

INTRODUCTION TO THE NATIONAL CONFERENCE

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Welcome to the 2005 National Conference on Appellate Justice. We have representatives here from all aspects of the American appellate world—state and federal appellate judges, appellate lawyers, staff attorneys, court administrators. We also have trial judges and law professors. Each of you has been invited because of what you can contribute to the deliberations and thus to the strengthening of our appellate courts in the twenty-first century. We also hope that this will be a learning experience for all of us.

Thirty years have passed since the last assemblage of such appellate talent. That was the 1975 National Conference on Appellate Justice, the first, and until now, the only such conference. It was convened by the Advisory Council for Appellate Justice and co-sponsored by the Federal Judicial Center and the National Center for State Courts. Of the thirty-three members of that Advisory Council, I regret to say that only eight remain. However, I am happy to say that five of those are with us at this conference. They are, in addition to myself, Judge Wilfred Feinberg of the United States Court of Appeals for the Second Circuit, Shirley Hufstedler and Seth Hufstedler of California, and Paul Carrington of the Duke law faculty. It is truly rewarding to have here that hardy group of survivors from our long-ago labors in the appellate vineyard, and to remember the other surviving members of that 1975 conference who are not with us tonight: Griffin Bell, Winslow Christian, and Roger Cramton.

At that conference, I was privileged to deliver some remarks, and I included a comment I had heard from an English

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judge. It is still pertinent, so I offer it again. He said, speaking of the English three-tiered system—trial courts, the Court of Appeal, and the House of Lords—that the trial judge should be quick, courteous, and right. But that is not to say that the Court of Appeal should be slow, rude, and wrong, for that would be to usurp the function of the House of Lords.

Just a few words about the past. From the beginning of our modern appellate systems in the nineteenth century until the 1960s, the procedure was essentially the same for all appeals—what we now call the traditional process. Lawyers filed briefs; they appeared in person before the judges to argue cases. The judges conferred among themselves; one of them wrote an explanatory opinion which was published in a bound volume.

But in the late 1960s that began to change in reaction to a huge upsurge of appeals. The upsurge continued without letup, hitting the intermediate courts especially hard. Those courts are the front line in the appellate system, breakwaters against which crash waves of appeals, all of which must be decided. The courts of last resort are situated in more placid waters to the rear, where they can think great thoughts and control their swelling dockets by denying review as a matter of discretion.

In response to the volume upsurge, judges were added to the intermediate courts and new courts were created. Courts began experimenting with novel internal procedures. These included screening cases to put them on different decisional tracks, with some cases bypassing oral argument and court conferences and receiving only abbreviated opinions or one-line affirmances. Many opinions went unpublished. Courts began to employ central staff attorneys in addition to law clerks. As in other fields, necessity was the mother of invention.

But those innovations were controversial, both inside and outside the courts. Many judges and lawyers saw them as threatening the integrity of the appellate process. Lawyers were especially disturbed by being shut off from oral argument. There was concern that those new central staff attorneys would lead to improper delegation of judicial responsibility. All those concerns mounted during the early 1970s, and they, among others, are what led to the 1975 conference.

That conference produced five volumes of material.¹ Those volumes addressed such topics as oral argument, nonpublication of opinions, delegation of judicial authority, securing uniformity of decisions, expediting criminal appeals, and the review of sentences. That conference prompted numerous programs across the country to improve the appellate process. In the years since then we have had a multitude of studies, commissions, and publications, official and unofficial, addressing appellate court problems, but many of their significant recommendations have gone unheeded.

Now here we are thirty years later. A whole new generation of judges and lawyers has come on the scene. What was novel and disturbing three decades ago has become woven into the appellate fabric and viewed as the norm by many of the current generation. Indeed, those innovations of the early '70s have expanded far beyond what could have been envisioned. From a handful of central staff attorneys in the intermediate courts, now in many courts there are dozens, far exceeding the number of judges. A large majority of appeals in many courts are decided without oral argument and without a published opinion or without any opinion at all.

But the outcry from the bar has become muted. Judges, too, are seldom heard deploring these developments. The sense of crisis pervading the appellate world thirty years ago seems to have diminished. Why this is so is not clear. Is it because appellate courts are adequately doing their job? Or is it because the world is unaware of what is actually happening inside those courts?

In any case, concerns have not disappeared, especially with the intermediate courts. In many, although not all, the volume of appeals continues to rise. There are worries about what is perceived as an increasingly invisible judiciary, the assembly-line nature of the appellate process, massive staffs doing work judges themselves would have done half century ago. Growth in the size of intermediate courts, speaking through multiple voices, increases the threat of inconsistencies in caselaw. And

1. Advisory Council for Appellate Justice, *Appellate Justice: 1975—Materials for a National Conference* (Natl. Ctr. for St. Cts. & Fed. Jud. Ctr. 1974/1975) (including Volumes I through IV, containing background material, which were published in 1974, and Volume V, containing the proceedings, which was published in 1975).

now the electronic age is upon us, with the Internet, computerized research, email, electronic filings, and video technology. Along with this technological revolution has come globalization, a development internationalizing litigation in new ways.

In light of these changes and concerns, the American Academy of Appellate Lawyers decided that the time has come once again to convene a national conference to take stock of the appellate scene. Co-sponsoring this effort with the Academy are the Federal Judicial Center, the National Center for State Courts, and The Institute of Judicial Administration. All four organizations were represented on the steering committee that planned this conference. I want to commend that group for the hundreds of hours it put into this effort over the past year.

The speakers and panelists to be heard from will provide us with a rich array of ideas about the appellate courts today and where they should go tomorrow. Those presentations will furnish the grist for the small group discussions. Each of you is assigned to a small group, and we urge you to contribute your insights and expertise to those discussions. That is why you are here. No effort will be made to reach a consensus, and no positions will be taken. The ideas generated in each discussion group will be transmitted by the group's reporter to the chief conference reporter who in turn will summarize them into one report, to be widely disseminated and published in *The Journal of Appellate Practice and Process*.

We hope that report will contain a variety of innovative ideas for dealing with the procedural, technological, and law-harmonizing aspects of appellate work, and will stimulate constructive improvements in the appellate courts. But that depends on your contributions in your small groups and on the will to implement. Good ideas are of no avail unless there is leadership to make them reality. In the largest sense, what we are dealing with is our conception of appellate courts in the American legal order today.

We are honored to have as the keynote speaker for the Conference Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court. She was chosen for this role because she is one of the outstanding leaders in the American judiciary today, well-known to many of you. Among her many professional activities,

she recently chaired the Conference of Chief Justices and the Board of Directors of the National Center for State Courts. Because you have biographical information on every speaker, the steering committee has given firm directions that introductions be kept brief. So without more, I present Chief Justice Abrahamson.



