

Appellate Administration of Justice

*A Crisis in
Massachusetts*



**Boston Bar Association
Committee on Massachusetts Appeals Court**

May 3, 2000

**Boston Bar Association Task Force
Committee on Massachusetts Appeals Court Judicial Positions**

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May 3, 2000

A. INTRODUCTION

Earlier this year, the Boston Bar Association appointed this Committee to investigate and report on the level of the number of judgeships and other employees at the Massachusetts Appeals Court and how that level of staffing impacts the appellate administration of justice in the Commonwealth. The impetus behind the Committee's formation was several. First and most notably, increased caseload before the Court has created palpable frustration by all concerned - - criminal and civil litigants, the public and Appeals Court judges - - in the delay of reaching cases for hearing and issuing decisions. Second, it has now been twelve years since the legislature last increased the number of judgeships on the Appeals Court, yet during that time significant external factors have vastly increased the caseload of panel and single justice matters requiring adjudication. Third, the ability of the Court to maintain its reputation for thoughtful appellate adjudication is threatened by the sheer size of the caseload, and has become a debilitating influence on the attractiveness of Appeals Court judicial positions and the enthusiasm of the Court to do its job.

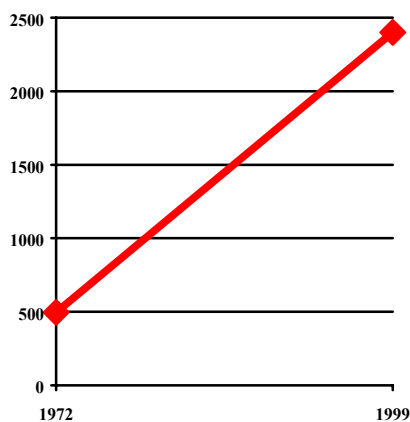
The Committee's mandate from the Boston Bar Association was straightforward: to investigate the existing staffing of the Court and to make recommendations, if appropriate, concerning any perceived need for an increase in judicial positions and/or ancillary support staff in order to correct, over a reasonable period of time, the inadequacies. In seeking to fulfill this mandate, the Committee has collected and analyzed a significant amount of documentary information on the Appeals Courts caseload, operations, internal policies and practices and other pertinent information. The Committee has also reviewed publicly available information regarding comparative caseloads from other jurisdictions to the extent that information is

germane. The Committee also interviewed numerous persons from the Appeals Court and the civil and criminal bars.

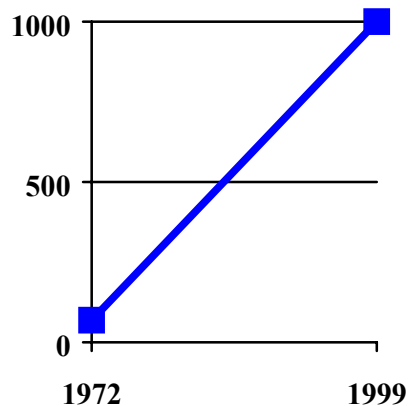
B. SUMMARY OF FINDINGS

The appellate administration of justice in the Commonwealth faces a crisis requiring immediate action. Significant external factors - - changes in criminal procedural and sentencing rules, the increased complexity of civil litigation, legislative expansion of the Court's jurisdiction, and technological advances in legal practice - - have combined in recent years to create a huge increase in appellate filings before the Massachusetts Appeals Court.

The annual caseload for review and decision by a three-member panel has almost quintupled since the Court's inception in 1972.¹ The caseload of filings for single justice review has grown even more dramatically, from 69 matters in 1973 to almost 1,000 last year.²



Appeals Court



Single Justice Appeals

¹ These graphs do not depict annual change, but demonstrate the steep increases that have occurred over the eighteen years.

² The Annual Report on the State of Massachusetts Court System –Fiscal Year 1999 provides statistical analysis of the growth of the Appeals Court's docket. The report indicates that the number of appeals entered in the Appeals Court in 1999 was more than fifty-three percent (53%) greater than what was docketed in 1992.

Further support of the dramatic increase in the work of the Appeals Court may be obtained from Annual Report on the State of the Massachusetts Court System – Fiscal Year 1998. In this report, the Appeals Court noted a fifty-five percent (55%) increase in the number of appeals entered in 1998 as compared to 1992. *Id.* at 44. Additionally, the report notes that over the course of five years, concluding in 1998, criminal business for the Appeals Court increased by more than forty-eight percent (48%). *Id.* at 45.

