the Commonwealth—Court of Appeals*, http://courts.ky.gov/courts (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

47. *Id.*

48. *Id.*

49. *Id.*

50. Michigan Court of Appeals, *Annual Report* 1 (Mich. Ct. App. 2006), http://courtofappeals.mijud.net/pdf/Annual_Report_2006.pdf (indicating that the Court began operations in 1965) (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

51. Michigan Courts, *Michigan Court of Appeals—History of the Court*, http://courtofappeals.mijud.net/court/history.htm (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

52. Michigan Courts, *Michigan Court of Appeals—Frequently Asked Questions*, http://courtofappeals.mijud.net/court/faq.htm (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

53. Office of the Clerk, Michigan Court of Appeals, *Internal Operating Procedures*, 7.201(B)(2), 7.201(D), http://courtofappeals.mijud.net/pdf/clerkiops.pdf (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

54. Michigan Courts, State Court Administrative Office, *Going to Court—Which Court Do You Need?* http://courts.michigan.gov/scao/selfhelp/intro/court.htm (referring to terms in section entitled "Court of Appeals") (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

55. *Id.*

H. Minnesota Court of Appeals

The Minnesota Court of Appeals was created in 1983 to serve as the state's single intermediate appellate court. [56] The court has mandatory jurisdiction to hear all civil and criminal appeals with the exceptions of tax appeals, Workers' Compensation cases, first-degree murder cases, and state-wide election contests.[57] The court has sixteen judges elected from ten districts across the state.[58] Judges are elected for six-year terms.[59] Judges sit in three-judge panels and travel to locations throughout Minnesota to hear oral arguments.[60]

I. Nebraska Court of Appeals

The Nebraska Court of Appeals is the state's single intermediate court created in 1991.[61] The six judges who form the court sit in panels of three.[62] The Supreme Court appoints a chief judge from among the six judges. [63] The chief judge serves a renewable two-year term.[64] The court has six districts from which judges are selected.[65] Judges serve six-year terms.[66] The court travels to cities throughout Nebraska to hear appeals from

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56. Minnesota Court of Appeals, *What you should know about the state's intermediate appellate court* 1, http://www.mncourts.gov/documents/0/Public/Court_Information_Office/CourtofAppeals2007.doc (Minn. Ct. Info. Ofc. 2007) [hereinafter *Minnesota Intermediate Court*] (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

57. *Id.*

58. Minnesota Judicial Branch, *Fast Facts about the Judicial Branch*, http://www.courts.state.mn.us/page=432 (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

59. *Id.*

60. *Minnesota Intermediate Court*, *supra* n. 56, at 1.

61. Nebraska Judicial Branch, *Court of Appeals*, in *The Nebraska Judicial System* http://supremecourt.ne.gov/press/guide.shtml [hereinafter *Nebraska Court Guide*] (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

62. Nebraska Judicial Branch, *The Court of Appeals*, http://www.supremecourt.ne.gov/appeals-court/index.shtml?sub2 [hereinafter *Nebraska Appeals Information*] (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

63. *Id.*

64. *Id.*

65. *Nebraska Court Guide*, *supra* n. 60.

66. American Judicature Society, *Judicial Selection in the States*, http://www.ajs.org/js/NE.htm (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

four to six months per year.[67] The court has mandatory jurisdiction over criminal and civil appeals; however petitions to bypass the Court of Appeals and appeal directly to the Nebraska Supreme Court may be granted.[68]

J. The Appellate Division of New Jersey's Superior Court

The Appellate Division of New Jersey's Superior Court is the state's single intermediate appellate court. [69] It was created in 1947.[70] The Appellate Division has general jurisdiction over appeals from the trial courts, the tax court, and state administrative agencies.[71] The New Jersey Appellate Division is composed of thirty-five judges.[72] Each judge sits on either a two or three judge panel,[73] "and each panel is part of a three or four judge Part."[74] Judges are appointed by the governor to seven-year terms on the Superior Court.[75] However, it is the Chief Justice who assigns judges to the Appellate Division and determines which judges shall sit on each Part.[76]

K. New Mexico Court of Appeals

The New Mexico Court of Appeals was established in 1966 and is the state's single intermediate appellate court.[77] The court

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67. *Nebraska Appeals Information*, *supra* n. 62.

68. *Id.*

69. *See* N.J. Const. art VI, § III, para. 3 (establishing the Appellate Division).

70. *Id.*

71. New Jersey Judiciary, *Superior Court, Appellate Division*, http://www.judiciary.state.nj.us/appdiv/index.htm (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

72. *Id.*

73. *Id.*

74. Memo. from Edwin H. Stern, Presiding J. for App. Admin., App. Div., N.J. Super. Ct., to David V. Brewer, C.J., Ore. Ct. App. (Nov. 6, 2007) (copy on file with author Binford).

75. New Jersey Judiciary, *A Walk through the Judicial Process—Judges*, http://www.judiciary.state.nj.us/process.htm#two (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

76. Stern Memorandum, *supra* n. 74. See N.J. Const. art. VI § 3, ¶ 3 (providing for the Appellate Division), §7, ¶ 1 (providing for governor's appointment of judges to Superior Court) (LEXIS 2007); N.J. Ct. R. 2:13-2(b) (providing for Appellate Division's parts and panels) (LEXIS 2007).

77. Interview by article authors with Lynn Pickard, J., N.M. Ct. App. (May 4, 2007).

has mandatory jurisdiction over civil and criminal cases with the exception of capital cases. The court also has discretionary jurisdiction over interlocutory decision cases and administrative agency appeals, excluding appeals arising from death penalty cases or life imprisonment cases, appeals from the Public Regulation Commission, and cases involving habeas corpus.[78] The New Mexico Court of Appeals consists of ten judges.[79] By law, the judges serve in panels of three on all appellate opinions.[80] At this time, six of the court's ten judges are headquartered in Santa Fe and four in Albuquerque.[81]

L. Court of Appeals of North Carolina

The North Carolina Court of Appeals is the state's single intermediate appellate court.[82] It was created in 1967.[83] It has fifteen judges who sit in panels of three.[84] The judges are elected to eight-year terms.[85] The Court has mandatory jurisdiction over civil and criminal appeals, except for death penalty cases and utility rate-making cases.[86]

M. Oregon Court of Appeals

The Oregon Court of Appeals was created in 1969 and has ten judges.[87] The court has mandatory jurisdiction to hear all civil and criminal appeals with the exception of death penalty

78. New Mexico Court of Appeals, *Court Overview*, http://coa.nmcourts.com/about/courtoverview.htm (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

79. *Id.*

80. *Id.*

81. *Id.*

82. North Carolina Administrative Office of the Courts, *The Judicial System in North Carolina* 3, http://www.nccourts.org/Citizens/Publications/Documents/JudicialSystem.pdf (2007) (accessed Nov. 26, 2007; copy on file with Journal of Appellate Practice and Process).

83. *Id.*

84. *Id.* at 5.

85. *Id.* at 11.

86. *Id.* at 5.

87. Oregon Judicial Department, *An Introduction to the Courts of Oregon*, http://www.ojd.state.or.us/aboutus/courtsintro/index.htm (accessed Nov. 28, 2007; copy on file with Journal of Appellate Practice and Process).

cases and tax-court appeals.[88] The judges have six-year terms and run in non-partisan elections.[89] The Chief Judge is appointed by the Chief Justice of the Oregon Supreme Court.[90] The Court sits in three-judge panels to hear appeals.[91]

IV. ANALYSIS AND DISCUSSION

A. Overall Productivity and Efficiency

1. Overall Productivity

Court productivity is difficult to define, let alone measure. The difficulty in defining and measuring court productivity lies in the myriad purposes our courts fulfill in our society requiring them to handle a multitude of tasks simultaneously. Nonetheless, the primary purpose of appellate courts is to resolve legal issues and disputes and the primary method for doing so is by issuing dispositive opinions. Thus, we focused on what we believed was the most elemental measure of productivity: the total number of opinions issued by a court in a given year.

Although we assumed (perhaps erroneously) that the term "opinion" did not need to be defined in the survey, we did categorize different types of opinions including: (1) total opinions, (2) signed, authored opinions, (3) unsigned, per curiam opinions and (4) unpublished opinions.[92] This categorization was necessary because not all opinions are created equal and we hoped these categories would provide further insights into the types of opinions being produced by the courts. Even so, we recognize that different courts may have different standards for what they consider a "signed, authored" opinion to be, for example. Thus, unless one engages in a page-by-page comparison of all opinions issued by the participating courts, it is difficult to ascertain the relative quality of the opinions issued (another possible measure of court productivity).

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88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *See* Survey Questions 15, 15a, 15b and 15c.

Courts were also asked whether they had other means to dispose of cases, such as summary disposition methods. The analysis of that data appears subsequent to the initial analysis of general productivity and efficiency below.[93]

We began by ranking the courts surveyed according to the number of opinions issued in 2005 ("productivity"). The range included a low of 479 opinions (Nebraska Court of Appeals) to a high of 3,573 opinions (Appellate Division of New Jersey's Superior Court) issued during the survey period. The mean for all courts was 1,470 opinions.

TABLE 1—TOTAL COURT PRODUCTIVITY

	Ranking for Total Opinions	Total Opinions[94]	Variance from Mean	Total Filings[95]
NJ	1	3573	+2103	7043
MI	2	3409[96]	+1939	7629
CO	3	1719	+249	2766
NC	4	1636	+166	Unreported
GA	5	1564[97]	+94	3139
MN	6	1484	+14	2432
KY	7	1401	-69	2620
KS	8	1262	-208	1964
AR	9	829[98]	-641	1322
NM	10	684	-786	907
OR	11	552[99]	-918	3801

93. Survey Question 16.

94. Courts' responses to Survey Question 15 (How many total opinions were issued in 2005?).

95. Courts' responses to Survey Question 1 (How many notices of appeal were filed in 2005?).

96. Whitbeck Interview, *supra* n. 16.

97. Georgia's response to Survey Question 15 indicates that the 1,564 total opinions reported does not include 104 additional companion cases. Georgia also reports in its response to Survey Question 16 that 87 cases were "affirmed without opinion"; those cases are not included in the number of total opinions (1,564).

98. Arkansas's response to Survey Question 15 indicates that 829 written majority opinions were issued, with an additional 389 employment cases that were "affirmed without opinion," which are not included here in the number of total opinions. The number of total opinions also does not include other separate opinions (concurrences, dissents, etc.) issued by members of the court.

99. Oregon's response to Survey Question 15 indicates that of the 1,680 opinions reported, 1,128 were "affirm without opinion" decisions and 552 were not. Again, the "AWOP"s are not included in the total number of opinions included in Table 1. If they had

TABLE 1—TOTAL COURT PRODUCTIVITY (continued)				
	Ranking for Total Opinions	Total Opinions	Variance from Mean	Total Filings
CT	12	523[100]	-947	1113
NE	13	479	-991	1501
		Mean: 1470		

While the measure of overall productivity at this stage did not go beyond looking at the number of opinions issued per court, later in the study we measured court productivity relative to other factors such as court budget, number of judges, etc. We found that courts appearing to be the most productive when one looks solely at the number of opinions issued appear to be far less productive when one takes into account the resources available.[101]

In any event, we hypothesized that there would be a correlation between the number of filings with a court and the number of opinions issued by the court. The hypothesis proved correct.[102] We were surprised, however, to see the wide range among the courts of the percentage of filings represented by the number of opinions issued. As detailed in Table 1, the Nebraska Court of Appeals issued opinions in just thirty-two percent of the cases filed with the court. Even more striking, the Oregon Court of Appeals only issued opinions in fifteen percent. In contrast, the New Mexico Court of Appeals issued opinions in seventy-five percent of cases filed.

Presumably, the reason why so few filings proceed to opinions in the Oregon Court of Appeals is the large number of affirmances without written opinions (AWOPs) issued by that court. Oregon reports that it issued 552 opinions in 2005, not including 1,128 AWOPs. In other words, Oregon issues more than two AWOPs for every opinion it issues. Close to one-third of the cases filed with the Oregon Court of Appeals are disposed

been, the Oregon Court of Appeals would have appeared to be one of the most productive courts that participated in the survey.

100. Connecticut's response to Survey Question 15 indicates that the total opinions reported (523) includes authored opinions, per curiam opinions, and memorandum decisions.

101. *See e.g.* Tables 17 and 18, *infra*.

102. $N = 12; r = .907; p = .000.$

of with AWOPs. Although Oregon relies on AWOPs far more than any other court participating in the survey, it is far from alone in utilizing summary disposition methods.

In fact, one possible explanation for the relatively low percentage of filings that proceed to opinion in the Nebraska Court of Appeals is a screening system it has set up where a staff attorney reviews each new appeal for jurisdictional issues.[103] If there appears to be an issue, the case is immediately referred to a panel for possible disposition.[104]

The Oregon Court of Appeals and the Nebraska Court of Appeals are just two of eleven courts from the study that indicate they use summary disposition methods including orders, memorandum opinions, one-sentence opinions, and affirmances without written opinion ("AWOP"s).[105] These methods are used for a variety of purposes including dismissal of cases, denial of discretionary review, affirmance, denial of leave to proceed, and allowance of withdrawal.[106] The bases for the issuance of these summary disposition methods are numerous including jurisdictional issues, mootness, a failure to raise a substantial question, and clear, controlling authority, among others.[107]

For example, the Appellate Division of New Jersey's Superior Court has a sua sponte summary disposition program.[108] After the briefs are filed, all cases are screened by

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103. Nebraska Response to Survey Question 42.

104. *Id.*

105. Arkansas has dismissal without opinion, affirmed without opinion, and transfer to the Supreme Court. Colorado reports that although it did not have a method at the time of the survey, the court recently decided to begin disposing of cases summarily using such methods as memorandum opinions and affirmances without written opinion. Connecticut issues memorandum decisions and short per curiam decisions. Georgia affirms decisions without opinion. Kansas employs summary affirmance or reversal. Kentucky issues orders to dismiss in cases not decided on the merits. Michigan issues orders. Minnesota reports that all cases submitted on the merits are decided by a written, authored opinion. Nebraska issues summary dispositions. New Jersey affirms with a short opinion and issues unpublished orders in cases that are orally argued without briefs. New Mexico enters orders of dismissal and transfers cases to the Supreme Court. North Carolina dismisses cases by unpublished order. Oregon affirms without written opinion, issues orders of dismissal or summary affirmance, and disposes of cases for failure to raise a substantial question of law. *See* Responses to Survey Question 16. Several courts also note that they issue unpublished opinions. *Id.*

106. *Id.*

107. *Id.*

108. New Jersey Response to Survey Question 42. Judge Stern of the Appellate Division notes, however, that the number of cases disposed of in the sua sponte program is small.

the director for central research (who is an attorney on the level of a deputy clerk) for selection into the summary disposition program.[109] The "easiest" ones (e.g., the record is short, the appeal only involves one issue, the law is clear) are reviewed by two-judge panels for possible summary disposition on the court's own motion.[110] Thus, it is hardly surprising that only about one-half, or fifty-one percent, of the appellate cases filed in this court require the issuance of an opinion.

Similarly, the Connecticut Appellate Court reports that its legal staff regularly reviews appeals for jurisdictional and other defects. Appeals that appear to be defective are placed on the court's monthly motion calendar for argument and possible disposition.[111] Some of its cases are disposed by memorandum decision (typically a summary affirmance) or a short per curiam decision.[112]

We continued the analysis of overall productivity by comparing the kinds of opinions issued by the courts as illustrated in the following table.

TABLE 2—OPINIONS COMPARED BY TYPE

	Total[113]	Authored[114]	Unpublished[115]	Per Curiam[116]
NC	1,636	1,636	991	0
CO	1,719	1,584	1,478[117]	135

According to Judge Stern: "dispositions other than by opinion are by motion, administrative disposition such as dismissal, and by substantial number (735 in the 2005-06 court term) of orders on sentence appeals which are argued orally without briefs." Stern Memorandum, *supra* n. 74.

109. E-mail from John Chacko, Clerk, App. Div., N.J. Super. Ct., to Hillary Taylor (Aug. 9, 2007, 7:28 a.m.) (on file with author Binford).

