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STATEMENT TO THE COMMISSION ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS

Commission on Structural Alternatives
for the Federal Courts of Appeals
One Columbus Circle N.E.
Washington DC 20544

I. Introduction.

This statement is in response to your invitation to submit statements devoted to the three questions stated in your news release of February 26, 1998.

My practice has from its inception been devoted to appellate advocacy. I was chair of the task force which wrote Washington's appellate rules. I am a past president of the American Academy of Appellate Lawyers. However, this statement is made solely on my behalf.

II. The Problem.

The problem with the federal system is that more and more cases are being decided without oral argument and primarily by staff. Thus, the process has become largely invisible. This will continue to impair public acceptance of the process and the resulting decisions. Without public acceptance, the system will inevitably falter.

III. Recommendations.

My first suggestion is to adopt the commissioner system for deciding motions in the appellate court. The system used in Washington is an appropriate model. It is described in part II of the accompanying paper which was initially prepared by me for an American Academy of Appellate Lawyers seminar.

May 27, 1998

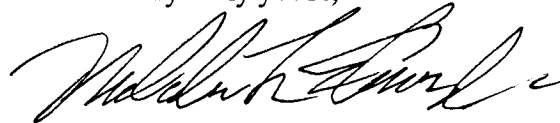
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My second suggestion is to adopt a procedure for decision of the relatively simple cases similar to the motion on the merits procedure used in Washington. A description of that procedure is also in the accompanying paper.

IV. Conclusion.

Thank you for your consideration of these suggestions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Malcolm L. Edwards", written in a cursive style.

Malcolm L. Edwards

MLE/tdf
enclosure

WASHINGTON'S MOTION ON THE MERITS

Malcolm L. Edwards

I. INTRODUCTION

There is a way to improve and accelerate the administration of justice in federal and state appellate courts without adding new judges. The method preserves oral argument and requires a reasoned written opinion which demonstrates a knowledge of the facts, the issues and the law. The procedure is now used in the State of Washington, and is called a "motion on the merits."

The purpose of this article and the accompanying presentation is to make the procedure well known to appellate practitioners and to stimulate discussion about its use. That the procedure is not well known now is demonstrated by a lack of significant writing on or discussion of the subject. As an example, a well reasoned article on appellate procedures recommended a new system for expediting appeals while preserving the desired attributes of the traditional appellate process. Thompson and Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ L.J. 1 at P.78. The authors were apparently unaware that the system they recommended was already being used in Washington, and had been in use for more than five years.

II. THE WASHINGTON COMMISSIONER SYSTEM: THE BIRTH OF THE MOTION ON THE MERITS

In 1976, Washington adopted a procedure where substantially all significant motions were decided by a commissioner, after oral argument before that commissioner. Other minor motions were decided by a clerk. The motions to be decided by a commissioner included matters as substantial as a motion for discretionary review of a trial court decision, the Washington equivalent of a petition for writ of certiorari.

The commissioner decided motions by a written ruling which included a statement of the reasons for the decision. That ruling was subject to *de novo* review by a panel of judges through a motion to modify the ruling. After some experience with the commissioner system, very few rulings by the commissioner have been subject to a motion to modify.

The commissioner system was adopted for several reasons. One purpose was to save the time of judges for judging cases on the merits. Another purpose was to assure public visibility of the motion process. Oral argument was not always available for significant motions under the prior system. There was also concern that important motions were being decided by a single judge who might have a view of the law which would differ significantly from the

court as a whole. A commissioner who was responsible to the full court would be more likely to decide motions in a manner consistent with the views of the court.

In 1980, the Washington Judicial Council began studying potential methods for reducing delay in the intermediate appellate court. These included elimination of oral argument, reviewing some cases without a complete record, deciding cases by order and not opinion, and limiting review to issues raised in a motion for new trial. Each of these ways assumed there was an identifiable body of cases where the result on appeal was fairly obvious. However, none of the suggested methods of deciding these cases was deemed to be as appropriate as expanding the commissioner system. Thus, the motion on the merits was born. Under this system a party or the court may file a motion to affirm or reverse a trial court decision. The parties have a right to oral argument before the commissioner. The commissioner decides the case by a written ruling which is subject to *de novo* review.