Unacceptable delay now exists between the time when a matter is ready for hearing and the date when oral argument is held. Civil cases sit idle, from briefing to hearing, for an average of about 15 months. Summary disposition matters are not considered for approximately a year. Criminal appeals, once briefed, must wait an average of eight months for a hearing, thereby significantly delaying the administration of criminal justice in the state. These alarming statistics have steadily gotten worse over the past 12 years.

The justices of the Court, unchanged in number since 1988, work long hours that challenge the inherently deliberative nature of thoughtful appellate adjudication. The work product expectations of each of the justices have become staggering. During the Court year term from September through June, each justice is expected to participate in the disposition of approximately thirty cases per month, and is expected to author opinions on a significant fraction of those cases.

Something must be done.

C. RECOMMENDATION

In view of its findings, the Committee strongly recommends that immediate attention be given to the passage of legislation that would increase the total number of statutory judges by an additional eleven justices, with five new statutory justices immediately, three new justices as of January 1, 2001 and another three new justices as of July 1, 2001. Of course, the legislation would need to authorize and fund an increase in the authorized number of support personnel, including secretaries and law clerks, to facilitate the work of the new justices.

The Committee is of the view that the total of eleven new statutory justices over the course of the next year is a conservative approach to increasing the size of the Appeals Court bench and addressing the issues it faces. Even if our recommendation is implemented, it would still take an extended period of time to reduce the current backlog. Meanwhile, the individual

caseload of the justices could return to a more realistic (though still heavy) level, thereby enabling the Court to give litigants, and their disputes, the attention they deserve.

Of course, simple statutory authorization for additional justices will not solve all the issues. There will need to be a continued partnership of the legislative, executive and judicial branches. The legislature will need to pass appropriate legislation that provides adequate support staff for the new justices so that they will have the tools to do their work. The executive branch, working with members of the bar, will need to identify and appoint as new justices men and women of the highest caliber who are able to meet the taxing work of understanding, deliberating, deciding and, at times, authoring decisions on many cases each year. The Appeals Court itself will need to continue its laudable existing efforts at maintaining the pace with the heavy caseload, and employing programs to aid in the mediation of disputes and the facilitation of expedited review of narrow classes of cases that demand immediate attention.

I. THE MASSACHUSETTS APPEALS COURT

A. BACKGROUND³

In 1972, the Commonwealth of Massachusetts joined most other jurisdictions by supplementing its judicial branch with an intermediate appellate court. The eruption of both civil and criminal litigation in the 1960's and 1970's mandated the addition of a court to assist the Supreme Judicial Court in the disposition of appellate business. When the Massachusetts Appeals Court (the "Appeals Court") held its inaugural session in November 1972, the enabling statute authorized six justices.

The adoption of the modern rules of civil and appellate procedure in 1975 led to even greater demand and the subsequent enlargement of the Appeals Court to ten justices in 1978. At

³ Background material was obtained from many sources including, Hon. Joseph P. Warner, *Massachusetts Appeals Court, in* Appellate Practice in Massachusetts (Greaney, John M. et. al. eds, 1994).

that time, the Appeals Court was given the authority to recall willing retired appellate justices for active service.

In addition to the size of the Appeals Court, the late 1970's and early 1980's marked an increase in the jurisdiction of the Appeals Court jurisdiction and consequential caseload. In response, the General Court added four new judgeships in 1988, thereby bringing the Appeals Court's membership to its present complement of 14 statutory justices. The addition of four judges at a time when the situation was not as dire as it is today made significant improvements in the Appeals Court's ability to dispense timely justice.

The primary goals of the Appeals Court have remained consistent during its almost thirty years of existence. The Appeals Court is committed to: (i) providing the public accessible appellate review, either in the Appeals Court or through *sua sponte* transfer to the Supreme Judicial Court; (ii) enabling the Supreme Judicial Court to exercise broad discretion in the number and character of appellate cases that it considers; and (iii) minimizing the number of cases that must be heard by both the Appeals Court and the Supreme Judicial Court.⁴

B. JURISDICTION

The Appeals Court is the only Massachusetts Court with no original jurisdiction. Each of its cases originates in either one of the departments of the Trial Court, one of a few executive agencies, or in the Supreme Judicial Court. Cases heard by the Appeals Court are either heard by an appellate panel (of at least three justices) or by a single justice.

⁴ Based upon the number of Appeals Court cases that are reviewed on further appellate review by the Supreme Judicial Court and the number of cases in which the Supreme Judicial Court reaches a different result than the Appeals Court, the Appeals Court may be accurately viewed as the Court of last resort in more than ninety-seven percent (97%) of the cases it decides.

