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Standards of Judicial Administration: Appellate Courts

by Geoffrey C. Hazard, Jr.

The Association's Commission on Standards of Judicial Administration has completed its tentative draft of Standards Relating to Appellate Courts and now is inviting comments. It is hoped that the standards in final form will be presented to the House of Delegates at the midyear meeting in 1977.

THE American Bar Association Commission on Standards of Judicial Administration has completed the tentative draft of Standards Relating to Appellate Courts. Copies of the tentative draft have been sent to judges, lawyers, interested legislative bodies, and selected news media for their information and review. Request has been made for comments, criticisms, and suggestions by October 1. These responses will be reviewed by the commission and drawn upon in presenting a final draft of these standards to the House of Delegates at its February, 1977, midyear meeting. The purpose of this article is to summarize the draft and to elicit additional suggestions for consideration before the draft is put into final form.

The Standards of Judicial Administration are to be distinguished from other standards promulgated by the Association or in the process of being drafted under its sponsorship—the Standards of Criminal Justice, the Traffic Court Standards, and the Standards of Juvenile Justice. The commission shaped its work to minimize the areas of overlap with these other standards and, to the extent of overlap, to achieve concordance among them. In doing so, the commission was greatly aided by the co-operation of the committees responsible for those other subjects.

The Standards Relating to Appellate Courts reiterate certain fundamentals concerning organization of appellate courts that were already expressed in the Standards Relating to Court Organization. These are (1) that the appellate system should have a supreme court of from five to nine members, with jurisdiction that extends to all types of cases regardless of subject matter or amount in controversy; (2) that it should have an intermediate appellate court level of similar jurisdiction, if the volume of

appellate litigation exceeds the capacity of a supreme court alone; (3) that in very large systems having two levels of trial courts, it may be appropriate to have an appellate division of the trial court of general jurisdiction to hear appeals from tribunals of limited original jurisdiction; and (4) that intermediate appellate courts should sit in panels of not less than three members but that panels or divisions should be avoided in a supreme court.

The standards deal with the following principal subjects: (1) rules of appellate procedure; (2) assistance of counsel on appeal; (3) preparation of a case on appeal; (4) decision procedure of appellate courts; (5) caseflow management in appellate courts; and (6) the functions and responsibilities of court staff, including administrative and legal staff.

Rules of Appellate Procedure

No attempt is made to prescribe a detailed code of appellate procedure. This seemed unnecessary because several jurisdictions, including the federal system, have in recent years thoroughly revised their appellate rules in such a way as to constitute useful models for other jurisdictions to draw upon. Because differences in tradition and practice regarding appellate procedure vary considerably, a single code would be unsuitable for the circumstances of every jurisdiction. Instead, the standards state basic principles that should govern the drafting of appellate procedural rules, with the view that the procedure in each individual jurisdiction might be modified accordingly.

The standards provide that there should be a right of appeal from the final judgment of a tribunal of first instance. It is recognized that the right of appeal, though not embodied in the due process clause, is fundamental to our sense of proper justice. Two important qualifications of this principle are stated and dealt with in some detail in subsequent sections. The first has to do with review of decisions and actions of governmental agencies, a function that is of ever-growing significance for the judicial system. The second relates to the review of decisions in civil cases of limited amounts and in criminal cases in which the penalty does not involve a jail sentence.

With respect to review of decisions and actions of governmental agencies, an attempt was made, concerning a very complex and difficult subject, to take account of the differences between types of agency and at the same time to state unifying concepts as to the scope and



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procedure of review. Particular emphasis is given to the requirement of prior resort to an agency for remedial action as a preliminary to seeking judicial review. With respect to review of "small cases," the principle adopted was that review on a record should be available only at the discretion of the reviewing court—a certiorari type of review. The purpose of this requirement is to prevent appeal being used automatically by litigants who wish to overcome their adversaries in "small cases" by protracting the litigation. Subject to these important exceptions, the standards specify that appeal should be a matter of right.