110. New Jersey Response to Survey Question 42 (citing N.J. Ct. R. 2:8-3(b), and attaching Rule).

111. Connecticut Response to Survey Question 42.

112. Connecticut Response to Survey Question 16. The court also notes in its survey response to Question 15 that Conn. Gen. Stat. § 51-215(a) provides that all opinions must be published. Thus, memorandum and per curiam decisions are also published.

113. Courts' Responses to Survey Question 15 (How many total opinions were issued in 2005?).

114. Courts' Responses to Survey Question 15a (How many total opinions were issued in 2005? How many were signed, authored opinions?).

115. Courts' Responses to Survey Question 15c (How many total opinions were issued in 2005? How many were unpublished opinions?).

116. Courts' Responses to Survey Question 15b (How many total opinions were issued in 2005? How many were unsigned, authored opinions?).

117. Colorado's Response to Survey Question 15c indicates that "[a]pproximately 80%

TABLE 2—OPINIONS COMPARED BY TYPE (continued)				
	Total	Authored	Unpublished	Per Curiam
GA	1,564[118]	1,564	279	N/A[119]
MN	1,484	1,484[120]	1,286[121]	N/A
KY	1,401	1,401[122]	1,241[123]	0
AR	829[124]	818	596	11
NM	684	684	535	0
OR	552[125]	400	0[126]	152
NJ	3,573	309	3,264	3,264
MI	3,409[127]	156[128]	3,400[129]	65[130]
CT	523			
KS	1,262	N/A[131]	1,124	
NE	479	N/A		

of all opinions issued by the Court are unpublished," excluding per curiam opinions. For fiscal year 2005, that is 1,478 unpublished opinions.

118. Georgia's Survey Response indicates that the number 1,564 does not include an additional 104 companion cases. Georgia also reports in its Response to Survey Question 42 that 87 cases were "affirmed without opinion." Again, those cases are not included in the number of total opinions.

119. Georgia's Response to Survey Question 15b indicates that there was no data available to answer this question; however, the court reports it issued "very few" per curiam opinions.

120. Minnesota's Response to Survey Question 15a reports that "Every one of the 1484 opinions was a signed, authored opinion."

121. Minnesota's Response to Survey Question 15c indicates that 1,184 opinions were in "unpublished format" and 102 were in the "more abbreviated and equally non-precedential 'order opinion' format."

122. Kentucky's Response to Survey Question 15a reports that "[a]ll opinions were authored."

123. Kentucky's Response to Survey Question 15c reports, "In 2005, 160 (11.4%) of the opinions were designated or publication; 1241 were unpublished."

124. Arkansas's response to Survey Question 15c indicates that 829 written majority opinions were issued, with an additional 389 employment cases that were "affirmed without opinion," which are not included here in the number of total opinions. That number does not include other separate opinions (concurrences, dissents, etc.).

125. Oregon's response to Survey Question 15c indicates that of the 1,680 opinions reported, 1,128 were "affirm without opinion" decisions and 552 were not.

126. Oregon's Response to survey Question 15c reports that "[n]one" of the opinions issued were unpublished. Presumably, this is because all "affirm without opinion" decisions are "published"; however, their "publication" consists of the inclusion of the case name in a list of case names that were affirmed without written opinion.

127. Whitbeck Interview, *supra* n. 16.

128. *Id.* The numbers of authored, per curiam, and unpublished opinions are approximations reported by the Chief Judge, which explains why the total number of opinions as reported by the Michigan Annual Report is slightly lower than the aggregate of numbers reflected here.

129. *Id.*

130. *Id.*

131. Kansas's responses to Survey Questions 15a and 15b report that "[t]he Court does not keep data as to whether the opinion was [an] authored opinion or per curiam."

The table highlights two interesting phenomena. First, a significant percentage of opinions issued by the courts in this study are unpublished. We suspect, but did not test our suspicion, that courts are issuing a larger percentage of their decisions as unpublished opinions than has been historically true. We encourage additional research to determine whether this is true and what effect, if any, issuing unpublished opinions has on court performance. In the meanwhile, we take a closer look at the use of unpublished opinions in this study in section (IV)(B)(3)(a), *infra*.

Second, most of the courts report that the majority of their opinions are authored with two notable exceptions: New Jersey and Michigan. In fact, just nine percent of New Jersey's opinions are authored and even fewer—five percent—of the opinions issued by Michigan are authored. The remainder of New Jersey's opinions are issued as per curiam opinions.[132] Indeed, New Jersey is the only participating court that indicates a heavy reliance on per curiam opinions. Further research should be conducted to assess whether issuing different types of opinions is a practice that can increase a court's productivity or efficiency or both.

2. *Overall Efficiency*

The courts were then ranked according to how quickly they processed cases from filing to judgment (which we termed "efficiency"). Again, considerable variance is evident with a range of 278 days (Minnesota Court of Appeals) to 720 days (Colorado Court of Appeals), with a mean of 427 days for all courts. Only one court (Minnesota Court of Appeals) met the American Bar Association Standard of 280 days total for case processing by appellate courts; more than half the courts report exceeding the ABA Standard by more than 160 days.[133]

132. Judge Stern of the Appellate Division advises that the "judges write the opinions, but sign only those which are to be published. Some published opinions, which are essentially summary, also remain Per Curiam." Stern Memorandum, *supra* n. 74.

133. *See ABA Standards*, *supra* n. 18 (setting recommended time limits).

TABLE 3—OVERALL COURT EFFICIENCY				
	Rank	Total Case Disposition Time (in days)[134]	Variance from Mean (427 days)	Variance from ABA Standard (280 days)[135]
MN	1	278	- 149	- 2
AR	2	300[136]	- 127	+ 20
NC	3	301	- 126	+ 21
KS	4	332	- 95	+ 52
NJ	5	442	+ 15	+ 162
NM	6	447	+ 20	+ 167
MI	7	449	+ 22	+ 169
CT	8	578	+ 151	+ 298
CO	9	720	+ 293	+ 440
		Mean: 427		
Georgia,[137] Kentucky, Nebraska, and Oregon did not report this data.				

Anticipating a comparison of the tables for productivity and efficiency, we hypothesized that courts issuing more opinions would take longer to process cases than courts issuing fewer opinions. Consider the Colorado Court of Appeals, for example. It ranks third for productivity, issuing 1,719 opinions in 2005.[138] Thus, it is not surprising that it would rank near the bottom for efficiency under this hypothesis. However, the analysis showed no correlation (positive or negative) between court productivity and efficiency.[139] (Nor was there a statistically significant relationship between total case processing time and the number of notices of appeals filed.[140])

Given the absence of correlative relationships between efficiency and productivity, it is less surprising to see the Connecticut Appellate Court ranked twelfth (out of thirteen) for total number of opinions and eighth (out of nine) for

134. Courts' responses to Survey Question 31a (What was the average time from case filing to issuing appellate judgment? For all Cases).

135. ABA Standards, *supra* n. 18.

136. Arkansas's Responses for Survey Questions 31b and 31c reports 268 days for civil cases, and 332 days for criminal cases; 300 is the average of the two numbers reported.

137. Georgia's Response to Survey Question 31a did not provide data for 2005, but the court did report that in 2002 the average time for civil cases was 163 days and the average for criminal was 171 days. *See* Georgia Survey Responses to Questions 17a and 17b.

138. *See* Table 2.

139. $N = 9$; $r = .050$; $p = .898$.

140. $N = 8$; $r = .052$; $p = .903$.

efficiency.[141] Conversely, the North Carolina Court of Appeals ranked fourth for productivity and third for efficiency, demonstrating that courts can be relatively productive and efficient.[142] But what makes them so?

B. Efficiency at Each Stage, Factors in Delay, and Recent Innovations at Individual Courts

To try to answer the question, "What makes intermediate appellate courts both productive and efficient?" we divided case processing into five stages:

1) Stage One is defined as the period from the filing of the notice of appeal to settlement of the record;

2) Stage Two is defined as the period from settlement of the record to completion of briefing;

3) Stage Three is defined as the period from completion of briefing to oral argument;

4) Stage Four is defined as the period from oral argument to issuing a decision; and

5) Stage Five is defined as the period from issuance of a decision to issuance of the appellate judgment.

We compared the courts' efficiency at each stage and considered innovations that courts were implementing to try to achieve increased efficiency at that particular stage.

1. Stage One: Settling the Record

Significant delays were noted at Stage One (from filing the notice of appeal to settling the record). In fact, this stage alone accounted for approximately thirty-eight percent of total case

141. *See* Tables 1 and 2.
142. *Id.*

processing time.[143] Although many of the courts report significant differences in how cases are processed at Stage One, none of the responding courts indicate they are able to meet the ABA standard of sixty days. Instead, the mean is 162 days, with a range from 85 days (Minnesota Court of Appeals) to 288 days (the Appellate Division of New Jersey's Superior Court).

However, these numbers are somewhat unreliable. A number of the courts departed from the definitions of the stages we identified and provided only partially responsive data that presumably was more readily available to their staff. Thus, for example, the number of days provided by New Jersey includes not just the period from notice of appeal to the settling of the record, as requested; it includes the entire period through final review.

In response to this dilemma, the authors initially began manipulating all of the data provided in an effort to make it as comparable as possible. However, the authors became uncomfortable with that approach when virtually every stage included manipulated data. Since this study was intended to be one based primarily on self-reporting, the authors ultimately made the decision to rely on the data as reported and to be thorough with providing footnotes to the reader that might explain variances between the data requested and the data provided.[144] Thus, it is critical for the reader not to read the data provided cursorily, but to look beyond the numbers reported and the rankings and to read the footnotes and the courts' actual survey responses to understand the variance of the data provided by the courts. This variance highlights the difficulty and limited usefulness of a study of this kind at this point in time. It also highlights the need for courts to utilize robust and versatile case tracking software so that they can retrieve data that can facilitate reliable data comparisons to measure relative court performance.

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143. This calculation is based on the mean total case processing time for all courts that responded to Question 31a (427 days) and the mean case processing time for Stage One (settling the record) for all courts that responded to Question 4 (162 days).

144. After the study and analysis was completed and the results began to be circulated, the authors were contacted by two different courts; both were concerned that the data provided by the clerks did not track the data requested in specific instances. After careful consideration, the authors decided to rely largely on their method of presenting the data as reported by the courts with generous footnoting to explain discrepancies.

TABLE 4—COURT EFFICIENCY AT STAGE ONE: SETTLING THE RECORD					
	Average Days[145]	Statute: Transcript [146]	Statute: Correcting Transcript[147]	Average's Variance from Statutory Standard[148]	Average's Variance from ABA Standard[149]
MN (1)*	85[150]	60		+ 25	+ 25
NC (3)	107.5[151]	60	30	+ 17.5	+ 47.5
CO (9)	140[152]	90	0[153]	+ 50	+ 80
NM (6)	189.5[154]	105[155]	40	+ 44.5	+ 129.5
NJ (5)	288	30		+ 258	+ 228
	Mean: 162				
Courts that did not report an average for this stage:					
AR (2)		90[156]			
CT (8)			35		
GA	N/A[157]	30[158]			

145. Courts' Responses to Survey Question 4 (How long on average does it take from the filing of notice of appeal to settling the record?).

146. Courts' responses to Survey Question 3 (How much time is allowed by rule or statute for preparing the transcript? Please cite applicable rule or statute).

147. Courts' responses to Survey Question 3a (How much time is allowed by rule or statute for correcting the transcript?).

148. The total number of days required by statute for the completion of briefing is calculated by adding the statutory requirements reported in Questions 3 and 3a. To determine the variance of the reported average from the statutory provisions, the average (reported as a survey response to Question 4) was subtracted from the reported statutory period.

149. ABA Standards, *supra*, n. 18 (providing for sixty days).

150. Minnesota's response to Survey Question 4 reports seventy days for civil cases and 100 days for criminal cases (with extensions being more common); eighty-five is the average between the two numbers reported.

151. North Carolina's Response to Survey Question 4 indicates a range of days from sixty-five to 150; 107.5 is the median.

152. Colorado reports that in 2005 at this stage, the average criminal case took 160 days and the average civil case took 120 days; 140 represents the average between the two numbers reported. *See* Colorado Response to Survey Question 4.

153. Colorado's Response to Survey Question 3a reports that there was no specific time allowance, however the court generally grants an additional thirty days.

154. New Mexico reports Stage One takes 166 days if the transcript is audio and 213 days if the transcript is a stenographic recording; 189.5 is the average between the two numbers reported. *See* New Mexico Response to Survey Question 4.

155. New Mexico distinguishes between transcription that is or is not computer assisted. *See* New Mexico Response to Survey Question 3.

156. Arkansas's response to Survey Question 3 reports that for general civil and criminal appeals, ninety days is allowed from the filing of the notice of appeal unless an extension is granted. The court also reports that by rule, the maximum allowable time is seven months.

157. Georgia does not provide a survey response from 2005 to Question 4. However, it should be noted that there is a state constitutional mandate that the court dispose of all cases within two terms of court (less than twelve months). Ga. Const. art. VI, § 9, par. 2. Georgia did report that for the January 2002 term, the average was ninety days from filing

TABLE 4—COURT EFFICIENCY AT STAGE ONE: SETTLING THE RECORD (continued)					
	Average Days	Statute: Transcript	Statute: Correcting Transcript	Average's Variance from Statutory Standard	Average's Variance from ABA Standard
Courts that did not report an average for this stage (continued):					
KS (3)		40			
KY		30[159]			
NE		79			
OR		30[160]	15		
		Mean: 61			
*(x) Indicates overall ranking for average total case processing time.					
Michigan did not report applicable data for this table.					

a. Technological Advances in Creating and Coordinating the Record

In trying to identify the source of delays at Stage One, most of the courts (including those who did not actually provide their own case processing time at Stage One) cite problems with what is generally described as a slow, complicated, and unreliable process in settling the record. Some courts mention that many of the court reporters in their jurisdictions have significant backlogs of transcription requests.[161] Others cite a shortage of court reporters due to budget constraints on lower courts as a major problem in this process.[162] A number of courts are turning to computerized transcription and audio and video recordings to create the record below. These changes are a result of budgetary shortages and available technological advances, and are being met with mixed success.

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to docketing. *See* Georgia Response to Survey Question 4.

158. Georgia's Response to Survey Question 3 indicates that the court may grant a time extension.

159. Kentucky's response to Survey Question 3 reports that "transcripts are seldom used"; in fact by rule they are not permitted "except by special order of the appellate court."

160. Oregon's response to Survey Question 3 indicates that an extension of time could be obtained.

161. *See* Connecticut Response to Survey Question 41.

162. *See* Colorado, Georgia, and Kansas Responses to Survey Question 41; Oregon Response to Survey Question 42.

The Kentucky Court of Appeals reports that it seldom uses transcripts.[163] Instead, video recording is used as the official record on appeal.[164] The Oregon Court of Appeals states that several years ago, the trial courts discontinued use of court reporters in most proceedings and replaced them with audio recording equipment.[165] However, problems with the equipment and the staff operating the equipment have led to proceedings that are not recorded properly and completely.[166] The court also reports that there are problems with the quality of the transcripts made from these recordings.[167]

The Appellate Division of New Jersey's Superior Court reports relative success with a recent innovation addressing transcript-related issues. New Jersey has implemented a statewide transcript tracking program.[168] Because a number of the courts report that one of the most significant issues they face is coordinating the transcripts, courts should look to this program as a potential model for increased efficiency. The Appellate Division of New Jersey's Superior Court recently re-wrote the existing system as a web-based program, implementing the electronic transcript coordination program in 2006, and the court currently reports an average of thirty-five days in 2007 to produce the transcript.[169] The success of this program is especially impressive in a state where over 400 trial courts send cases to the Appellate Division and the case records are made with seventy-one court reporters (all but two are computer writers), as well as audio and video recording.[170]

b. e-Filing

Creating a record is not the only area in which courts report an increased reliance on technological advances. Several courts

163. Kentucky Response to Survey Question 3.

164. *Id.*

165. Oregon Response to Survey Question 42.

166. *Id.*

167. *Id.*

168. New Jersey Response to Survey Question 42.

169. E-mail Message from John Chacko, Clerk, App. Div., N.J. Super. Ct., to Hillary Taylor (June 8, 2007, 9:23 a.m.) (on file with author Binford).