1. Panel Jurisdiction

The Appeals Court has an extensive civil and criminal jurisdiction, concurrent (with few exceptions) with the Supreme Judicial Court. Civil final judgments and other appealable orders decided in the Trial Court, including the Superior Court, Probate and Family Court, Land Court, Housing Court and Juvenile Court Departments, may be appealed to the Appeals Court. The Appeals Court also has jurisdiction over appeals from final decisions of the respective appellate divisions in the District Court and Boston Municipal Court Departments. In addition, the Appeals Court receives appeals directly from the District Court and the Boston Municipal Court Departments in zoning cases, small claims cases, and matters originating in the Department of Employment and Training. Since 1985, the Appeals Court has also had direct panel jurisdiction in appeals taken from dispositive orders of the Labor Relations Commission and the Appellate Tax Board. Decisions of the Department of Industrial Accidents are appealed to the Appeals Court, albeit to a single justice session. Work for the panel teams is also generated by the single justice sessions because some decisions of a single justice may be appealed to a panel of the Appeals Court. Appeals from interlocutory orders may be sent to a panel by order or report of a single justice of the Appeals Court or the Supreme Judicial Court.

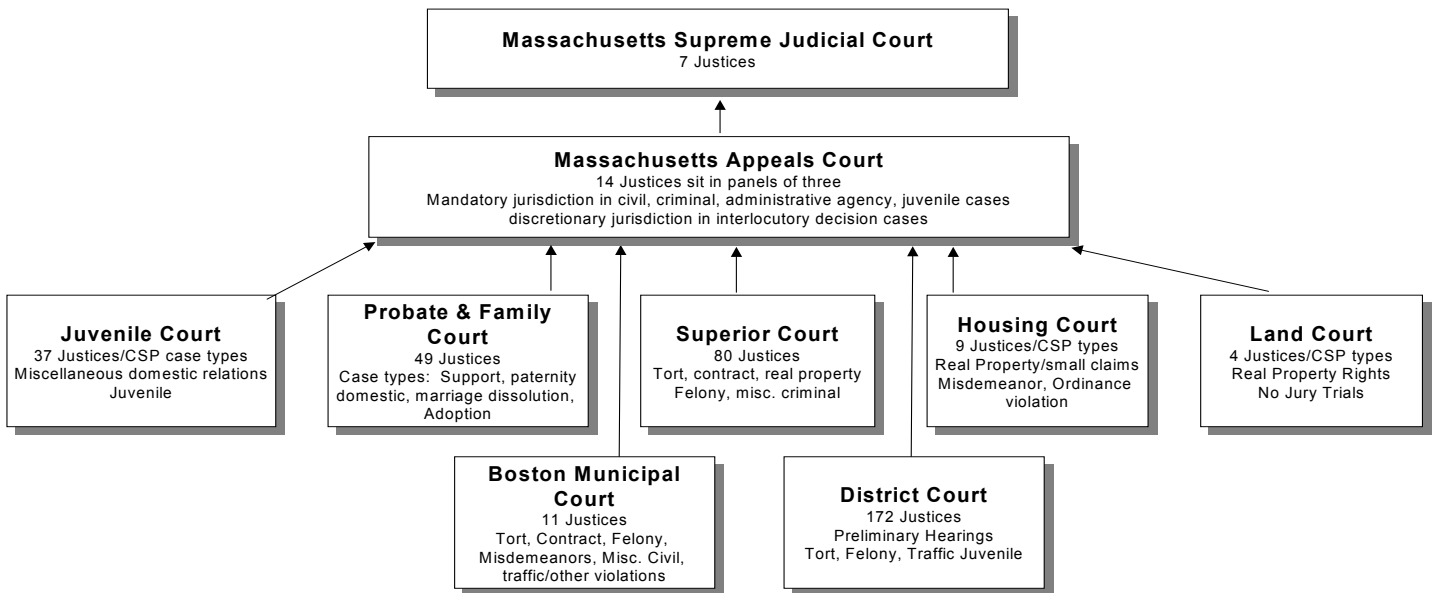
On the criminal side, all criminal cases (with the exception of first-degree murder matters) fall within the jurisdiction of the Appeals Court. Most post-conviction motions may also be reviewed by the Appeals Court. Though the prosecution's right to appeal is more limited, in appropriate circumstances such appeals are brought to the Appeals Court. As is true in the civil context, a single justice of the Appeals Court may authorize appeals from interlocutory orders in criminal cases.