The right of appeal, however, should be limited to one appeal. In a court system with an intermediate appellate court, successive review by a supreme court should be available only by the certiorari type of procedure. This limitation has a twofold purpose. First, it eliminates the cost and delay of successive appeals, except in cases involving questions of legal importance or general interest. Second, it permits the highest appellate court to give particular attention to cases of the character just described. Nothing is more subversive of effective appellate justice than rules that entitle a party to successive appellate review of an issue of interest only to the immediate litigants.

A related principle is that expressed in the "final judgment" rule, that is, that appeal ordinarily is available only on final judgment in the trial court. This rule obtains in most of our jurisdictions and is adopted as a basic principle by the standards. Experience has demonstrated, however, that the final judgment rule is unduly rigid if it is unqualified. An order of a trial court other than a final judgment may be of critical importance to subsequent proceedings in a case, particularly one involving complex legal issues. A nonfinal order also may deal with a matter of importance that should be settled for the guidance of the trial courts generally but that, if not resolved by interlocutory appellate review, may become mooted by the final judgment. This can be true, for example, of orders dealing with joinder of parties or with the scope of discovery. Accordingly, the standards recommend that review be available of interlocutory orders only on a discretionary basis. Alternative mechanisms for invoking the exercise of discretion are suggested, being drawn from the practice established

in many jurisdictions.

With respect to the scope of review, the standards reaffirm a widely accepted (but not uniformly observed) distinction between the functions of an appellate court and those of a trial court. Trial courts are responsible for resolving issues of fact, and indeed exclusively possess the procedural machinery for doing so intelligently: they can see and hear the witnesses and assess the evidence considered as a whole. Appellate courts are responsible for reviewing the regularity with which trial proceedings are conducted and for authoritatively determining questions of law. This division of function is expressed in the standards by the proposition that it is the function of an appellate court to "determine whether the court below relied on properly applicable and correctly interpreted rules of law, conducted the proceedings fairly and deliberately so that there was no substantial prejudice to the parties, and rested its determinations on factual conclusions reasonably supported by the evidence." This provision should apply whether the fact finder in the trial court was a jury or a judge sitting without a jury.

The standards set forth a number of particulars regarding what might be called the more mechanical aspects of appellate procedure. It should be noted, however, that although mechanical, these matters have a great deal to do with the expeditiousness of the appellate process. The commission determined, from experience and from extensive studies that have been done of appellate litigation, that much of the delay on appeal is attributable to mechanics. Delay is "built in" by rules that allow unreasonably long periods for the steps involved in preparing an appeal and by administrative practices that take an indulgent view of compliance with the rules governing these matters. If the record and briefs are not prepared with all reasonably possible dispatch, an appeal cannot be concluded promptly no matter how industrious the appellate judiciary may try to be. It is therefore recommended that the time to appeal should not exceed thirty days from the date of judgment or appealable order, that the record be completed within thirty days after the notice of appeal, and that the briefs be closed not later than sixty days thereafter. It is also suggested that even shorter intervals be permitted if local practice and administration can permit.

Two other devices are recommended in connection with preparation of the case for the appellate court. One is an information statement, to be filed by the appellant, indicating the nature of the facts and legal issues involved. This statement is to serve the administrative purposes of the appellate court, so that it can classify incoming cases according to subject matter and apparent complexity. It is not a bill of exceptions or statement of points to be used in decision of the case, a distinction that is vital if perhaps easily overlooked. The other device, also drawn from the practice of several courts, is the motion for summary determination. This is designed to permit a party to the appeal, appellant or respondent, to signal that, in his estimation, the case involves no issue of

major consequence and can be decided without extended argument or deliberation. The motion's purpose is to assist the appellate court in allocating its time among the cases flowing onto its docket. Quite clearly, in a case of significant complexity, the appellate court should deny the motion and proceed to hear the case regularly.