170. New Jersey Response to Survey Question 42.

indicate efforts to introduce e-filing.[171] The Court of Appeals of the State of Georgia is in the process of implementing an e-filing system that would allow attorneys to file pleadings, briefs, and motions electronically, and enable the court to issue notices, orders and opinions by email to the parties and trial courts.[172]

In Kentucky, the offices of the Court of Appeals judges are located throughout the state.[173] Consequently, shipping time and expense are two of the factors that lead to delay in that court.[174] To alleviate these issues, the court is currently supporting the clerk in the development of an e-filing system for both briefs and record material.[175]

To expedite the end of the appellate process, the Appellate Division of New Jersey's Superior Court has created an electronic database that allows the Final Disposition Unit to manage all Appellate Division opinions more readily.[176] After receiving opinions electronically from the court, the Final Disposition Unit reviews and logs them, and distributes them electronically to the parties and the press.[177] The opinions (both published and unpublished) are also posted on the New Jersey Judiciary's website.[178] The case management teams also communicate with attorneys and pro se litigants using email.[179]

c. Case-Tracking Software

Before beginning this study, we noted that nearly all of the courts surveyed were reported to have case tracking software. The exception was the Oregon Court of Appeals, which did not implement its automated case management system until 2006.[180] Thus, we were surprised by the number of courts reporting that

171. Georgia and Kentucky Responses to Survey Question 42.

172. Georgia Response to Survey Question 42.

173. Kentucky Response to Survey Question 41.

174. *Id.*

175. Kentucky Response to Survey Question 42.

176. New Jersey Response to Survey Question 42.

177. *Id.*

178. *Id.*

179. *Id.*

180. Oregon Court of Appeals, *Annual Report* 2-4 (2006), http://www.publications.ojd.state.or.us/2006CAReport.pdf (accessed Nov. 29, 2007; copy on file with Journal of Appellate Practice and Process).

they do not have data on case processing periods, because this is one of the basic functions and benefits of case management software. Are courts fully utilizing case management software? If not, why not? Further research should help courts and researchers understand why courts appear not to be benefiting from case management technology as much as they should be.

The only two courts to identify an automated case management system as an innovation helping to alleviate court delay are the Michigan Court of Appeals[181] and the Appellate Division of New Jersey's Superior Court.[182] These courts also had the highest number of filings. Thus, there is likely a relationship between the volume of work these courts face and the need to seek innovation because the magnitude of the problem and the associated benefits of automated solutions are likely higher. The New Jersey court's software enables it to monitor the processing of cases, including generating reports showing the status of cases and which transcripts or briefs are overdue.[183] Add to this the court's practice of assigning every case to a case manager, who is responsible for processing and monitoring the case, and one can envision the potential for a significant increase in the court's efficiency.[184]

2. Stage Two: Briefing

Stage Two (the period from settlement of the record to completion of briefing) takes even longer than Stage One to complete. In fact, this stage is the longest of all, constituting thirty-nine percent of total case processing time.[185] The mean for Stage Two is 165 days, with a range from ninety days (North Carolina Court of Appeals) to 214.5 days (Colorado Court of Appeals). Only one court (North Carolina Court of Appeals) is able to meet the ABA standard of one hundred days.

181. Michigan Response to Survey Question 42.

182. New Jersey Response to Survey Question 42.

183. *Id.*

184. *Id.*

185. This calculation is based on the mean total case processing time for all courts that responded to Survey Question 31a (427 days) and the mean case processing time for Stage One (settling the record) for all courts that responded to Survey Question 5 (165 days).

TABLE 5—COURT EFFICIENCY AT STAGE TWO: BRIEFING						
	Average Days[186]	Statute: Civil[187]	Statute: Criminal[188]	Statutes Average	Variance of Court Average from Statutory Average	Variance of Court Average from ABA Standard[189]
NC (3)*	90	60	60	60	+ 30	- 20
NM (6)	163.5[190]	90	90	90	+ 73.5	+ 53.5
AR (2)	191	100[191]	100[192]	100	+ 91	+ 81
CO (9)	214.5[193]	84[194]	84[195]	84	+ 130.5	+ 104.5
		Mean: 165				
Courts that did not report an average for this stage:						
CT (8)		95	95	95		
GA		0[196]	80	80		
KS (4)		105	105	105		
KY		210	210[197]	210		
MN (1)		70	120	95		

186. Courts' responses to Survey Question 5 (What is the total average time from settlement of the record to completion of briefing, including extensions?).

187. Courts' responses to Survey Question 6 (What is the time mandated by statute or court rule to complete civil briefing? Please cite applicable rule or statute.).

188. Courts' Responses to Survey Question 7 (Are criminal cases subject to different deadlines? Please explain and cite any pertinent rule or statute.).

189. The ABA Standard is 110 days. ABA Standards, *supra* n. 18.

190. New Mexico's Response to Survey Question 5 reports data of 209 days if the transcript is audio, and 118 days if it is stenographic; 163.5 is the average between the two reported numbers.

191. Arkansas's Response to Survey Question 6 indicates that extensions can be obtained.

192. *Id.* (Response to Survey Question 7).

193. Colorado's Response to Survey Question 5 reports an average of 283 days for criminal cases, 146 days for civil cases, and fifty-nine days for expedited juvenile procedures. The average between the numbers reported for criminal and civil cases (excluding the reported data for expedited juvenile cases) is 214.5 days.

194. Colorado's Response to Survey Question 6 reports that the court grants up to an additional sixty days in extensions.

195. Colorado's Response to Survey Question 7 reports that the same statutory rules apply to criminal cases as civil. However, the public defender can request an automatic 120-day extension and the Attorney General can request another sixty-day extension. The court indicates that this is regular practice, and that the court routinely grants extensions beyond the described automatic extensions.

196. Georgia's response to Survey Question 5 indicates that a statute allows eighty days, plus the court is generous in granting an additional twenty-day extension.

197. Kentucky reports that although civil and criminal briefing periods are the same, if the defendant is represented by a Public Advocate at the time, briefing begins to run from the date the appellate clerk makes the record available to the Public Advocate. *See* Kentucky Response to Survey Question 7.

TABLE 5—COURT EFFICIENCY AT STAGE TWO: BRIEFING (continued)						
	Average Days	Statute: Civil	Statute: Criminal	Statutes Average	Variance of Court Average from Statutory Average	Variance of Court Average from ABA Standard
Courts that did not report an average for this stage (continued):						
NE		70	70	70		
NJ (5)		85[198]	85	85		
OR		140[199]	0[200]	140		
		Mean: 102	Mean: 101	Mean: 102		
*(x) Indicates overall ranking for average total case processing time.						

a. Extensions for Filing Briefs

A number of the courts cite the high number of requests for extensions of time for filing briefs as a significant factor in court delay.[201] For example, the Kentucky Court of Appeals reports that historically it has been liberal in granting extensions of time for briefing, and consequently, attorneys now have an expectation of these extensions and do not brief their cases as promptly as they should.[202] The Appellate Division of New Jersey's Superior Court states that it is not unusual for the same litigant or attorney to submit two or three requests for an extension in the same case.[203]

Some courts have tried to begin enforcing deadlines in the appellate process. For example, the Connecticut Appellate Court has implemented two programs focused on managing delinquent parties: the "Nisi Program" and the "Practice Book § 85-1 Program."[204] Under the Nisi Program, the court monitors all civil appeals that are not on the ready docket.[205] The court may

198. *See* N.J. Ct. R. 2:6-11(a) (LEXIS 2007).

199. Oregon's Response indicates that extensions may be granted.

200. Oregon's Response reports that if the defendant is represented by the Public Defender, the due date for the opening brief is negotiated between that office and the court. Currently, it is due 210 days after the record settles. *See* Oregon Response to Survey Question 7.

201. *See e.g.* Kentucky and New Jersey Responses to Survey Question 41.

202. Kentucky Response to Survey Question 42.

203. New Jersey Response to Survey Question 41.

204. Connecticut Response to Survey Question 42.

205. *Id.*

dismiss the appeal if a necessary paper such as a brief is not timely filed.[206] (The program is not applied to juvenile and habeas corpus cases.)[207] Prior to dismissal, the court issues a notice informing the appellant that the appeal will be dismissed if the statement or brief is not filed within a specified period of time.[208]

The second program, the Practice Book § 85-1 Program, is administered through the Chief Clerk's Office.[209] The § 85-1 Program applies to delinquent filings in criminal, civil, juvenile and habeas cases. If a necessary paper is found to be late, the parties are summoned to appear before the court on the motion calendar to "give reasons, if any, why the case(s) should not be disposed of . . . and why sanctions should not be imposed."[210]

The ambivalence that many courts experience in deciding whether to grant extensions is aptly described by the Minnesota Court of Appeals:

> [E]xtensions (on top of transcript problems. . .) can have a big impact on overall case processing time. But it's difficult to deny extensions, when a fully-briefed case will sit on the shelves for up to six months, waiting for a hearing date, anyway. And denying extensions to respondents increases the risk that they won't file briefs at all, leaving the court to figure out (on its own) if there's a basis to affirm the trial court. Adequate funding of the offices responsible for the bulk of appellate briefs would be very helpful.[211]

In other words, unless courts are in a position to advance cases promptly after submission of briefs, it appears futile to insist that attorneys adhere strictly to deadlines because that will not make a significant difference in case processing time. On the other hand, unless changes are made at some level and everyone is held accountable for adhering to appropriate periods that apply to their roles in the appellate process, appeals will continue to require one to two years to process.

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206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. Minnesota Response to Survey Question 41.

b. Public Attorneys

Inadequate funding of law offices responsible for preparing appellate briefs is one of the most frequently cited causes of appellate court delay by participating courts.[212] The United States Supreme Court established in *Gideon v. Wainright*[213] the government's constitutional responsibility to provide legal representation to criminal defendants who are unable to hire their own lawyers. To those who do not view the chronic underfunding[214] of indigent defense services as problematic, it is necessary to offer a reminder:

> The criminal justice system will not function in a constitutional manner unless we provide a competent defense to indigent defendants. At these rates, it is increasingly difficult—and sometimes impossible—to find qualified lawyers willing to do the work. A criminal conviction is only as good as the constitutional adequacy of the accused's defense counsel.[215]

The Oregon Court of Appeals describes a process in which delays with public counsel begin immediately with the appointment of appellate counsel.[216] According to the Oregon court, court appointed attorneys are paid at a rate so low that few attorneys in private practice are willing to take on the cases.[217] While the Office of Public Defense Services in Oregon "never has been adequately funded," the legislature also recently cut the budget of the Solicitor General.[218] As a result, that office now

212. Colorado, Kansas, Kentucky, Minnesota, New Jersey, and Oregon all report underfunding in their responses to Survey Question 41 or 42.

213. 372 U.S. 335 (1963).

214. *See e.g.* Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. Pitt. L. Rev. 293 (2002) (discussing the consequences of underfunding of indigent defense counsel and how it has been resolved or combated in several states from the perspective of individual rights).

215. Theodore R. Kulongoski, *A Proposal to Deal with Three Pressing Needs*, 67 Or. St. B. Bull. 33, 34 (Jan. 2007).

216. Oregon Response to Survey Question 42.

217. *Id.*

218. *Id.* After the completion of this study, the 2007 session of the Oregon Legislature voted funding increases for both the Department of Justice and the Office of Public Defense Services. *See Capital Insider* 1, 1-2 (Pub. Aff. Dept., Ore. St. B. July 9, 2007) (also available at http://www.osbar.org/_docs/lawimprove/capinsider/ci_070709.pdf) (accessed Nov. 29, 2007; copy on file with Journal of Appellate Practice and Process).

requires almost as much time as the public defender to file briefs.[219] Currently, the court allows the Office of the Public Defender seven months (210 days) to file an opening brief.[220]

Recall that the ABA standard for total appellate case processing from start to finish is 280 days total, and one realizes that the Oregon Court of Appeals is left with only seventy days to complete the other four stages in the appellate process and still issue a decision within the timeframe recommended by the ABA.[221] When one considers that over fifty percent of that court's caseload is composed of criminal cases,[222] it is easy to appreciate the considerable delays that occur in appellate courts due to legislatures' failure to adequately fund public appellate counsel.

Although the 210-day period for filing briefs (for public defenders) allowed by the Oregon Court of Appeals is the longest period cited by any of the respondents to the survey, other courts describe similar scenarios. The Colorado Court of Appeals reports that there are delays in both the Office of the Colorado Public Defender's Appellate Section and the Colorado Attorney General's Office.[223] Consequently, the court allows the Public Defender to place cases on an "automatic extension list," which allows an automatic 120-day extension for filing the opening brief.[224] The Attorney General is then allowed to place the case on an automatic extension list for a sixty-day extension.[225] However, the court regularly grants additional extensions beyond those allowed as automatic extensions.[226]

As with extensions generally, some courts are actively denying a number of requests for extensions even when made by under-funded public attorneys. For example, the Appellate Division of New Jersey's Superior Court generally forwards requests from the Office of the Attorney General and the Office of the Public Defender to the Presiding Judge of

219. Oregon Response to Survey Question 42.
220. Oregon Response to Survey Question 7.
221. *See ABA Standards*, *supra* n. 18 (setting recommended time limits).
222. Oregon Response to Survey Question 42.
223. Colorado Response to Survey Question 7.
224. *Id.*
225. *Id.*
226. *Id.*

Administration.[227] Despite the fact that the court recognizes that both offices are subject to budget constraints, the presiding judge is "tightening up" on extension requests from those offices.[228]

Unfortunately, the consequences of the failure to adequately fund public defenders and attorneys general extend beyond their ability to file timely appellate briefs. The Minnesota Court of Appeals reports that the state public defender's office (which is "chronically underfunded") has a budget for transcripts that is often exhausted long before the new budget cycle begins.[229] Thus, the public defenders have to rely on the "kindness" of the court reporters to prepare transcripts without a guarantee of payment on delivery.[230] Some court reporters are unwilling to assume the risk of non-payment and the appeals are stalled as a result.[231]

Minnesota reports that another consequence of underfunding is that counsel is not available for oral argument in the majority of cases handled by the state public defender's office.[232] Therefore, defendants are left unrepresented at that stage in the appellate process. The implications of this resulting lack of representation could negatively impact defendants in a systemic way.

The underfunding of offices providing public defense services is not a new concern to courts. However, underfunding of such crucial services should be studied with an eye toward the potential impact on the appellate process as a whole, to determine whether a ripple effect exists to such a degree as to warrant further attention by state legislatures. Perhaps providing adequate funding for such offices would aid the productivity and efficiency of the entire system.

c. Fast Tracking

Fast tracking or streamlining the processing of certain cases

227. New Jersey Response to Survey Question 41.
228. *Id.*
229. Minnesota Response to Survey Question 41.
230. *Id.*
231. *Id.*
232. Minnesota Response to Survey Question 42.

is one innovation that intermediate appellate courts have adopted to address the issues of delay and inefficiencies within the appellate process. For example, briefs are not filed with the Appellate Division of New Jersey's Superior Court in criminal cases where sentencing is the only issue. Instead, these cases are decided after submission of the record and oral argument.[233]

The Colorado Court of Appeals has adopted a method for screening the appellant's brief in criminal cases to determine whether a respondent's brief is necessary and if the case would be suitable for a per curiam docket.[234] Cases that qualify are fast tracked.[235] No extensions are allowed for respondents' briefs and many cases are submitted to a division solely on the appellant's brief.[236] The court is also screening all *pro se* post-conviction cases when the appellant's brief is filed.[237] The court determines whether an additional record, including transcripts, will be necessary, and if so, orders are issued to complete the record.[238]

Efforts to fast track and streamline cases are not limited to criminal appeals. Senior staff attorneys with the Kansas Court of Appeals evaluate cases for assignment to different decision tracks and to determine whether they are ruled by controlling precedent.[239] If they are, the case is either ruled by order or identified for expedited decision.[240]

Unfortunately, courts are discovering that expediting cases may be more challenging than anticipated. The Minnesota Court of Appeals reports that it has been trying to fast track certain cases that involve related, straightforward issues. For example, it uses this method for cases involving *Blakely*[241] issues and unemployment appeals with simple disqualification issues.[242] Select cases are submitted to panels in addition to their regular

233. New Jersey Response to Survey Question 4a.

234. Colorado Responses to Survey Questions 41 and 42.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. Kansas Response to Survey Question 42.