During 1999, as an example, about two-thirds (805) of the Appeals Court's civil cases came from the Superior Court. The Probate and Family Court provided 124 civil cases and the

District Court produced 80 civil matters. A smaller portion of the caseload was derived from other departments of the Trial Court - - 44 civil cases from the Land Court, 18 cases from the Housing Court, and 34 cases from the Juvenile Court. Additional civil cases came before the Appeals Court as a result of the Single Justice Session (39 cases), the Appellate Tax Board (33), and the Labor Relations Commission (15).

Similarly in that year, on docket's criminal side, the Appeals Court heard cases from the Superior Court (637), the District and Municipal Courts (438), the Juvenile Court (28), and the Single Justice Session (3).

Massachusetts Court Structure



2. Single Justice Jurisdiction

In addition to the crowded panel docket, the Appeals Court maintains a demanding single justice session. The single justice session operates continuously throughout the year. Each associate justice sits as the designated single justice for a one-month period. The chief justice may substitute in this capacity if the designated single justice is either unavailable or is recused from a matter. Although argument is not generally permitted on matters presented to the single justice, the single justice is responsible for considering all written motions, petitions and oppositions filed with the Court. A single justice may, however, schedule a hearing when a hearing is believed necessary.

Based upon both statute and court rule, the single justice has authority to review interlocutory orders entered in the Trial Court departments and to act on various matters relating to pending appeals. The bulk of the work earmarked for the single justice is derived from statutory authority that permits aggrieved parties to seek review of interlocutory orders entered in the Superior, Probate and Family, Land and Housing Court Departments. By statute, the single justice jurisdiction includes consideration of matters relating to questions of indigency, awards of attorneys' fees, appeal bonds in summary process cases from the Superior Court and the Housing Court and appeals from the reviewing board of the Department of Industrial Accidents in workers' compensation actions. Additionally, a single justice is also responsible for both hearing bail appeals where the bail amount has been set in the trial court and for reviewing applications for bail pending appeal.

A single justice, as authorized by various rules of the Court, routinely considers motions for stays or for injunctions pending appeal, motions to extend time for filing the notice of appeal in the trial Court, motions to allow late docketing of an appeal in the Appeals Court, stays of

execution of sentence in certain criminal matters, and findings of criminal contempt. The designated single justice also lends significant support to the management of pending appeals. The single justice often considers motions to extend the time for filing briefs, motions to file supplemental appendices and motions related to the scheduling of cases. As a final element of the single justice's extensive workload, the Supreme Judicial Court may transfer a matter to a single justice of the Appeals Court.

The Appeals Court, in its single justice session, has the broadest range of interlocutory review of any state in the country. Massachusetts has the broadest rights of interlocutory appeal of any state.

C. DECISIONS

The Appeals Court adheres to the sound policy of requiring that appellate panel decisions be made by judges, and rather than by staff attorneys or law clerks (a practice not unknown in some other jurisdictions). Every decision is the product of discussion and decision by all three panel members. Allegiance to a process whereby judges write the law ensures greater public confidence in the system, and has likely led to the reputation for sound judicial decision making enjoyed by the Court over the years.

Consideration of a matter may include analysis of the written materials submitted by the parties, or it may include oral argument. Six or more cases may be argued in an oral argument session. Argument is normally limited to 15 minutes per side.

1. Published Opinions

The onerous task of drafting an appellate decision is never routine. Because each case involves distinct issues, the Court typically conducts a great deal of additional legal research before the writing process begins. One justice from the panel who heard the case is assigned to draft the opinion. Once the draft author is satisfied with the opinion, it is circulated to the other

two members of the panel. The panelists often make extensive comments to the draft, necessitating substantial revision. Once drafting negotiation concludes and all of the panel members are satisfied with the opinion, the decision receives the formal approval of the three-judge panel that heard the case.

If the panel's decision is to be published in the official reports of the Appeals Court, the opinion is circulated to all justices for their review. Although the non-panel justices do not vote on the opinion, they are free to make comments or suggestions about the draft decision. Sometimes the comments of a non-panel justice result in modifications of the panel's opinion; occasionally, the comments of a non-panel justice may persuade the original three-judge panel to rethink an aspect of the decision. The review process by the entire Appeals Court serves the vital purpose of keeping each justice current on developments in the law. Additionally, this practice enhances the quality of the opinions and reduces the probability of conflicting panel decisions. Approximately one-fifth of all decisions are released as published opinions.