Assistance of Counsel

The question of assistance of counsel on appeal has two related aspects. One is providing legal assistance to parties who cannot afford legal counsel in the limited classes of cases in which an appointment is of right in the trial court, as set forth in the Standards Relating to Trial Courts. This includes persons charged with a crime punishable by jail or imprisonment, persons subject to commitment on account of mental illness, parents threatened with legal termination of their right to custody of children, and several other situations. The underlying theory is that the assistance of counsel in these cases is no less essential to an indigent at the appellate level than at the trial level, and also that the availability of counsel provides assurance that the case will be presented to the appellate court in coherent form.

The other aspect of the question of assistance of counsel is the advocate's role in assisting the court in deciding an appeal, whether it is counsel retained by the parties or counsel appointed to assist an indigent. The standards place great emphasis on the role of the advocate, in the following respects: making it the responsibility of the court to be familiar with the briefs that have been submitted by the parties; specifying that there is a right to oral argument except in cases in which it is clear that argument will be of no assistance to the court; and making explicit the responsibility of counsel for preparation of the record and briefs in accordance with the rules of the court.

Preparation of a Case

The preparation of a case on appeal entails responsibilities for both counsel and the court. Counsel's responsibilities are alluded to above. The court's responsibilities are equally important. The theme of the standards is that the appellate court should assume administrative control of an appeal from the time that notice of appeal is filed, rather than postponing active concern for a case until the briefs have been completed. Experience demonstrates that if the appellate court does not assume control when the appeal is commenced, preparation of the record and the briefs is almost invariably beset with delay. If the appellate court takes account of a case only when the briefs are in, it loses an opportunity to forecast the composition of its docket and to adjust its calendaring accordingly. Adjustment of calendaring in turn permits the court not only to be more efficient in the strictly administrative sense but also to allocate its energies in such a way as to give the merits of each case the attention they deserve.

The standards specify a group of procedures by which

to achieve this objective. In addition to those already mentioned (for example, the information statement describing the nature of the case), these include: (1) the court's routinely making a preliminary analysis of each case to determine whether cases involving similar issues may be scheduled for hearing on the same date, whether the time for oral argument should be extended or curtailed, and whether special administrative supervision may be required in cases involving unusually complex records or issues; (2) each judge's personally becoming familiar before argument with cases to be heard; (3) effectively utilizing staff legal assistance to provide necessary research in preparation for deciding cases; and (4) maintaining administrative control over the movement of the case within the court itself.

The standards recommend that an appellate court's rules and policies concerning preparation and decision of cases be reduced to writing and made available to the bar. This requirement is intended not only to instill confidence in the fairness of the court's administrative procedures but also to help assure that the procedures are understood by counsel who appear before the court.

Decision Procedure

The standards do not undertake to prescribe how appellate courts ought to decide cases, for that is the judicial function. But they do prescribe certain characteristics that the court's decision procedure should have.

First, as noted earlier, every judge participating in a case should be familiar with the brief and record before oral argument; an appeal should not be a "one-man" decision merely acquiesced in by the other members of the court.

Second, the task of analyzing the case should not be delegated to law clerks, legal staff, or other judges. Although a judge "may appropriately refer to preliminary memoranda prepared by fellow judges, his clerk, or members of the court's research staff, . . . the responsibility for decision is personal to each judge."

Third, there should be an opportunity for ample deliberation before decision. The commission took note of suggestions that appellate courts should more widely employ the English system of rendering decision orally from the bench but observed that "in English appellate procedure, in which oral pronouncement of opinions is the norm, the argument which it follows is long and leisurely by American standards and includes discussion among the judges." Accordingly, decision by oral opinion should be employed "only if the court is thoroughly acquainted with the briefs and record before argument and has opportunity to defer decision if any judge is in doubt" as to the proper disposition of the case.

Fourth, the decision in every case, whether rendered in writing or orally, should be "supported at least by reference to the authorities or grounds on which it is based."

Fifth, clear directions regarding further proceedings should be included in the court's order of disposition

when the remand requires action in the trial court.

And lastly, but also of importance, the appellate court should undertake to dispose of its cases in an average of thirty days after submission and in no case later than sixty days, except in cases of extraordinary complexity.