240. *Id.*

241. *Blakely v. Wash.*, 542 U.S. 296 (2004) (considering Sixth Amendment right to jury trial).

242. Minnesota Response to Survey Question 42.

calendars with an abbreviated bench memo from experienced staff and a proposed opinion.[243]

However, the Minnesota judges have reported dissatisfaction with several aspects of this program: (1) they prefer having a full, written bench memo for every case; (2) once the "easier" cases were removed from the regular calendar, the difficulty of the remaining cases noticeably increased; (3) the judges found that the additional calendar over-extended them; and (4) some of the judges were reluctant to adopt the proposed opinions, requiring significant rewriting and expansion of the opinions (which undermined the intended efficiency gains from the process).[244]

Fast tracking is becoming more widespread (and not just for procedural reasons) despite some judges' displeasure with certain aspects of it. Courts report that they are fast tracking an increasing number of cases largely based on the substantive nature of the case. The fast tracking of cases is occurring under legal mandate in many cases, but courts also indicate they are expediting certain types of cases voluntarily.

The cases most commonly expedited by intermediate appellate courts are those involving children. Most of the courts that responded indicate that they are fast tracking cases involving child abuse and neglect (including termination of parental rights),[245] and a significant number are also expediting cases involving custody,[246] adoptions,[247] juvenile status,[248] and paternity,[249] among others.[250]

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243. *Id.*

244. *Id.*

245. Colorado, Georgia, Kansas, New Mexico, North Carolina, and Oregon Responses to Survey Question 12.

246. Kansas, Minnesota, and Nebraska Responses to Survey Question 12.

247. Kansas and Oregon Responses to Survey Question 12.

248. Connecticut and North Carolina Responses to Survey Question 12.

249. Colorado and Connecticut Responses to Survey Question 12.

250. Arkansas allows any party by motion to apply for expedited procedure on appeal. Connecticut reports that to the extent possible, criminal, habeas, and foreclosure cases are assigned as soon as they are ready to be argued. Kansas expedites, among others, cases on public utility water and electricity rates, appeals from agency actions arising from rate hearings, and habeas corpus cases. Kentucky may expedite oral argument when appropriate. Minnesota expedites criminal pretrial prosecution appeals and cases involving commitment of the mentally ill. In Nebraska, criminal, workers' compensation, unemployment, and custody cases are advanced without motion as well as appeals from the

These efforts appear to be relatively successful. The Appellate Division of New Jersey's Superior Court reports that it processes child custody cases in approximately half the period it takes to process a non-custody case (seven and a half months compared to fourteen and a half months).[251] The Colorado Court of Appeals reports that the criminal cases expedited in that court proceed to oral argument in an average of 196 days, while civil cases take 227 days.[252]

Not all courts are touting the uncompromised success of fast tracking certain cases. The Nebraska Court of Appeals specifically identifies the expedition of abuse and neglect cases as a source of delay in the processing of other cases that are not advanced.[253] However, abuse and neglect cases are not the only cases subject to an expedited process in the Nebraska Court of Appeals. The court identifies ten categories of cases that are allowed to proceed to oral argument without motion: (1) criminal cases (although oral argument is not allowed where the accused entered a plea of not guilty or no contest or where the sole allegation was excessive sentence, except where the penalty was life imprisonment or death); (2) workers' compensation cases; (3) unemployment compensation cases; (4) questions certified by other courts; (5) original actions; (6) appeals involving custody of minor children; (7) appeals within original concurrent jurisdiction of the court; (8) cases where a "case stated" has been prepared and filed by the parties; (9) appeals from the Tax Equalization and Review Commission; and (10) appeals from the Department of Natural Resources.[254] Because so many categories of cases enjoy expedited procedures in the Nebraska Court of Appeals, it is not surprising that the court would observe the effect of the delay on cases that are not fast tracked.

Tax Equalization and Review Commission and the Department of Natural Resources. New Jersey expedites without briefs the following types of appeals: (1) sentencing, (2) continued civil commitment of sexual violent predators, and (3) tier classification and notification of sex offenders under Megan's Law. *See* States' Responses to Survey Question 12.

251. New Jersey Response to Survey Questions 31a and d.

252. Colorado Response to Survey Question 14.

253. Nebraska Response to Survey Question 41.

254. Nebraska Response to Survey Question 12 (citing Neb. Ct. R. 11(B)(2)(a)-(j)).

Nebraska's neighbor to the south reports an even higher number of categories of cases that must be heard on an expedited basis. The Kansas Court of Appeals must expedite thirteen different types of cases. These categories range from an appeal of any action of the State Corporation Commission to any action of the Water Transfer Hearing Panel of the Kansas Water Authority to criminal interlocutory appeals to waiver of parental notification for minors seeking an abortion.[255] One wonders what case is not heard on an expedited basis by the Kansas Court of Appeals. Certainly, there comes a point where the consequence of expediting so many categories of cases must create exactly the effect articulated by the Nebraska Court of Appeals, and at a noticeable level.

However, at this point the Nebraska Court of Appeals and the Kansas Court of Appeals appear to be the exceptions. Most courts report that they expedite cases in just a handful of categories. For example, the Court of Appeals of the State of Georgia is required by statute and policy provisions to expedite (1) criminal cases in which the appellant is incarcerated[256] and (2) parental rights cases.[257] The Appellate Division of New Jersey's Superior Court expedites child custody cases[258] and also expedites oral argument and hears the matter without briefs in three categories of cases: (1) those involving sentencing issues; (2) continued civil commitment of sexually violent predators; and (3) tier classification and notification of sex offenders under Megan's Law.[259]

Some courts indicate that they take an even more flexible approach to fast track cases. The North Carolina Court of Appeals has accelerated briefing for certain juvenile and termination of parental rights cases, as well as discretion to expedite any other case where the party moves for expedition and the court is persuaded that expedition is appropriate.[260] Similarly, the Kentucky Court of Appeals tries to identify early

255. Kansas Response to Survey Question 12 (citing, for example, Kan. Stat. Ann. § 82a-1505(b) (providing for expedited review in water-transfer cases)).

256. Georgia Response to Survey Question 7.

257. Georgia Response to Survey Question 12.

258. New Jersey Response to Survey Question 31d.

259. New Jersey Response to Survey Question 12.

260. North Carolina response to Survey Question 12 (citing N.C. R. App. P. 29(a)).

and expedite cases involving the protection of "vulnerable victims."[261]

The mechanical implementation of fast tracking and streamlining efforts varies from court to court. However, it frequently involves shorter briefing periods; the waiver of briefing, either partially or entirely; fewer extensions of time; and priority for oral argument.[262]

3. Stage Three: Oral Argument

Although the courts indicate that they are able to complete Stage Three (the period from completion of briefing to oral argument) more quickly than the first two stages in the appellate process, once again, none of the courts was able to meet the ABA standard of fifty-five days. Instead, court efficiency ranged from seventy-five days (New Mexico) to 211.5 days (Colorado). Stage Three constituted twenty-nine percent of overall case processing time.[263]

TABLE 6—COURT EFFICIENCY AT STAGE THREE: ORAL ARGUMENT		
	Average Number of Days[264]	Variance from ABA Standard[265]
NM(6)*	75[266]	+20
AR(2)	86[267]	+31
MN(1)	97	+42
KY	120[268]	+65

261. Kentucky Response to Survey Question 42.

262. For examples, see Colorado, Connecticut, Georgia, Kansas, and Nebraska Responses to Survey Questions 41 and 42.

263. This calculation is based on the mean total case processing time of 427 days for all courts that responded to Question 31a and the mean case processing time of 123 days for Stage Three (oral argument) for all courts that responded to Question 14.

264. Courts' Responses to Survey Question 14 (What is the average total length of time after briefing is completed for a case to proceed to oral argument?).

265. The ABA Standard is fifty-five days. ABA Standards, *supra* n. 18.

266. New Mexico's Response to Survey Question 14 indicates that it takes 2.5 months from answer brief to submission to a panel for decision, and that oral argument is rarely used.

267. Arkansas's Response to Survey Question 14 reports that because the court heard so few cases in oral argument, the data reported includes cases whether they were orally argued or not.

268. Kentucky's response to Survey Question 14 reports that a case that is ready in January would be slotted for oral argument in May, suggesting a time period of four months from the end of briefing to oral argument. We interpreted this response as

TABLE 6—COURT EFFICIENCY AT STAGE THREE: ORAL ARGUMENT (continued)		
	Average Number of Days	Variance from ABA Standard
NC(3)	120	+65
KS(4)	132	+77
NJ(5)	143[269]	+88
CO(9)	211.5[270]	+156.5
	Mean: 123	
*(x) Indicates overall ranking for average total case processing time.		
Connecticut, Georgia,[271] Michigan, Nebraska, and Oregon did not provide responses.		

Many of the responses to the survey suggest that courts generally view oral argument as a stage in which courts could streamline the appellate process. The Court of Appeals of the State of Georgia reports that it is no longer permitting oral argument in all cases filed in the court, and that this change seems to have improved court efficiency.[272] The Kentucky Court of Appeals only heard about twelve percent of cases (151) in 2005 in oral argument, submitting the remaining 1,123 cases without oral argument.[273]

In fact, seven of the nine courts that provide data regarding both cases heard in oral argument and cases decided without oral argument report that they decide the majority of their cases without oral argument. Many of these are by a vast majority. For example, the Arkansas Court of Appeals heard oral argument in only thirty-three cases in 2005,[274] deciding the remaining 867 without oral argument.[275] Similarly, the New Mexico Court of Appeals heard oral argument in only thirty-nine cases (out of

indicating 120 days.

269. New Jersey's response to Survey Question 14 reports an average of four months and twenty-seven days for civil cases (147 days) and four months and nineteen days (139 days) for criminal cases; 143 is the average between the two numbers reported.

270. Colorado's response to Survey Question 14 reports an average of 196 days for criminal cases and 227 days for civil cases; 211.5 is the average between the two numbers reported.

271. Georgia did not report an average for Question 14; however, the court did state that it took approximately three and a half to four and a half months from when a case is docketed for it to be scheduled for argument.

272. Georgia Response to Survey Question 42.

273. Kentucky Response to Survey Question 8.

274. Arkansas Responses to Survey Questions 8 and 9.

275. *Id.*

684 opinions issued) in 2005.[276] In fact, the default procedure is for cases not to be heard in oral argument. Court rules in New Mexico expressly provide that all cases will be decided without oral argument unless the court determines otherwise, and that there shall be no argument in summary cases.[277] Consequently, each judge in New Mexico spends only about one hour per month in oral argument.[278]

TABLE 7—COURT PRODUCTIVITY IN STAGE THREE: ORAL ARGUMENT

	Number of Cases Argued Orally[279]	Opinions in Orally-Argued Cases[280]	Days Each Month in Oral Argument[281]
NJ	1,440	40%	4
NC	205	13%	2
CO	391	23%	1[282]
KY	151	11%	1[283]
OR	710	42%	3
AR	33	3%	1
MN	788	53%	3
KS	499	40%	2
CT	456	87%	6
GA	216	13%	1.5[284]
MI	*	*	3
NE	*	*	3
NM	39	6%	.13

*Michigan and Nebraska did not report data for these questions.

In addition to waiver and denial of oral argument, one innovation reported to create more efficiency at this stage in the appellate process is the "standby case program" developed by

276. New Mexico Response to Survey Questions 8 and 9.

277. New Mexico Response to Survey Question 10 (citing N.M. R.A. 12-214 and N.M. R.A. 12-210 (D) (4)).

278. New Mexico Response to Survey Question 11.

279. Courts' Responses to Survey Question 9 (How many total cases were heard in oral argument in 2005?).

280. Percentage of total opinions issued in cases heard in oral argument was calculated by dividing Responses to Survey Question 9 by Responses to Survey Question 15.

281. Courts' Responses to Survey Question 11 (On average, how many days each month does each judge spend in oral argument?).

282. Colorado's Response to Survey Question 11 reports that a division sat for half of a day twice a month and sometimes three times a month.

283. Kentucky's Response to Survey Question 11 reports that its judges sit for one day a month and rarely for a second day.

284. Georgia's Response to Survey Question 11 reports one to two days per month; 1.5 is the median.

the Connecticut Appellate Court.[285] Under the standby case program, one or two extra cases are designated as "standbys" for oral argument each day. If a case on the regular docket is withdrawn or continued, the court provides at least forty-eight hours' notice to the parties and schedules another case for oral argument in that time slot. The court provides an incentive for parties to agree to appear on such short notice: All standby cases not called during the month are heard the following month as part of the regular calendar.[286]

4. Stage 4: Issuing a Decision

Stage Four (the period from oral argument to issuing a decision) is unique because it is the only stage in the appellate process in which a substantial percentage of the courts are able to meet the ABA standard for case processing. In fact, if one were to exclude the New Mexico Court of Appeals (because it rarely allows oral argument, it calculated its Stage Four data from submission to issuance of an opinion), the mean for the courts overall would be fifty-three days, two days less than the ABA standard. Excluding New Mexico, this period constitutes just twelve percent of the total case processing period.[287] Courts' efficiency at this stage is especially telling because it is one of the most labor intensive stages for the judges, and consequently, the stage most within their direct control.

285. Connecticut Response to Survey Question 42.

286. *Id.*

287. This calculation is based on the mean total case processing time for all courts that responded to Question 31a (427 days) and the mean case processing time for Stage Four (oral argument to decision) for all courts (excluding New Mexico) that responded to Question 17 (53 days).

TABLE 8—COURT EFFICIENCY AT STAGE 4: ORAL ARGUMENT TO DECISION			
	Average Number of Days[288]	Variance from ABA Standard[289]	Average Days to Decision if No Oral Argument
CO(9)*	24	-31	237[290]
AR (2)	29	- 26	106[291]
MI (7)	30	- 25	
KS (4)	37	- 18	
MN (1)	70	+ 15	168
NJ (5)	74[292]	+ 19	46[293]
CT (8)	107	+ 52	
NM	193[294]	+ 138	193
	Mean: 71		
*(x) Indicates overall ranking for average total case processing time.			
Georgia, Kentucky, Nebraska, North Carolina,[295] and Oregon did not provide this data			

Most of the innovations aimed at increasing efficiency at this stage focus on identifying and issuing opinions that are appropriate in light of the facts and circumstances of individual cases. We suspect courts are moving towards issuing a greater percentage of abbreviated, unpublished opinions than they have historically; further research in this area is encouraged. Our

288. Courts' Responses to Survey Question 17 (What is the average time between oral argument and issuing a decision?).

289. The ABA standard is fifty-five days. ABA Standards, *supra* n. 18.

290. Colorado's Response to Survey Question 18 reports an average of 218 days for criminal cases and 256 days for civil cases; 237 is the average between the two reported numbers.

291. Arkansas's Response to Survey Question 18 reports an average of 100 days for criminal cases and 112 days for civil cases; 106 is the average between the two reported numbers.

292. New Jersey's Responses to Survey Question 17a and 17b report two months, six days for criminal cases and two months, twenty-two days for civil cases; seventy-four is the average between the two reported numbers.

293. New Jersey's Response to Survey Question 18 reports an average of one month, twelve days for civil cases and one month, twenty days for criminal cases; forty-six is the average between the numbers reported.

294. New Mexico's Response to Survey Question 17 indicates it takes 193 days from submission to panel to decision because oral argument is rare.