III. CASES WHICH MAY BE DETERMINED BY A MOTION ON THE MERITS

A motion on the merits to affirm should only be made where the appeal is “clearly without merit.” RAP 18.14(e)(1). A motion on the merits to reverse is rare and should be made only when the appeal is “clearly with merit.” RAP 18.14(e)(2).

A case may be clearly without merit without being frivolous. A case may be clearly with or clearly without merit if it is one in which the issues (1) are clearly controlled by settled law; (2) are factual and supported or clearly not supported by the evidence or (3) involve a matter of judicial discretion and the decision is clearly within the trial court’s discretion. RAP 18.14(e).

IV. STARTING MOTION ON THE MERITS

The motion on the merits procedure may be instituted by a party by filing a motion. A motion to affirm may be made only after the appellant’s brief has been filed. RAP 18.14(b). A motion to reverse may be made only after the respondent’s brief has been filed. RAP 18.14(b).

The appellate court may also initiate a motion on the merits. The court may do so at any time. RAP 18.14(b). All three divisions of Washington’s intermediate appellate courts screen cases to determine whether any should be the subject of a motion on the merits.

A motion on the merits filed by a party may be rejected by a commissioner without argument. That ruling by a commissioner is not subject to review by the court as the only effect of the ruling is to leave the case on the normal path to disposition by a panel of judges.

V. MOTION PROCEDURE

A motion on the merits is handled like any other motion. The motion is a separate document, and cannot be made in a brief. RAP 18.14(a) and (c). However material contained in a brief may be incorporated by reference. RAP 18.14(c).

A response to a motion on the merits may be filed as in any other motion, and may incorporate material from a brief by reference. RAP 18.14(c), RAP 17.4(e).

VI. ARGUMENT OF MOTION

The parties are entitled to oral argument on the motion on the merits. Oral argument is 10 minutes per side in two of the appellate divisions and 20 minutes per side in the third division. Additional time may be granted if appropriate. RAP 18.14(f). Argument may be by telephone conference call if requested by the parties or directed by the commissioner. RAP 17.5(e).

VII. DECISION

The commissioner decides a motion on the merits by a written ruling. RAP 17.6(a). If the ruling grants the motion, the ruling takes the form of an opinion which includes a description of the facts sufficient to place the issues in context, a statement of the issues, and a decision of those issues with supporting reasons. RAP 18.14(h). A decision denying a motion on the merits is also in writing, but requires nothing more than a brief statement of the reasons for the denial. RAP 17.6 and RAP 18.14(g). The ruling of the commissioner is not published unless on a motion to modify the court adopts the commissioner's ruling and directs that it be published. See *Marshall v. AC&S, Inc.*, 56 Wn.App. 181, 182, 782 P.2d 1107 (1989).

VIII. REVIEW OF A COMMISSIONER'S DECISION GRANTING A MOTION IS SUBJECT TO REVIEW

A commissioner's decision to grant a motion on the merits is subject to *de novo* review by a panel of judges. RAP 18.14(I). The aggrieved party seeks review by filing a motion to modify the ruling. The motion to modify must be filed within ten days after the ruling is filed. The motion to modify will usually be decided by the judges without oral argument. RAP 17.5(b). Two of the divisions routinely prepare staff memoranda evaluating the commissioner's ruling. One division does so only on the request of a judge. In any case, the staff used is one that has not worked on the underlying motion on the merits.

If the commissioner denies the motion on the merits, that decision is not subject to review as it simply means the case will be heard in the regular course of events by a panel of judges.

IX. REVIEW BY THE SUPREME COURT

A ruling of a commissioner is not subject to review by the Supreme Court. A decision by the judges on a motion to modify is subject to discretionary review by the Supreme Court. RAP 13.4 and RAP 13.5.