It might be noted that the requirement as to timely decision, when taken with the standards regarding preparation of the case, would mean that appeals should be determined ordinarily within five months of the date of judgment in the trial court. This is far more expeditious than most, but not some, courts now achieve. The commission believes that this standard is practicable, if a court has appropriate procedure and administration, if the court is resolute in the aim of eliminating delay, and if the appellate bar observes its obligations to the courts. In appellate courts, as in trial courts, elimination of delay is not accomplished by "breakthroughs" but by consistent concern for bringing each case to a conclusion on proper schedule.

The standards provide that all opinions should be matters of public record. Parties should be provided copies when the opinion is filed, but formal publication in printed volumes should be ordered only if, in the judgment of the participating judges, the decision is one that: (1) establishes a new rule of law, alters or modifies an existing rule, or applies an established rule to a novel fact situation; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

These standards for publication of judicial opinions follow those adopted by the Advisory Council on Appellate Justice of the National Center for State Courts, which made an exhaustive study of selective publication of appellate opinions.

On the issue of citation of "unpublished" opinions—that is, opinions the court believes are not of sufficient significance to be published in the printed reports of its decisions—the commission has not reached a final conclusion of its own and has presented alternatives for consideration. One alternative is to provide that an unpublished opinion "may not be cited before a court except for the purpose of applying the rules of res judicata, collateral estoppel, or the law of the case." The other is that an unpublished opinion may be cited but only if "the person making reference to it provides the court and opposing parties with a copy of the opinion or otherwise gives them advance notice of its content." This question has been extensively debated among the bench and bar. The commission welcomes additional expressions of view and hopes to reach an acceptable conclusion in its final report.

Caseflow Management

The standards assert that realization of the goal of the prompt and just determination of appeals can be achieved only if the court assumes affirmative responsibility for managing its caseflow. This in turn implies important supervisory responsibilities for the presiding

judge and adherence by all judges to the court's procedures. It also implies that the court monitor the progress of each case, that it have internal information and control systems to permit effective monitoring, and that it have an administrative staff sufficient in numbers and training to accept and carry out responsibility for administrative routines.

Although many appellate courts have reached a high degree of efficiency in these respects, almost all of them can benefit from giving more intensive and thoughtful consideration to caseflow management problems. As appellate dockets have increased in size and complexity, effective caseflow management can no longer be achieved simply by adhering to traditional procedures. It has become something of an administrative science of its own, and needs to be treated with corresponding respect. This, in turn, implies that each appellate court system needs the staff capacity not only to conduct its routine administrative operations but also to subject them to continuous study, critical evaluation, and necessary modification.

Court Staff and Facilities

An appellate court's staff includes two basic types of auxiliary personnel. The first is legal staff, both personal law clerks and legal research staff. The standards recognize that a personal law clerk has become an indispensable aid to an appellate judge. They also recognize that "central" legal staff—legal research assistants serving the court as a whole—are also essential or at least highly useful in courts with heavy dockets. On the other hand, they also recognize that such a staff can become so large or so remote from the judges that it is either useless or, what is worse, the repository of undue delegation of judicial authority. "Where a court employs a central staff, it must be continually alert to the risk of internal bureaucratization and guard against any tendency to rely on staff for decisions that should be made only by judges personally."

With respect to administrative staff, the standards recommend the concept of a court executive—a chief of administrative staff who, working with and under the authority of the presiding judge, is responsible for the nonjudicial aspects of the court's operation. The commission took no position on whether the chief of staff should "be" the clerk of court or a person denominated the court executive to whom the clerk of court reports. The title is of little significance; it may be appropriate to use the traditional title of "clerk of court" for the chief of staff. What is important is that there be a chief of staff under whose supervision are performed the functions of clerk of court, personnel officer, fiscal and budgeting officer, chief "housekeeper," and director of training, planning, and research.

If these functions are performed by staff members who separately report to the presiding judge, then the presiding judge necessarily becomes the chief of staff. This in turn diverts the presiding judge's energies from judicial

responsibilities and can result in poor co-ordination of staff operations. The principle of merit selection and promotion of staff personnel, specified in the Standards Relating to Court Organization, is carried over into the appellate court standards.