295. North Carolina reports that this information is unavailable. However, the court's Response acknowledges an internal policy requiring opinions to be filed within ninety days of the date on which the case was calendared for argument or decision without argument. *See* North Carolina Response to Survey Question 17; *see also* email message from John C. Martin, C.J., N.C. Ct. App., to W. Warren H. Binford (Nov. 21, 2007, 7:03 a.m.) (on file with author Binford).

research shows already that ten of the eleven courts that responded to relevant questions submitted data indicating that the vast majority of opinions they issue are unpublished.[296] In fact, the Connecticut Appellate Court, the Court of Appeals of the State of Georgia, and the Oregon Court of Appeals are the only courts that report publishing most of their opinions.[297]

a. Court Productivity: Published vs. Unpublished Opinions

We decided to compare published and unpublished opinions as a secondary measure of court productivity and to see whether issuing a significant number of unpublished opinions improves court efficiency. Acknowledging that opinions differ from court to court and even within a court, our basic assumption is that a published opinion generally requires more time and resources to produce than an unpublished opinion, although this assumption is certainly debatable.[298]

TABLE 9—COURT PRODUCTIVITY MEASURED BY PUBLISHED OPINIONS

	Number of Published Opinions[299]	Number of Unpublished Opinions[300]
GA	1,285	279
NC	645	991

296. *See* Table 9 *infra*.

297. *Id.* A large percentage of Oregon's published opinions are AWOPs. Connecticut does not identify the number of published opinions, but it did report that statute requires all appellate opinions to be published, so presumably all of its 528 opinions are published.

298. *See* Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?* 32 Hofstra L. Rev. 1215, 1222 (2004) (quoting Judge Alex Kozinski's testimony to a Congressional subcommittee on the courts in which he argued that "if these decisions were citeable, the judges who write them might have to pay much closer attention to their precise wording, the judges might have to agree on the precise reasoning, the judges who dissent from the result might have to make that fact known, and judges not on the panel might have to pay much closer attention to the decisions written by their colleagues," all evidence of the impairment that citation of unpublished opinions would cause to the federal judiciary in terms of workload and efficiency) (internal citations and quotation marks omitted).

299. The number of published opinions was calculated by subtracting the number of unpublished opinions (responses to Survey Question 15c) from the number of total opinions (responses to Survey Question 15). Connecticut and Nebraska do not appear in Table 9 because they did not report this data.

300. Courts' Responses to Survey Question 15c (How many total opinions were issued in 2005? How many were unpublished opinions?).

TABLE 9—COURT PRODUCTIVITY MEASURED BY PUBLISHED OPINIONS (continued)		
	Number of Published Opinions	Number of Unpublished Opinions
OR	552[301]	n/a
NJ	309	3,264
MI	271[302]	3,400[303]
CO	241	1,478
AR	233	596
MN	198	1,286[304]
KY	160	1,241
NM	149	535
KS	138	1,124

Approximately ninety percent of the opinions issued by the Appellate Division of New Jersey's Superior Court in 2005 were unpublished.[305] Almost eighty-nine percent of the opinions issued by the Kentucky Court of Appeals were unpublished,[306] as were approximately eighty percent of the opinions issued by the Colorado Court of Appeals (excluding per curiam opinions).[307] The Arkansas Court of Appeals expressly identifies the importance of its authority to issue unpublished opinions (and to affirm without written opinion in unemployment compensation appeals that have not been briefed) to promote efficient case processing.[308] But does the practice of issuing unpublished opinions actually contribute to court efficiency?

Not all of the courts agree that they are experiencing a marked benefit by issuing a greater percentage of unpublished opinions. The Minnesota Court of Appeals is one of the courts

301. Oregon's response to Survey Question 15 indicates that total opinions were 1,680, and of those, 1,128 were 'affirm without opinion' ("AWOP"). Oregon did not report unpublished opinions in response to Question 15c. The number reflected above is the number of opinions reported; it does not include the number of cases the court "affirmed without opinion."

302. Whitbeck Interview, *supra* n. 16. The court estimates that for 2005 it issued 156 authored opinions, sixty-five per curiam opinions, and fifty memorandum opinions.

303. *Id.* The court estimates that for 2005 it issued approximately 3400 unpublished per curiam opinions.

304. Minnesota's response to Survey Question 15c reports that the number 1,286 includes 1,184 in the "unpublished format" and 102 in the more abbreviated and equally non-precedential "order-opinion" format.

305. New Jersey Response to Survey Question 16.

306. Kentucky Response to Survey Question 15c.

307. Colorado Response to Survey Question 15c.

308. Arkansas Response to Survey Question 42.

actively trying to decrease the overall number of published opinions in favor of unpublished opinions.[309] Unfortunately, the court reports that the judges "have not seen an appreciable decrease in the amount of preparation time as a result."[310] The court reports that it is also authorized to issue order opinions, which the court describes as "even more abbreviated, although they do have a recitation of the legal analysis and are not 'summary affirmances' by any means."[311] However, the court is reluctant to use the format.[312]

Many of the courts surveyed appear to be less reluctant than the Minnesota Court of Appeals to issue summary affirmances, even in their most abbreviated form. In addition to the Arkansas Court of Appeals, the Appellate Division of New Jersey's Superior Court sometimes affirms with a short opinion, and generally disposes by an unpublished order cases argued orally without briefs.[313] The Kansas Court of Appeals is allowed to issue an order to summarily affirm or reverse where there is a prior controlling appellate decision that is dispositive of the appeal.[314] The court may also "summarily affirm or reverse an appeal of a sentencing issue where there are no substantial questions presented by the appeal."[315] One might surmise that this practice would explain the fact that only 138 of the 1,262 opinions issued by the Kansas Court of Appeals in 2005 are published.[316] However, the statistics reported do not include these dispositions, which could include a significant portion of 135 miscellaneous denials counted as "dispositions," not "opinions."[317] It would be interesting to determine the factor driving the significant percentage of unpublished opinions by the Kansas Court of Appeals to ascertain the effect of this practice on court performance.

309. Minnesota Response to Survey Question 42.

310. *Id.*

311. *Id.*

312. *Id.*

313. New Jersey Response to Survey Question 16.

314. Kansas Response to Survey Question 16 (citing Kan. S. Ct. R. 7.041).

315. *Id.* (citing Kan. S. Ct. R. 7.041a and Kan. Stat. Ann. § 21-4721(g), (h)).

316. Kansas Responses to Survey Questions 15 and 15c.

317. E-mail from Kevin Beckwith, Counsel to C.J., Kan. Ct. App., to David V. Brewer, C.J., Ore. Ct. App. (Oct. 25, 2007, 7:58 a.m.) (on file with author Binford).

The vast majority of the opinions issued by the Oregon Court of Appeals were "affirmed without opinion" in 2005 (1,128 out of 1,680 total). Unlike the order opinions described by the Minnesota Court of Appeals, these published opinions do not include a summary of the facts or legal analysis, and in that sense they really are not written opinions and are published only in the sense that the disposition appears in the case report stating it is "affirmed without written opinion." In order for the court to issue an AWOP, all three judges on the panel must agree both on the result and that a written opinion is not necessary.[318] A case that is disposed of by AWOP in Oregon endures the appellate process in the same way and with the same rigor as other cases, minus the exercise of writing an opinion. In this way, Oregon's AWOP is similar to other courts' use of abbreviated unpublished opinions, and appears to require a similar amount of labor and care.

The relationship between legal staff and the issuance of unpublished opinions is discussed in section IV.D *infra*. It is important to note here, however, that we found no correlation (positive or negative) between court efficiency and the number[319] or percentage[320] of unpublished opinions. Although courts may choose to issue unpublished opinions and dispose of cases by summary disposition methods, that choice does not necessarily have a significant impact on the workload associated with a particular case and as a result may not improve court efficiency overall. If a case is fully briefed and argued, the judges confer, and the case is then slotted for summary disposition, the only time saved appears to be the time taken to write a more developed opinion.

b. En Banc Procedures

We also surveyed the courts regarding the role of en banc procedures in the decisionmaking process. En banc procedures generally allow all of the members of the court, rather than a single judge or a panel of judges, to participate in a decision. We

318. Oregon Response to Survey Question 29.

319. $N = 8$; $r = .264$; $p = .528$.

320. $N = 8$; $r = .350$; $p = .395$.

were curious as to whether the courts perceive the practice to affect efficiency or productivity.

The courts' responses indicate that only one-half of the courts have an en banc option, and most of those that do, rarely use it.[321] The responses summarized below in Table 10 indicate that the en banc option appears to have very little to no impact on the overall systematic work of the courts surveyed.

TABLE 10—EN BANC PROCEDURES

	Does the court have an en banc option?[322]	When is it used?[323]	How often is it used?[324]	Who decides whether a case will be taken en banc?[325]
AR	Yes	Motions.		
CO	No			
CT	Yes	Resolve conflicts b/w panels.	Infrequently (1 case in 2005-06).	Chief Judge or the entire court.
GA	Yes	If opinion proposed overrules prior decision. If majority of panel thinks issue should be passed on by the entire court.	2-3% each term are decided by 7- or 12-judge panels.	Majority of judges on the panel, or 7 judges, or if there is a dissent on reconsideration.
KS	Yes		Rarely (last time was in 1989).	Entire court votes on the motion.
KY	Yes	If panel is unable to reach a decision; to overrule prior decision; resolve conflicts between panels.	Rarely (once or twice per year).	Entire court votes.
MN	No[326]			
NE	No			
NJ	No			
NM	No			

321. *See* Table 10, *infra*.

322. Courts' Responses to Survey Question 30 (Is there an en banc option?).

323. Courts' Responses to Survey Question 30a (If so, when is it used?).

324. Courts' Responses to Survey Question 30b (How often is it used?).

325. Courts' Responses to Survey Question 30c (Who decides whether a case will be taken en banc?).

326. Minnesota's Response to Survey Question 30 indicates that it does not have an en banc option, but that its "super-panel" procedure, which falls short of requiring all sixteen judges to hear the case, is similar to an en banc option.

TABLE 10—EN BANC PROCEDURES (continued)				
NC	No			
OR	Yes	Generally, a judge refers a case when he or she disagrees with the result or the analysis.	Rarely (11 cases in 2005).	A vote of the majority of the participating judges is required.
Michigan did not report this data.				

5. Stage Five: Judgment

The fifth and final stage in the intermediate appellate process, from the issuance of the decision to the issuance of the judgment, is the briefest period reported by the courts. Not all courts report a time period for this stage, which was at least partially due to the fact that in many courts the issuance of a decision or order was the final judgment.[327] There is no ABA standard to compare the courts' performance to, but the responding courts report periods with a mean of forty-four days; however, this appears to be largely affected by the data reported by the New Mexico Court of Appeals and the Colorado Court of Appeals, which require three to five times longer to process cases at Stage Five than the other courts.

TABLE 11—COURT EFFICIENCY AT STAGE FIVE: DECISION TO JUDGMENT	
	Average Number of Days[328]
AR (2)*	20[329]
GA	20
NC (3)	20
MN (1)	30
NE	30
KY	31

327. For example, New Jersey reports that N.J. Ct. R. 2:11-3(b) provides, "The date of the filing of the opinion shall be deemed to be the date of the entry of the judgment." *See* New Jersey Response to Survey Question 19.

328. Courts' Responses to Survey Question 19 (What is the average time from issuance of decision to issuance of the appellate judgment?).

329. Arkansas's Response to Survey Question 19 indicates that this information is not available. However, the court reports that the mandate usually issued on the twentieth day after the opinion, unless a timely petition was filed.

TABLE 11—COURT EFFICIENCY AT STAGE FIVE: DECISION TO JUDGMENT (continued)	
	Average Number of Days
NM (6)	94
CO (9)	108[330]
	Mean: 44
*(x) Indicates overall ranking for average total case processing time.	

C. Motion Practice

Court performance is not measured solely by the volume of opinions issued and the speed of the process; there are other indicators. Motion practice can also require a significant amount of an intermediate appellate court's time, energy, and resources. To evaluate this aspect of the appellate process, we surveyed courts about the volume, efficiency, nature, and staffing of their motion practices. The responses are summarized in Table 12 below.

TABLE 12—MOTION PRACTICE				
	Total Motions Filed[331]	Motions for Time Extension[332]	Average Time: Time Extension Motions[333]	Average Time: Other Motions[334]
OR	22,244	14,230	3	82
CO	15,685	7,066	1.5[335]	11
KS	10,735		Unknown[336]	

330. Colorado's Response to Survey Question 19 reports an average of 116 days for criminal cases and 100 days for civil cases; 108 is the average between the two numbers reported.

331. Courts' Responses to Survey Question 21 (How many motions were filed in 2005?).

332. Courts' Responses to Survey Question 22 (Of total motions in 2005, how many motions were for time extensions?).

333. Courts' responses to Survey Question 25 (What is the average time for a motion to be decided for time extensions versus other types of motions?).

334. *Id.*

335. Colorado's Response to Survey Question 22a indicates that it took thirty-six hours to decide a motion for time extension and between seven and fifteen days for other motions. We interpreted this data as one and a half days for motions for time extensions and the median between seven and fifteen, or eleven days, for other motions.

336. Kansas's Response reports that the court did not collect this data; however, it states that pursuant to court rule, any party could respond within five business days of service of the motion and the clerk's office could grant motions for extensions of time for up to

TABLE 12—MOTION PRACTICE (continued)				
	Total Motions Filed	Motions for Time Extension	Average Time: Time Extension Motions	Average Time: Other Motions
GA	10,000+			
NJ	7,171	1,238	28[337]	28
CT	5,607[338]	4,359	5[339]	17.5
NC	5,009	3,005[340]	1.5[341]	
KY	4,738	unknown[342]		
NM	3,281	2,127	2	13
AR	3,272[343]	2,221	4[344]	21
MN	1,212	402	4[345]	25
Michigan and Nebraska did not report this data.				

The volume of motion practice at individual courts varies considerably. The range includes a high of 22,244 motions (Oregon Court of Appeals) to a low of 1,212 motions (Minnesota Court of Appeals). Additional research should be conducted to ascertain why a court such as the Oregon Court of Appeals would have a motion volume that is more than eighteen times as large as that of the Minnesota Court of Appeals, even though the Oregon Court of Appeals only had 1,369 more cases filed in 2005 than the Minnesota Court of Appeals.[346]

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twenty days without waiting for a response. *See* Kansas Response to Survey Question 25.

337. New Jersey's Response to Survey Question 25 reports that if all parties consent, then the motion may take only two weeks.

338. Connecticut's Response to Survey Question 21 also reports there were sixty-six *sua sponte* motions filed in 2005.

339. Connecticut reports that it does not have a tracking system to determine the length of time for these motions; the numbers reported are estimates.

340. North Carolina's Response to Survey Question 22 reports that the court estimated that the number of motions for time extensions was sixty percent of its total motions filed.

341. North Carolina's Response to Survey Question 25 reports one to two days; 1.5 is the median.

342. Kentucky's Response to Survey Question 22 reports that this data is unavailable. However, the court indicates that of the 4,738 motions filed in 2005, 2,463 were assigned to dockets indicating they were procedural in nature.

343. Arkansas's Response to Survey Questions 21 and 22 indicates that the number 3,272 connotes motions for extension for briefing time, not for settling the record.

344. Arkansas's response reports that the information is not available; however, motions take three weeks and motions for time extensions take a few days. We interpreted this as twenty-one days for general motions and four days for motions for time extensions. *See* Arkansas Response to Survey Question 23.

345. Minnesota's Response to Survey Question 25 reports three to five days for motions for time; four is the median. The court reports that other motions took twenty to thirty days; twenty-five is the median.

346. *See* Table 1, *supra*.

Many courts report that the majority of motions filed are for extensions of time. Although most courts are able to decide motions for extension within a few days, one court (the Appellate Division of New Jersey's Superior Court) reports that the decision regarding an extension normally takes twenty-eight days, unless all parties consent, in which case the motion would be decided in approximately two weeks.[347] (This may be due to the court's effort to reduce the number of extensions granted and the chief judge's involvement in making such decisions.)[348]

The courts report considerable variance in how the courts manage their motions practice, although most appear to rely heavily on staff attorneys with targeted involvement by judges.