X. CONSTITUTIONALITY OF MOTION ON THE MERITS

The Washington Supreme Court has held that the motion on the merits procedure is constitutional for both civil and criminal cases. *In Re Marriage of Wolfe*, 99 Wn.2d 531, 663, P.2d 469 (1983) and *State v. Rolax*, 104 Wn.2d 129, 133-34, 702 P.2d 1185 (1985). The court held that the constitutional right to appeal does not prevent the court from adopting procedures to deal with increasing demands placed on the court. The right to *de novo* review of the commissioner's ruling by a panel of judges preserves a party's right to have the party's case determined by judges properly selected pursuant to the Washington constitution and statutes.

XI. THE EFFECT OF THE USE OF MOTIONS ON THE MERITS

In 1981, the Washington motion on the merits procedure was subjected to rigorous empirical examination. Thomas B. Marvell, *An Empirical Examination of Motions on the Merits*, 15 UPS Law Review 37 (1991). The material in this section comes from that study and an analysis of the annual reports put out by the office of the administrator for the courts.

More than twenty-five percent of the appeals which are decided on the merits in the Washington intermediate appellate courts are decided by a motion on the merits. Seventy-seven percent of the commissioner's decisions granting a motion on the merits are in criminal cases and 23% are in civil cases. By contrast, sixty percent of all of the cases decided on the merits are criminal appeals. Thirty-two percent of all the criminal appeals were decided by a motion on the merits, while only 17% of the civil cases were decided using this procedure.

For every four motions on the merits that are granted, there are three cases decided by the judges that would not have been decided without the motion on the merits procedure. *Marvell*, at page 60, note 121. The ratio is not 1 to 1 as some judicial time is required to determine motions to modify.

The commissioners grant a motion on the merits in more than three-fourths of the cases in which a motion is made. A motion to modify is made in about half of those cases. Less than five percent of the motions to modify are granted. *Marvell*, at page 53.

The distribution of motions to modify between criminal and civil dispositions is not available. However, an informal survey of the commissioners indicated their belief that a

higher percentage of their dispositions in criminal cases are subject to a motion to modify than in civil cases. In Washington, substantially all of the criminal appeals are at public expense. This, plus counsel's obligation to exhaust all possible avenues for reversal, would explain why motions to modify may be more likely in the review of criminal cases.

One of the initial concerns with the motion on the merits procedure was that it might affect the reversal rate. That has not been the case. There is no evidence that the reversal rate is impacted by the motion on the merits procedure, and this conclusion applies to both civil and criminal appeals. *Marvell*, at page 65.

By 1990, two-thirds of the attorneys surveyed had favorable overall opinions of the motion on the merits procedure. A follow up to this survey concluded that negative views were held as a result of recent adverse rulings by the commissioner rather than as a reaction to the procedure. *Marvell*, at pages 66-67.

XII. CONCLUSION

The Washington motion on the merits procedure is not the only answer to the problem of appellate delay. It is, however, one of the answers and it is better than many of the other procedures currently in use. It preserves the limited visibility in the appellate process by retaining oral argument in all cases. This visibility is necessary to preserve public confidence in the appellate process.

Written reasoned opinions by a commissioner are far preferable to unreasoned orders from a panel of judges. Written opinions are necessary to promote public confidence that the decision maker understands the case and is deciding it based on the rule of the law. The requirement of a written opinion also imposes a discipline on the intellectual process that does not exist with a simple order.

Finally, almost all courts employ a screening process where cases which appear to be fairly obvious may be initially "decided" by a staff attorney who may write the proposed opinion. It is far preferable to have this hidden decision maker have the opportunity to test his or her knowledge of the facts and opinions on the issues through face to face contact with the advocates in oral argument and to be openly responsible for his or her decision. The procedure also gives the parties the opportunity to directly discuss and argue for or against the opinions expressed by the commissioner through the motion to modify procedure. This is an opportunity that does not exist where the court channels cases to staff for recommended disposition.