Two related subjects covered by the standards may be mentioned in this connection. One is maintaining administrative liaison with the trial court in managing the movement of cases in which an appeal has been taken. It is recommended that a staff person be specifically assigned this responsibility, with particular concern for keeping track of criminal cases and the preparation of transcripts by court reporters. The other is the question of library resources. The commission observed that although "an appellate court's library is the primary source of the information it requires for its decision making, . . . many appellate courts have inadequate libraries." Because so little attention has been given to the subject, however, it is impossible to formulate specific standards for appellate libraries. The commission's recommendations on this subject are therefore in general terms, coupled with a suggestion that detailed studies be made that could serve as the foundation for more specific standards.

Standards Offer Ultimate Goals

This analysis considers the principal matters dealt with in the appellate court standards. While many appellate systems now fulfill the standards in many respects, none does so to the degree that ought to be aimed for. Assuming that the standards are approved in substantially the form proposed by the commission, the task of implementing them will be a formidable one, but it ought to be commenced immediately, through study of the standards in each jurisdiction and inquiry as to how present procedures and administrative practices might be modified in light of them.

The commission recognizes that there may be disagreement with some of the proposed standards. But there seems little doubt that all appellate courts could profitably modify their present methods of operation in important respects. The commission is confident that the proposed standards are a useful guide for this purpose. ▲

Corporate Counsel Institute

THE FIFTEENTH annual corporate counsel institute will be held October 6-7, 1976, at Northwestern University School of Law, Chicago. The institute is presented by Northwestern University School of Law; the American Bar Association Committee on Corporate Law Departments of the Section of Corporation, Banking, and Business Law; the Chicago Bar Association Committee on Corporate Law Departments; the Illinois State Bar Association Section on Corporate Law De-

partments; and with the support and co-operation of Illinois Institute for Continuing Legal Education.

Tuition is \$110. Further information may be obtained from Registrar, Fifteenth Annual Corporate Counsel Institute, Illinois Institute for Continuing Legal Education, 2395 West Jefferson Street, Springfield, Illinois 62702. The toll-free number for Illinois calls is 800/252-8062; outside Illinois 217/787-2080.

Manfred S. Guttmacher Award

THE MANFRED S. Guttmacher Award for 1977 is given by the American Psychiatric Association for any outstanding contribution to the literature of forensic psychiatry in the form of a book, monograph, paper, or any other work, including audio/visual presentations submitted to or presented at any professional meeting or published during the year ending December 31, 1976. The award includes an honorarium of \$250 and a plaque which will be presented at the Convocation of Fellows at the annual meeting in May, 1977, in Toronto, Canada.

Applicants should submit five copies of the work as well as five abstracts to Carl P. Malmquist, M.D., Chairman, Guttmacher Award Board, 1700 Eighteenth Street, N.W., Washington, D.C. 20009.

Entries will be acknowledged but will not be returned. The deadline for submissions is January 1, 1977, and all entries must be received by that date.

Photographs of the Chief Justices

A SET of photographic reproductions—fifteen in all—of the chief justices of the United States, on art-portrait paper, is available from the *American Bar Association Journal*.

Included are the Gilbert Stuart painting of John Jay; Trumbull painting of John Rutledge; painting by Earl of Oliver Ellsworth; painting by Peale of John Marshall; engraving of Roger B. Taney; photographs by the famous Brady, who recorded the Civil War in pictures, of Salmon P. Chase and Morrison R. Waite; and the favorite studio photographs of Melville W. Fuller, Edward Douglass White, William Howard Taft, Charles Evans Hughes, Harlan F. Stone, Fred M. Vinson, Earl Warren, and Warren E. Burger.

Each reproduction is 8" by 10" and is designed for framing. The complete set is \$20.00, individual prints are \$2.00. They are mailed in sturdy packets postpaid on receipt of order and check. Address American Bar Association, Circulation Department 8003, 1155 East Sixtieth Street, Chicago, Illinois 60637.