TABLE 13—STAFFING FOR MOTION PRACTICE	
Arkansas	Chief Judge decides routine unopposed extensions for brief time. Other motions are submitted to the court en banc, with one judge assigned primary responsibility to recommend disposition.[349]
Colorado	Two staff attorneys and administrative assistant (attorney) and one full-time clerk, additional clerk to process and mail rulings. Routine unopposed motions are ruled upon by a staff attorney. One judge can rule on any motion (usually the Chief Judge). Motions that may dispose of all or part of an appeal are routed by Chief Judge to three-judge motions panel.[350]
Connecticut	Two staff attorneys and 1.5 law clerks. Appellate Clerk's Office may rule on motions for extension of time. Motions not dispositive of appeal may be ruled on by 1+ members of the court, subject to review by a full panel (three or five judges).[351]

347. New Jersey Response to Survey Question 25. Subsequently, Judge Stern of the Appellate Division informed the Court Study Committee that the court's Rules "require waiting ten days after service for an answer to be filed, with three additional days if service is made by mail." Stern Memorandum, *supra* n. 74.

348. *See Extensions for Filing Briefs*, *supra* Section III(B)(2)(a).

349. Arkansas Responses to Survey Question 22 and 23.

350. Colorado Responses to Survey Question 23 and 24.

351. Connecticut Responses to Survey Questions 23 and 24.

TABLE 13—STAFFING FOR MOTION PRACTICE (continued)	
Georgia	Three staff attorneys per judge that assist judge in motion practice. The judge assigned to author the opinion is responsible for deciding the motion, if the motion is dispositive it is circulated to the three-judge panel.[352]
Kansas	Motions attorney, Counsel to Chief Judge, motions panel of three judges (rotates). Clerks may rule on motions for extension of time. Other motions are routed to the motions attorney and assigned motions judges.[353]
Kentucky	Three staff attorneys prepare recommendations and orders for the Chief Judge. (Chief staff attorney devotes 15-20% of time.) Procedural motions are decided through administrative order by ruling of the chief judge. Substantive motions are assigned to motions panels (with rotating judicial personnel).[354]
Michigan	Motions are decided by a motions panel, which rotates monthly.[355]
Minnesota	Motions practice takes the time of three staff attorneys and one administrative assistant. Chief Judge decides routine motions. Potentially dispositive motions are decided by a three-judge panel.[356]
Nebraska	Clerk's office handles first two motions for time extension. Most motions are decided by a motions judge or panel rotation.[357]
New Jersey	Clerk's office may grant unopposed requests to extend brief time.[358] Other motions are decided by a single judge (usually the Presiding Judge or a more senior judge) or a two-judge panel.[359]

352. Georgia Responses to Survey Questions 22, 23, and 24.

353. Kansas Responses to Survey to Questions 22, 23, and 24.

354. Kentucky Responses to Survey Questions 22, 23, and 24.

355. Whitbeck Interview, *supra* n. 18.

356. Minnesota Responses to Survey Questions 23 and 24.

357. Nebraska Responses to Survey Questions 22, 23, and 24.

358. Judge Stern of the Appellate Division has subsequently advised the authors that the "clerk can grant only two unopposed requests to extend the period for briefing." Stern Memorandum, *supra* n. 74.

359. New Jersey Responses to Survey Questions 22 and 23.

TABLE 13—STAFFING FOR MOTION PRACTICE (continued)	
New Mexico	Chief clerk, staff attorneys, motions judge, judges (all spend some of their time on motions practice). Chief clerk decides routine motions. Motions judge or panel decides substantive motions.[360]
North Carolina	Motions are reviewed by a member of the legal staff and either referred to the panel or decided by the Chief Judge.[361]
Oregon	Administrative staff may decide motions for extensions of time, per grant of authority from the Chief Judge. Chief Judge decides all administrative motions other than for time extensions and all substantive motions except those decided by the Motions Department (three-judge panel). Office of Appellate Legal Counsel has primary responsibility for reviewing substantive motions.[362]

Only one court, the Nebraska Court of Appeals, reports that an increased motion practice is one of its methods to increase court efficiency.[363] Specifically, the court has been sustaining motions for summary affirmances.[364] Additional research should be conducted to determine both (1) how courts can ensure an efficient motion practice, and (2) how a court's motion practice can increase the court's performance overall.

D. General Factors in Court Delay and Recent Innovations at Individual Courts

We also studied factors that might influence court productivity and efficiency generally such as court resources, mediation programs, and court culture.

1. Court Resources

First, we analyzed court resources such as budget, judicial

360. New Mexico Responses to Survey Questions 22, 23, and 24.
361. North Carolina Response to Survey Question 22a.
362. Oregon Responses to Survey Questions 22, 23, and 24.
363. Nebraska Response to Survey Question 42.
364. *Id.*

salaries, and staffing to determine whether there appears to be a statistically significant relationship between individual court resources and court performance. Very few resources appear to correlate, perhaps due to the small sample size.

a. Total Budget

One of the challenges courts continue to face is insufficient budget resources. Following the recession in 2001, state budgets have taken an upward turn; however, this does not necessarily translate into greater funding for state judicial departments.[365] A 2006 study conducted by the National Center for State Courts predicts that fiscal trends in state courts will not improve due to the decreased amounts of federal funding that is shifting the fiscal burden for state courts to the individual states.[366] "Beginning in 2005, states noticed decreased federal grants and support to justice programs, transportation, and education."[367] If this trend continues, the study predicts, it "will certainly put a great deal of strain on state coffers" and "by FY 2008, at least 19 states expect structural deficits."[368] With this in mind, we proceed to assess the budgeting of the courts participating in this study.

We first ranked the courts according to the size of their total budgets.

365. *Future Trends in State Courts 2006*, 14 (Carol R. Flango, Chuck Campbell & Neal Kauder eds., Natl. Ctr. for St. Cts. 2006) (comprising a discussion in *State Courts and Budget Challenges* section of *Ten Trends Impacting State Courts*).

366. *Id.* Decreased federal funding is attributed to the rising cost of healthcare and Social Security as the population ages and also to the continually high federal deficit.

367. *Id.*

368. *Id.*

TABLE 14—TOTAL COURT BUDGET				
	Total Court Budget[369]	Variance from Budget Mean	Total Filings[370]	Variance from Filings Mean
GA	$12,139,965[371]	+ $5,677,302	3,139[372]	+ 119
MN	$8,327,188	+ $1,864,525	2,432	- 588
KY	$7,121,134	+ $658,471	2,620[373]	- 400
CO	$5,487,778	- $974,885	2,766	- 254
NM	$4,900,000	- $1,562,663	907	- 2,113
AR	$4,857,251[374]	- $1,605,412	1,322[375]	- 1,698
KS	$4,767,986	- $1,694,677	1964	- 1056
OR	$4,100,000	- $2,362,663	3801	+ 781
	Mean: $6,462,663			
Connecticut, Michigan, Nebraska, New Jersey,[376] and North Carolina did not report total.				

The sizes of the courts' budgets range from a high of $12,139,965.00 (Court of Appeals of the State of Georgia) to a low of $4,100,000.00 (Oregon Court of Appeals), with a mean of $6,462,663.00. We hypothesized that there would be correlations between the size of the court's total budget and (1) the total number of filings with the court; (2) the court's

369. Courts' Responses to Survey Question 39 (What was the total court operating budget for the most recently completed year or biennium? Please specify which year(s) the budget was in place.).

370. Courts' Responses to Survey Question 1 (How many notices of appeal were filed in 2005?).

371. Georgia's Response indicates that the number is for fiscal year 2006. *See* Georgia Response to Survey Question 39.

372. Georgia's Response to Survey Question 1 indicates that the number 3,139 includes 2,353 direct appeals and 786 applications to appeal.

373. Kentucky's response to Survey Question 1 reports that 2,620 is the number of total docketings, including 1498 civil appeals, 147 Workers' Compensation appeals, 736 criminal appeals, eighty-eight motions for discretionary review, and 151 original actions.

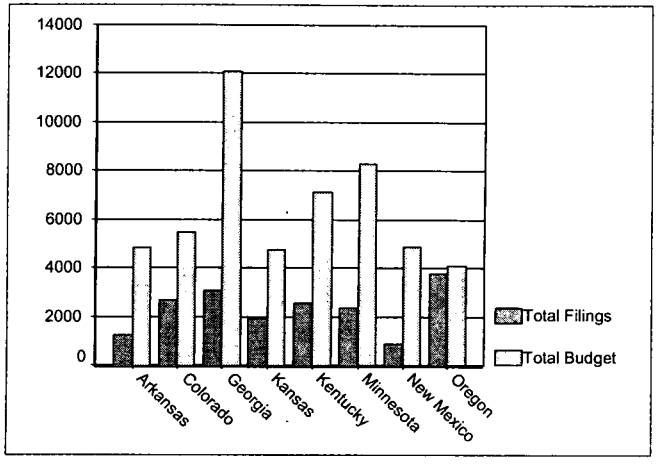
374. Arkansas's Response to Survey Question 39 indicates that this number does not include matching funds for judges' salaries.

375. Arkansas's Response to Survey Question 1 indicates that although this data is unavailable, 1322 records were lodged with the clerk commencing jurisdiction in the appellate court.

376. New Jersey reports an appropriation for fiscal year 2005 of $1,581,000.00, not including judicial salaries. Because the court did not provide a full budgetary calculation, we did not include this number in our analysis. We decided that to include the number reported would result in inappropriately skewed statistical analysis and an inaccurate representation of the court's actual operating budget. New Jersey also speculated that for the 2006 budget year, the total budget allocation was $17,776,000.00. *See* New Jersey Response to Question 39 and e-mail from John Chacko, Clerk, App. Div., N.J. Super. Ct., to Hillary Taylor (May 25, 2007, 12:22 p.m.) (on file with author Binford).

productivity; and (3) the court's efficiency. All three hypotheses proved incorrect.

GRAPH 1—TOTAL COURT BUDGET COMPARED TO TOTAL FILINGS



There is no significant statistical relationship between the total number of filings and a court's total budget.[377] For example, of the courts that report both their total budget and total filings, the court with the highest total filings (Oregon Court of Appeals) had the lowest budget, while the court with the highest budget (Court of Appeals of the State of Georgia) ranked seventh (out of twelve) for total number of filings. As the above graph illustrates, the number of total filings remained comparatively consistent while total budget varied dramatically.[378] The lack of relationship evident here produces several questions for further investigation. Do legislatures (or executives as the case may be) consider the caseload of a court when appropriating resources? If not, what considerations inform those who set, increase, decrease, and affect judicial budgets? What factors should dictate a court's total operating budget?

There is also no significant relationship between total court budget and the average total case processing time.[379] Although

377. $N = 8$; $r = .311$; $p = .453$.

378. *See* Graph 1 *supra*.

379. $N = 5$; $r = -.250$; $p = .685$.

the relationship between a court's total budget and the number of opinions issued is stronger, it does not rise to the level of statistical significance.[380] The only significant correlation identified is a positive relationship between the court's total budget and the number of authored opinions per judge.[381]

b. Budget per Case

We next ranked the courts according to the size of each court's budget per case. The budget per case was calculated by dividing the court's total budget by the total number of cases filed with the court to derive the dollar amount each court is spending on each case.

TABLE 15—BUDGET PER CASE		
	Budget per Case[382]	Variance from the Mean
NM	$5,402.43	+ $2,330.38
GA	$3,867.46	+ $795.41
AR	$3,674.17	+ $602.12
MN	$3,424.01	+ $351.96
KY	$2,717.99	- $354.06
KS	$2,427.69	- $644.36
CO	$1,984.01	- $1,088.04
OR	$1,078.66	- $1,993.39
	Mean: $3,072.05	

The budget per case ranged from a high of $5,402.43 (New Mexico Court of Appeals) to a low of $1,078.66 (Oregon Court of Appeals), with a mean of $3,072.05.

We predicted that the budget per case would correlate with both (1) efficiency and (2) productivity. However, we discovered that there is no correlation between budget per case and court efficiency [383] or productivity.[384] For example, the New

380. *N = 8; r = .611; p = .107.* It is worth noting that this number is significantly higher and closer to statistical significance at the .1 level than the correlation was when calculated to include the number of AWOPs included in the number of total opinions ($N = 8$; $r = .352$; $p = .392$).

381. $N = 7$; $r = .867$; $p = .012$.

382. Budget per case was calculated by dividing total budget (Question 39) by total filings (Question 1).

383. $N = 5$; $r = -.333$; $p = .584$. It is possible that this negative correlation is only a mathematical result of lower variance in budget per case than in number of filings.

384. *N =8; r = -.103; p = .807.* However, when the correlation between budget per case and court productivity was calculated to include AWOPs (in the measure of total

Mexico Court of Appeals has the highest budget per case and yet ranks last (twelfth of twelve) for number of filings and tenth (of thirteen) for productivity.[385] By contrast, the Colorado Court of Appeals had the second lowest budget per case, but was fifth (out of twelve) for number of total filings and third (out of thirteen) for productivity.[386] Because of the small sample size, further research should be conducted to ascertain whether these results can be duplicated when more courts are studied.

c. Legal Staff

One of the most significant factors affecting court productivity is court legal staff (including judges). Although we found almost no significant correlations between legal staffing and efficiency,[387] statistical analysis consistently demonstrated positive correlations between the number of most categories of legal staff and court productivity.[388] Thus, it is not surprising to read courts partially attributing performance issues to staffing shortages. According to Cynthia Lehr, Chief Attorney with the Minnesota Court of Appeals:

> We could easily absorb another six judges (two panels of three judges), but do not have the funding. When the court was created (it began operations in 1983), there was a specific mechanism for increasing the number of judges, in proportion to the caseload. That formula was never implemented, however, and the legislature eventually repealed that part of the statute. Funding shortfalls have also reduced the overall number of law clerks available to

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productivity) a negative correlation was indicated ($N = 8$; $r = -.752$; $p = .032$).

385. *See* Table 1, *supra*.

386. *Id.*

387. No statistically significant relationships were found between total case processing time and (1) number of judges ($N = 9$; $r = .037$; $p = .925$), (2) number of law clerks ($N = 8$; $r = -.186$; $p = .660$), (3) number of staff attorneys ($N = 8$; $r = .394$; $p = .334$), (4) number of judicial assistants ($N = 8$; $r = -.142$; $p = .737$) and (5) number of total legal staff ($N = 8$; $r = .248$; $p = .553$). *See* subsection (3) of this section for a discussion of the relationship between the use of senior or retired judges and court efficiency.

388. Statistically significant correlations were found between the number of total opinions issued and (1) number of judges ($N = 13$; $r = .967$; $p = .000$, sig. at .01), (2) number of law clerks ($N = 12$, $r = .792$; $p = .002$, sig. at .01), (3) number of staff attorneys ($N = 12$; $r = .747$ $p = .005$, sig. at .01), and (4) number of total legal staff ($N = 12$; $r = .908$; $p = .000$, sig. at .01), but not between total opinions and the number of judicial assistants ($N = 12$; $r = -.033$; $p = .919$).

> assist the judges . . . and precluded expansion of the central staff.. . . Without an adequate number of judges and support staff, we cannot sustainably increase the number of hearing slots AND continue to issue full, written opinions within the allotted time.[389]

The Oregon Court of Appeals also cited a shortage of judges as a source of delay for the court.[390] The court indicates that it has too few judges to handle the number of cases that need to be decided on the merits, and could readily utilize another three-judge panel.[391] In the meantime, cases are at issue for four to six months before being set for oral argument because there are not enough oral argument dates to hear all of the cases in which oral argument is requested.[392]

Minnesota and Oregon are not the only courts that identify increasing the size of the bench as one possible method to increase efficient case processing. In 2005, the Colorado Court of Appeals undertook a time-use study to address the problem of appellate delay. The results of Colorado's study show that for its current caseload, the court requires twenty-five judges (nine more than the sixteen judges sitting in 2005). In July 2006, the court added three more judges, growing to nineteen. The judicial department hopes to add an additional three judges in July 2008, a request that was pending before the legislature when the court completed the survey.[393] Colorado is a prime example of a court that sought to evaluate its shortcomings, identified solutions, and obtained legislative support to implement such solutions.

As legislatures are often unwilling to increase or incapable of increasing the composition of the court, courts are trying to identify and implement systems for operating effectively with an insufficient number of judges. For example, the Appellate Division of New Jersey's Superior Court allows cases to be decided by panels of two judges, except when the presiding judge determines that three judges are necessary.[394] Sixty-eight

389. Minnesota Response to Survey Question 41 (emphasis in original).

390. Oregon Response to Survey Question 42. The Oregon court has since responding to the survey been successful in gaining an increase in judicial compensation. *See Capital Insider*, *supra* n. 218.

391. Oregon Response to Survey Question 42.

392. *Id.*

393. Colorado Response to Survey Question 41.

394. New Jersey Response to Survey Question 42 (citing N.J. Ct. R. 2:13-2(b)).

percent of the appeals decided during the 2005-2006 court term were decided by panels of two judges, which allows for the disposition of more appeals.[395]

The Connecticut Appellate Court utilizes former Supreme Court justices and appellate court judges to sit on the appellate court by designation as judge trial referees. The judge trial referees are able to hear and decide appeals, allowing the court "to hear and dispose of more cases than is otherwise possible."[396]

1. Associate Judges

We then focused on individual legal staff roles to determine whether a relationship exists between court performance and other aspects of court resources, including judicial salaries. The survey instrument did not include an inquiry regarding judicial salaries; therefore, we relied on the 2005 salary data compiled by the National Center for State Courts to facilitate further comparison throughout the study.[397]

TABLE 16—ASSOCIATE JUDGE SALARIES

	2005 Associate Judge Salary[398]	Variance from the National Mean[399]	2005 National Salary Ranking[400]
GA	$152,139	+ $26,394	4
MI	$151,441	+ $25,696	5
NJ	$150,000	+ $24,255	7
CT	$137,137	+ $11,392	10
MN	$127,740	+ $1,995	14
AR	$124,652	- $1,093	15
KY	$122,085	- $3,660	20
KS	$114,118	- $11,627	26
NE	$113,312	- $12,433	27
NC	$113,293	- $12,452	28

395. New Jersey Response to Survey Question 42.

396. Connecticut Response to Survey Question 42.

397. *See Survey of Judicial Salaries* 30 (Nat. Ctr. for St. Cts. 2005) (showing judicial salary figures as of Apr. 1, 2005), also available at http://www.ncsconline.org/WC/Publications/KIS_JudComJudSal040105Pub.pdf.

398. *Id.*

399. *Id.* The mean salary nationwide for a judge serving on a state intermediate court of appeal in 2005 was $125,745.00.

400. *Id.* There are thirty-nine intermediate appellate state courts; NCSC ranks judicial salaries on a scale of one to thirty-nine, with thirty-nine representing the lowest judicial salary.

TABLE 16—ASSOCIATE JUDGE SALARIES (continued)			
	2005 Associate Judge Salary	Variance from the National Mean	2005 National Salary Ranking
CO	$111,647	- $14,098	30
OR	$102,800	- $22,945	38
NM	$101,612	- $24,133	39

According to the salary data from the National Center for State Courts, 2005 associate judge salaries for the courts included in our sample range from a low of $101,612.00 (New Mexico Court of Appeals)[401] to a high of $152,139.00 (Court of Appeals of the State of Georgia).[402] We hypothesized that associate judge salaries would correlate with (1) total number of filings; (2) court productivity; and (3) court efficiency. Under this theory, for example, the New Mexico Court of Appeals, which has the lowest associate judge salary (despite having the highest budget per case),[403] would have a relatively low level of filings and performance. The New Mexico Court of Appeals, in fact, ranks last for number of filings,[404] tenth (out of thirteen) for productivity,[405] and sixth (out of nine) for efficiency.[406]

Statistical analysis shows that there is a correlation between associate judge salaries and the number of total filings[407] and the number of opinions issued,[408] but not court efficiency.[409] Do associate judges who are higher paid produce more opinions because they are more highly paid or are they more highly paid because they serve in courts with more volume?

If the answer is that their productivity is driven by compensation,[410] how does one explain the North Carolina Court of Appeals, which ranks tenth (out of thirteen) for

401. *Id.* at 2.

402. *Id.* at 7 (rounding figure to $153,000.00). We found it curious that New Mexico had the highest budget per case, but the lowest judicial salaries in the study sample (*see* Table 14 *supra*). Where are the funds being spent?

403. *See* Table 15, *supra*.

404. *See* Table 1, *supra*.

405. *Id.*

406. *See* Table 3, *supra*.

407. $N = 12$; $r = .604$; $p = .037$.

408. $N = 13$; $r = .663$; $p = .013$.

409. $N = 9$; $r = .027$; $p = .946$.

410. We recognize that overall results are usually affected by multiple factors, but would like to identify which factors are important in improving court performance and which are not.

associate judge salaries,[411] but third (out of nine) for court efficiency[412] and fourth (out of thirteen) for court productivity?[413] Further research should be conducted to determine what factors contribute to relatively high court productivity and efficiency despite relatively low compensation for associate judges.

Given the correlation between associate judge salaries and court productivity overall, we continued by looking at productivity per judge.[414]

TABLE 17—PRODUCTIVITY PER JUDGE		
	Opinions per Judge[415]	Signed, Authored Opinions per Judge[416]
GA	130	130
MI	122	6
NC	109	109
CO	107	99
KS	105	
NJ	102	9
KY	100	100
MN	93	93
NE	80	
AR	69	68
NM	68	68
CT	58	
OR	55	40
	Mean: 92	Mean: 75

Ranking the courts according to productivity per judge highlights that there appear to be factors other than compensation that affect productivity. Two of the six courts with the most productive judges (Kansas Court of Appeals and North Carolina Court of Appeals) are from two of the six courts with

411. *See* Table 16 *supra*.

412. *See* Table 3 *supra*.

413. *See* Table 1 *supra*.

414. Judge Stern of the Appellate Division of New Jersey's Superior Court points out that any retired or recall judges included in our calculation of the number of judges serving on that court are recalled on a per diem basis and do not serve full-time. He also notes that they handle primarily settlement conferences as opposed to working on motions or opinions. Stern Memorandum, *supra* n. 74.

415. "Opinions per judge" was calculated by dividing the total number of opinions (Question 15) by the total number of judges on the court.

416. "Signed, authored opinions per judge" was calculated by dividing the total number of signed, authored opinions (Question 15a) by the total number of judges on the court.

the lowest paid judges among the study sample.[417] Recognizing that there are correlations between the number of total filings and court productivity[418] and filings per judge[419] and opinions per judge,[420] one possibility is that judges perform at the level necessary given the volume of the court, and that in some states, but clearly not all, those persons responsible for setting judicial salaries reward their judges for that high level of productivity.

TABLE 18—FILINGS AND OPINIONS PER JUDGE AND TOTAL COURT BUDGET

	Filings per Judge	Opinions per Judge	Budget Ranking
OR	380	55	8
MI	272	122	
GA	261	130	1
NE	250	79	
NJ	201	102	
KY	187	100	3
CO	173	107	4
KS	163	105	7
MN	152	92	2
CT	124	58	
AR	110	69	6
NM	90	68	5
NC		109	
	Mean: 197	Mean: 92	

2. Chief Judges

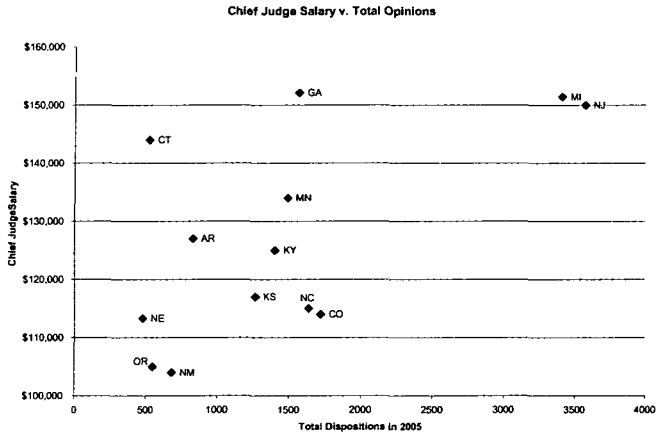
We were also curious about what relationship, if any, salaries of chief judges had to court performance. Similar to the hypotheses regarding associate judge salaries, we predicted that chief judge salaries would correlate to (1) total court filings, (2) court productivity and (3) court efficiency. Two of these proved correct: There is a correlation between the salary of the chief judge and court productivity[421] and total filings,[422] but not efficiency.[423]

417. *See* Table 16 *supra*.
418. $N = 12; r = .907; p = .000$.
419. $N = 12; r = .513; p = .088$.
420. $N = 12; r = .512; p = .089$.
421. $N = 13; r = .618; p = .024$.
422. $N = 12; r = .549; p = .064$.
423. $N = 9; r = .029; p = .941$.

TABLE 19—CHIEF JUDGE SALARIES		
	2005 Chief Judge Salary[424]	2005 National Salary Ranking[425]
GA	$152,139	4
MI	$151,441	5
NJ	$150,000	7
CT	$144,000	10
MN	$134,000	14
AR	$127,000	15
KY	$125,000	20
KS	$117,000	26
NC	$115,000	28
CO	$114,000	30
NE	$113,312	27
OR	$105,000	38
NM	$104,000	39

In evaluating this data, we were intrigued by the patterns that emerged outside the correlation, and decided to scatter plot the results.

GRAPH 2—CHIEF JUDGE SALARIES AND TOTAL OPINIONS



424. *Survey of Judicial Salaries*, *supra* n. 397. For this calculation, if the state does not have a higher rate of pay for the chief judge as indicated on the survey, the associate judge salary is considered the chief judge salary.

425. *Id.* This number represents total judicial salary ranking; it is not chief-judge-salary specific. There are thirty-nine intermediate appellate state courts. As noted above, NCSC ranked judicial salaries from one to thirty-nine, with thirty-nine representing the lowest judicial salary.

The scatter plot in Graph 1 shows that while two of the highest-paid chief judges head courts that are among those producing the most opinions (Michigan Court of Appeals and Appellate Division of New Jersey's Superior Court), there were also relatively low-paid chief judges who head more productive courts than do some of their more highly paid colleagues (Colorado Court of Appeals and North Carolina Court of Appeals, for example). This observation supports the belief that judges (both chief and associate) are motivated to be productive by factors other than fiscal incentives alone. The lack of a correlation between chief judge salary and court efficiency strengthens the hypothesis that non-financial considerations inform an individual judge's and a court's overall performance. It also suggests that there are many factors contributing to court efficiency, some of which may be beyond the chief judge's direct or indirect control.

3. Senior or Retired Judges

Of the thirteen courts surveyed, eight indicate that they use senior or retired judges.[426] One of the few factors that we identified that correlates with court efficiency is the use of senior or retired judges.[427] The more senior or retired judges a court uses, the longer the court tends to take to process cases. Another way to look at the relationship is that the longer the court takes to process cases, the more likely they are to turn to senior or retired judges. In other words, one cannot tell from the data collected whether the use of senior or retired judges is part of the problem or part of the solution. All we know is that there is a large positive correlation between the average time to process cases and the number of senior or retired judges used by a court. Further research should be conducted to determine (1) if the use of senior or retired judges is as prevalent among all intermediate appellate courts as it was in our sample group, (2) whether courts utilize such judges with an eye toward eliminating appellate delay, and (3) if their participation does indeed help to improve overall court performance.

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426. Responses of Colorado, Connecticut, Kansas, Kentucky, Minnesota, New Jersey, North Carolina, and Oregon to Survey Question 36.

427. $N = 8$; $r = .773$; $p = .024$.

4. Total Legal Staff[428]

We tried to identify the role of legal staff in determining the level of court performance. We hypothesized that the total number of legal staff would correlate with (1) the number of filings, (2) the size of the court's total budget, (3) the number of opinions issued (productivity), and (4) case processing time (efficiency). We anticipated that the correlation with case processing time would be a negative correlation. In other words, we predicted that courts are staffed with legal professionals according to volume and budget, and that courts with larger legal staffs were more productive, but less efficient, as a whole.

TABLE 20—OVERALL LEGAL STAFFING

	Total Judge[429]	Law Clerk[430]	Staff Atty[431]	Judicial Clerk[432]	Judicial Asst[433]	Rtd/Sr. Judge[434]	Trial / Temp Judge[435]	Total[436]
AR	12	24	4		14			54
CO	16	19	19	10	19	10		93
CT	9	25.5	9		4[437]	12		59.5
GA	12	36[438]	6		14[439]			68

428. We calculated the total number of legal staff by adding together the number of judges and the responses to Survey Questions 32, 33, 34, 35, 36, and 37 (which includes law clerks, staff attorneys, judicial clerks, judicial assistants, retired or senior judges, and trial court or temporary judges).

429. United States Department of Justice, Bureau of Justice Statistics, *State Court Organization 2004* at 12 (Table 2: "Number of Appellate Court Judges"), also available at http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf.

430. Courts' Responses to Survey Question 32 (What is the number of law clerks?).

431. Courts' Responses to Survey Question 33 (What is the number of staff attorneys?).

432. Courts' Responses to Survey Question 34 (What is the number of judicial clerks?).

433. Courts' Responses to Survey Question 35 (What is the number of judicial assistants?).

434. Courts' Responses to Survey Question 36 (What is the number of retired or senior judges used?).

435. Courts' Responses to Survey Question 37 (What is the number of trial court judges or other temporary judges used?).

436. *See* n. 428, *supra*.

437. Connecticut's Response to Survey Question 35 reports that the court does not have judicial assistants but it does have four appellate court secretaries.

438. Georgia's Response indicates that the traditional role of law clerk is called "staff attorney"; there are three per judge for each of the twelve judges as well as an additional six that are "central staff attorneys". For the purposes of comparison, we interpret this to mean there are thirty-six law clerks and six staff attorneys. *See* Georgia Response to Survey Question 32.

TABLE 20—OVERALL LEGAL STAFFING (continued)

	Total Judge	Law Clerk	Staff Atty	Judicial Clerk	Judicial Asst	Rtd/Sr. Judge	Trial / Temp Judge	Total
KS	12	12	17		12	5		58
KY	14	28	10		14[440]	Unknown[441]		66
MI	28							
MN	16	37	5.7		19	2[442]		79.7
NE	6	12[443]	1		2			21
NJ	35	51	32			6		124
NM	10	10	15		10			45
NC	15	31	8		15	3		72
OR	10	15	10		6	5	9	55

We found that there are positive correlations between the total number of legal staff and the number of notices of appeal filed,[444] and total opinions issued,[445] but no correlations between total legal staff and total budget[446] or court efficiency.[447] These findings demonstrate that courts with greater budgets are able to hire more legal staff and be more productive without affecting the court's efficiency. We also found a positive correlation between the total number of legal staff and the number of unpublished opinions issued,[448] an indication of the pattern already observed that bigger courts with greater caseloads tend to issue higher numbers of unpublished opinions.

Once again, however, we were confounded that we could not predict correlations related to court budgets. Recall that total court budget does not correlate to total filings,[449] court

439. Georgia's Response to Survey Question 35 indicates that the court designates those filling this position as "administrative assistants."

440. Kentucky's Response to Survey Question 35 indicates that it is unsure of the term "judicial assistant," but that each judge has one secretary/assistant.

441. Kentucky's Response to Survey Question 36 indicates that the court uses retired or senior judges, but did not provide a numerical value.

442. Minnesota's Response to Survey Question 36 reports that there are two retired judges actively serving the court at a time, with a total of six serving throughout the year.

443. Nebraska did not report the number of law clerks. However, the court's response to Survey Question 34 indicates that the court's judicial clerks serve the function of traditional law clerks.

444. $N = 11$; $r = .787$; $p = .004$.

445. $N = 12$; $r = .908$; $p = .000$.

446. $N = 8$; $r = .351$; $p = .394$.

447. $N = 8$; $r = .248$; $p = .553$.

448. $N = 10$; $r = .890$; $p = .001$.

449. *See supra* n. 377 and accompanying text.

efficiency,[450] or court productivity.[451] Total court budget also does not correlate to total number of judges,[452] or the number of total legal staff. If total legal staff is correlated to total filings, and total judges is correlated to filings, but total budget is not related to any of these (total filings, total judges or total legal staff), what data are the legislatures (or executives) using to determine the size of budgets necessary to properly staff intermediate courts of appeals and what affect do budgets ultimately have on courts' performance? This data suggests that court budgets are autonomous, existing without relationship to the factors that many would expect influence them. Again, we urge further research to ascertain what determines the allocation of court budgets.

Next, we approached legal staffing on a pro rata basis, dividing the total filings by the total number of legal staff to ascertain what effect, if any, higher caseloads per legal staff member had on court performance overall. We hypothesized that as the number of total filings per legal staff member increases, the number of total opinions produced would decrease as the court experienced a volume that was beyond its capacity, or at least hindered court efficiency. However, we found no correlation between filings per legal staff member and court efficiency[453] or productivity (as measured by total opinions issued).[454]

We did find a negative correlation between filings per legal staff member and court productivity as measured by the percentage of total filings that the number of total opinions represented.[455] This relationship suggests that as a court's caseload increases proportionate to each legal staff member, the court's overall performance is hindered, leading to a lower percentage of filings resulting in opinions. The implication here is that there is a critical mass for each legal staff member, a point at which the court's overall productivity will be restricted due to the individual workload of each member of the legal staff.

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450. *See supra* n. 379 and accompanying text.

451. *See supra* n. 380 and accompanying text.

452. $N = 8$; $r = .285$; $p = .494$.

453. $N = 7$; $r = -.112$; $p = .811$.

454. $N = 11$; $r = .135$; $p = .691$.

455. $N = 11$; $r = -.811$; $p = .002$.

TABLE 21—PRODUCTIVITY PER STAFF MEMBER		
	Filings per Legal Staff Member[456]	Total Opinions per Legal Staff Member[457]
NE	71	23
OR	69	10
NJ	57	29
GA	46	23
KY	40	21
KS	34	22
MN	31	19
CO	30	18
AR	24	15
NM	20	15
CT	19	9
NC		23
North Carolina did not report total filings, and the information for Michigan was incomplete.		

We hypothesized that overburdened courts would find ways to resolve cases using less labor intensive methods than issuing published opinions to alleviate delay and related issues. For example, we predicted that as filings per legal staff member increased, courts would issue a larger percentage of unpublished opinions and a smaller percentage of signed, authored opinions. In fact, when we tested this hypothesis, we found the indication of a negative correlation between filings per legal staff member and the percentage of signed, authored opinions issued by the court.[458] In other words, the higher the caseload per legal staff member, the less likely the court is to issue signed, authored opinions as compared to other types of opinions.

Even more interesting, there is a negative correlation between filings per legal staff member and the percentage of unpublished opinions issued by the court.[459] This relationship suggests that as caseload per legal staff member increases, the likelihood of the court producing an unpublished opinion

456. "Filings per staff member" was calculated by dividing total filings (Question 1) by the total number of legal staff available to the court. *See supra* n. 428.

457. "Total written opinions per legal staff member" was calculated by dividing the total number of written opinions (Question 15) by the total number of legal staff available to the court.

458. $N = 8; r = -.607; p = .110$. However, when we conducted this analysis based on a measure of total opinions that included AWOPs, the correlation was stronger ($N = 8; r = -.965; p = .000$).

459. $N = 8; r = -.611; p = .080$.

actually decreases. This might suggest that unpublished opinions are not necessarily produced in lieu of other types of opinions (namely signed, authored opinions) as a one-for-one trade designed to increase court productivity and efficiency. There must be other factors that control the use of such opinions, beyond the consideration of caseload per legal staff member.

How can one explain this negative correlation? For example, the Kansas Court of Appeals has the median number of filings per legal staff member (thirty-four) and produces a high number of opinions per legal staff member (twenty-two).[460] Yet, the Court of Appeals of the State of Georgia is ranked fourth for filings per legal staff member (forty-six) and for opinions per legal staff member (twenty-three) and it reports that eighteen percent of the total opinions it issues are unpublished.[461] At this level of comparison, the appellate courts of Kansas and Georgia were similarly productive on a pro rata basis; however, in reality Kansas is operating at a budget deficiency because its budget per case is only two-thirds that of Georgia.[462] It is unclear what controls the disparity in productivity and what informs courts' use of unpublished opinions.

2. Mediation and Settlement Programs

Many of the participating courts identify a mediation or settlement program as one effort to improve court efficiency. The Kentucky Court of Appeals reports that it has a pre-hearing conference procedure that has facilitated settlement in over 200 cases per year for more than a decade.[463] The New Mexico Court of Appeals indicates that its mediation program contributes to efficient case processing in that court.[464] The Connecticut Appellate Court reports that a large number of the cases referred to its pre-argument settlement conference program are resolved without further appellate activity.[465] That

460. See Tables 9 and 21, *supra*.
461. *Id.*
462. *See* Table 15, *supra*.
463. Kentucky Response to Survey Question 42.
464. New Mexico Response to Survey Question 42.
465. Connecticut Response to Survey Question 42.

court reports that its settlement conference program is staffed by "retired and senior judges and justices of the Supreme and Appellate Courts, as well as some former Superior Court judges,"[466] and that "[a]ll newly filed civil appeals, except habeas and juvenile cases, cases involving *pro se* parties and cases in which the trial court has reserved questions of law for decision by the Appellate Court" are systematically scheduled for a settlement conference prior to argument.[467] The Appellate Division of New Jersey's Superior Court reports that it uses its "recall judges" (six retired Appellate Division judges who are on recall and assigned to the court) to conduct settlement conferences under the court's Civil Appeals Settlement Program.[468]

However, not all courts perceive benefits from their mediation programs. The Colorado Court of Appeals reports that it has had a settlement program for several years, but the program has not been successful.[469]

3. Court Culture

There are other factors that contribute to the overall performance of appellate courts. Court culture is a qualitative factor that is cited by some courts as influential on court performance. Unfortunately, it is difficult for legal scholars without access to private judicial conferences and the inner workings of courts to measure and evaluate court culture. The people whose careers take them to the bench are often touted as the best and brightest of us all, making it perhaps more difficult to achieve the tranquility and respectful deliberation that is at the core of the appellate process.[470] Just how does the stability, civility, and relationships among the judges of a court impact court performance?

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466. *Id.*

467. *Id.*

468. New Jersey Responses to Survey Questions 36a and 36c.

469. Colorado's survey response to Question 42.

470. "One of the wisest but hardest things for a new judge to say at a conference is 'I don't know, I'm not sure.' An apprentice's key to collegiality and open-mindedness is docility, a virtue perhaps most difficult for those most intellectually gifted." Rudolph J. Gerber, *Collegiality on the Court of Appeals*, 32 *Arizona Attorney* 19, 19 (Dec. 1995).

Former chief judge of the D.C. Circuit Harry T. Edwards has defined a collegial court as one in which

> judges have a common interest, as members of the judiciary, in getting the law right, and . . . as a result, [they] are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.[471]

Judge Edwards provides insight into forming and maintaining a collegial court that can be applied to state intermediate courts of appeal. Recognizing that empirical studies on judicial decisionmaking are inherently flawed because they fail to take into account factors such as collegiality, Judge Edwards states that, most fundamentally, work on the appellate bench is a group process.[472] A stable court, with strong leadership and individual judges who subscribe to the institutional mission of the judiciary (getting the law right), can achieve collegiality and high quality productivity.[473]

Court culture has also been studied at the trial court level. Brian Ostrom, Roger Hanson, and Matthew Kleiman studied a number of Minnesota trial courts and developed a two-axis matrix of court culture, measuring variations in "sociability" and "solidarity."[474] "Sociability" was defined as "the degree to which judges and administrators get along and emphasize the importance of social relations," and "solidarity" was defined as "the degree to which a court has clearly stated and shared goals, mutual interests, and common tasks."[475] The researchers applied their matrix by sending questionnaires to the judges and staff in each trial court, asking them to rank both their current perception of their court along with their preferred style of court. The study verified its "basic hypothesis" that "the more courts

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471. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639, 1645 (2003).

472. *Id.* at 1656.

473. *Id.*

474. Brian J. Ostrom, Roger Hanson & Matthew Kleiman, *Examining Court Culture* 2, in 11 *Caseload Highlights* (Natl. Ctr. for St. Cts. May 2005) (including illustration of matrix) (also available at http://www.ncsconline.org/D_Research/csp/Highlights/Vol11No2.pdf).

475. *Id.*

emphasize Solidarity and deemphasize Sociability, the more timely their case processing."[476]

The two courts studied that had the highest rankings on solidarity were also the most expeditious; the researchers attribute that to the fact that "[j]udges and administrators in these two counties have made timely case processing a priority, articulated expectations to the criminal bar, and monitor and enforce the rules."[477] Though these studies focusing on "court culture" or "collegiality" do did not involve state intermediate appellate courts, their lessons resonate with observations from some of the participants in this study.

For example, one New Mexico Court of Appeals judge states that personal will is the "only" factor that leads to an avoidance of court delay:[478]

> Courts that timely process their cases have a culture of getting things done on time that is primarily internal, but also extends externally. That is, when judges do their work on time and require court staff to do the same, it is easy for them to insist that counsel and to a lesser extent court reporters do the same.[479]

The Michigan Court of Appeals also identifies court culture as playing a major role in that court's performance.[480]

The Oregon Court of Appeals suggests that cultural changes may be necessary to challenge and engage judges who contribute to court delays through underperformance.[481] The court suggests circulating lists of old cases, openly and actively encouraging good work habits from the chief judge down, not shielding judges from consequences of low productivity, and discouraging low-performing judges from assuming duties other than deciding cases.[482] The culture and collegiality existing between judges and court staff presumably plays a significant role in the way a given court operates and its overall performance, especially considering that no single factor can be

476. *Id.* at 4.
477. *Id.* at 5.
478. New Mexico Response to Survey Question 41.
479. *Id.*
480. Whitbeck Interview, *supra* n. 16.
481. Oregon Response to Survey Question 42.
482. *Id.*

said to be determinative of performance. Thus, a court culture that values productivity and efficiency while giving its members collegiality with each other and active deliberation, might tip the balance in favor of higher court performance.

V. CONCLUSION

There can be no question that intermediate courts of appeal are struggling to meet the ABA Standards for case processing at the appellate level. Issues of efficiency seem to plague every court surveyed in the Willamette Court Study in most stages of the appellate process. These issues of efficiency exist independent of the court's level of productivity. Whether these issues are due to external factors (such as budget shortages affecting court reporters, public counsel, or the courts themselves) or internal factors (such as court culture or the productivity of individual judges), it is clear from the data collected that intermediate courts of appeal are being challenged to identify systems for improved performance in the face of limited resources. As more courts innovate by developing new ways to process more cases more efficiently, these efforts should be studied over time. Such studies can contribute to a body of literature that identifies best practices among intermediate courts of appeal, enabling other courts striving to improve their performance to adopt these best practices in order to optimize the process for the bench, bar, and all parties affected by the work of intermediate appellate courts.

APPENDIX A

Appellate Court Survey

The Willamette Court Committee, which comprises Oregon appellate judges and Willamette University College of Law faculty and students, is undertaking a nationwide study of 15 courts of appeals with similar structure. Each court being examined has one court of last resort with discretionary jurisdiction and one intermediate appellate court with mandatory jurisdiction. These courts include: Arkansas, Colorado, Connecticut, Georgia, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina and Oregon.

The Willamette Court Committee seeks to determine which factors contribute to appellate court efficiencies and productivity. At the completion of the study, the committee will publish a report of its findings, as well as an academic article analyzing the study results. These publications should help courts develop and assess effective performance measures and identify factors paramount to an efficient court system. Both the report and academic paper should be available in Spring 2007.

Your participation is greatly appreciated. We recognize that hard statistical data may not be available to answer all of the survey questions. For each question seeking statistical data, please use data from 2005. If reliable data from 2006 is available, also include that information and indicate that it is 2006 data. Lastly, please indicate the method by which the data was obtained, whether by statistical reporting, sampling or some other means. With your permission, we may call you to follow up or clarify responses. As soon as our study is completed, we will make our results available to each participant prior to official publication. Thank you.

To save response, and return to the survey, please fill out the "FORM ACCOUNT LOGIN" located after question #42. Once a login account is created, the survey must be **"Submitted"** to save responses. To access saved responses, return to URL link and login to the "FORM ACCOUNT

LOGIN" located after question #42. **Please "Submit" form results before printing a hard copy**; work product will not be saved unless "Submitted".

The Oregon Court of Appeals has itself completed the survey. In the interest of encouraging your full participation we sent our response in PDF format with Judge Brewer's introductory e-mail.

*Form Completed By: (Name, Phone Number, Position)

CASE PROCESSING:

Establishing the Record

How many notices of appeal were filed in 2005?

How many appeals were dismissed before briefing?

How much time is allowed by rule or statute for preparing the transcript? Please cite applicable rule or statute.

How much time is allowed by rule or statute for correcting the transcript?

How long on average does it take from the filing of notice of appeal to settling the record?

Are all notices of appeal taken into consideration when developing this average? If not, which cases are excluded?

Briefing

What is the total average time from the settlement of the record to completion of briefing, including extensions?

What is the time mandated by statute or court rule to complete civil briefing? Please cite applicable rule or statute.

Are criminal cases subject to different deadlines? Please explain and cite any pertinent rule or statute.

How many cases were decided after briefs were submitted without oral argument in 2005?

Oral Argument

How many total cases were heard in oral argument in 2005?

What are the limitations, if any, on which cases may be heard in oral argument? Please cite applicable rule or statute.

On average, how many days each month does each judge spend in oral argument?

What types of cases do expedited procedures for oral argument apply to? Please cite applicable rule or statute.

Please explain any special procedures for hearing criminal cases in oral argument.

What is the average total length of time after briefing is completed for a case to proceed to oral argument?

Decision

How many total opinions were issued in 2005?

How many were signed, authored opinions?

How many were unsigned, *per curiam* opinions?

How many were unpublished opinions?

Does the court dispose of cases by means other than authored or *per curiam* opinions, such as: affirmances without opinion, unpublished order, or unpublished opinion?

What is the average time between oral argument and issuing a decision?

What is the average time in civil cases to issue a decision?

What is the average time in criminal cases to issue a decision?

If no oral argument occurs, what is the average time after briefing to issue a decision?

Issuing Appellate Judgment

What is the average time from issuance of decision to issuance of the appellate judgment?

Are petitions for reconsideration permitted?

MOTION PRACTICE

How many motions were filed in 2005?

Of total motions in 2005, how many motions were filed in

2005?

What is the process of deciding motions for time extensions?

How many motions were for relief other than an extension of time?

Who decides these motions?

Who has the primary duties in motion practice outside of time extensions?

What court resources are devoted to motion practice?

What is the average time for a motion to be decided for time extensions versus other types of motions?

PANEL STRUCTURE

What are the panels' primary duties?

Are there internal rules of procedure that govern whether members of a panel must be prepared to vote on each opinion when it is first considered?

What and how are assignments made to individual judges?

Who decides what type of opinion will be issued?

Is there an *en banc* option?

If so, when is it used?

How often is it used?

Who decides whether a case will be taken *en banc*?

What was the average time from case filing to issuing appellate judgment?

For all cases

Civil

Criminal

Expedited

LEGAL STAFF

What is the number of law clerks?

Per Judge

Primary Duties

What is the number of staff attorneys?

Per Judge

Primary Duties

What is the number of judicial clerks?

Per Judge
Primary Duties
What is the number of judicial assistants?
Per Judge
Primary Duties
What is the number of retired or senior judges used?
Per Judge
Primary Duties
What is the number of trial court judges or other temporary judges used?
Per Judge
Primary Duties
What internal training does the court offer to legal staff?

NUMERICAL ASSESSEMENT

What was the total court operating budget for the most recently completed year or biennium? Please specify which year(s) the budget was in place.

METHODOLOGY

How was the data used to complete this survey collected? Please briefly explain procedure used.

OPINION

In your opinion, what factors contribute most to court delay at different stages of case processing and what could be done to make the process more efficient?

What innovations or reforms has your court adopted to promote efficient case processing? Examples might include: computerized transcription, appellate mediation program, and affirmances without opinion.