2. Appeals Court Rule 1:28

Once a matter has been fully briefed, the Court has the power to summarily dispose of the case pursuant to Appeals Court Rule 1:28. Rule 1:28 was promulgated in 1975 in an effort to keep pace with the rapidly expanding appellate caseload. Originally, Rule 1:28 authorized the Appeals Court to summarily affirm, without oral argument, any civil case that, in the Court's determination, presented "no substantial question of law." Three years later, Rule 1:28 was amended to include reversal and modification in cases where the Court found a "clear error of law." In 1980, Rule 1:28 was expanded to include criminal matters.

Rule 1:28 summary orders, unlike published opinions, may not be cited to the Appeals Court in an unrelated case and do not have precedential value. Summary dispositions reflect

only the view of the three-judge panel who reviewed the matter. Except in unusual instances, the decision is not circulated to the other members of the Appeals Court.

D. INTERNAL EFFORTS TO REDUCE ADJUDICATION DELAY

In 1993, the Appeals Court implemented an additional program to assist in moving certain cases through the process efficiently. The Appeals Court Conference Program is a useful mediation program that resolves some civil cases before requiring the Court to reach a decision. By using an impartial, independent Conference Counsel (either a retired judge or an experienced trial attorney), the program seeks to facilitate settlement at the appellate level. After a case is entered on the Appeals Court docket and before any briefs are filed, a conference is held.

During fiscal year 1999, for example, 418 cases were selected to participate in the Conference Program. By the end of the year, conferences had been conducted in 400 of those cases. Full settlements were achieved in 144 of the cases, with settlement discussions still pending in some. The fiscal year 1999 settlement rate in the program was approximately thirty-five percent (35%) and was consistent with the previous five years. Even in cases that do not settle, the Conference Program is often helpful in clarifying issues for appeal.

E. APPEALS COURT JUSTICES AND STAFF

The Appeals Court is comprised of many individuals, in addition to the 14 statutory judges, who support the work of the justices. The following is a brief description of the staff of the Court.

1. Statutory Judges

The Appeals Court is currently comprised of 14 full-time statutory justices. The statute requires that the Appeals Court “consist of a chief justice and thirteen associate justices.” M.G.L. c. 211A, § 1. Each judge is expected to be a ‘generalist’. Therefore, cases are not selected for particular judges or panels according to the subject matter of the dispute.

Additionally, every judge on the Court rotates in order to meet the statutory requirement that each judge sit with every other judge as often as practicable.

Appellate judges are often the most experienced members in the judicial community. Unfortunately, age is often parallel with experience. Consequently, the older judges who serve on the Commonwealth's appellate Courts are forced to confront normal life barriers like illness and issues.

2. Recall Judges

Recall judges were first authorized in 1978. Pursuant to M.G.L. c. 211, § 24 and c. 211A, § 16, the Appeals Court may, as needed, request that a retired appellate judge who has served previously on the Appeals Court or the Supreme Judicial Court return to the Court. In this role, a recall judge performs all of the same duties that a regular judge on the Appeals Court does.

The important distinction, however, is that recall judges control their work schedule and are under no obligation to maintain a full-time schedule. Consequently, the Appeals Court may have periods when no recall judges are available, when recall judges are available for only part-time assistance, or when recall judges are available for certain months of the year. Although the recall judges provide important relief to the beleaguered statutory judges, the age, health, and schedules of retired judges limit the Court's ability to depend on their services.

Currently, the Appeals Court is enjoying the assistance of four recall judges, who together constitute the equivalent of about three full-time statutory judges.

3. Staff Attorneys

There are currently more than 20 staff attorneys employed by the Appeals Court. They perform the vital functions of screening incoming cases and editing all outgoing decisions.

(a) Screening Attorneys

An initial screening of all cases docketed in the Appeals Court is completed to identify cases that may be appropriate for Rule 1:28 summary disposition. If a screening attorney believes that a case is ripe for summary disposition, the attorney prepares an extensive memorandum justifying that determination. The attorney frequently prepares a proposed summary disposition order. If the attorney believes that the matter cannot be summarily disposed of, a more limited memorandum is prepared. Certain screening attorneys review civil matters while others review criminal cases.

(b) Editorial Staff Attorneys

All Appeals Court decisions are edited by designated staff attorneys for technical and substantive accuracy before the opinion is released to the public.

4. Law Clerks

Law Clerks play an important role in the Appeals Court. While two law clerks are assigned to the chief justice, associate justices each have one law clerk. The Court, from time to time, may have additional ‘floater’ law clerks who assist the Court in meeting the high demands that are placed on it. Law clerks generally serve in the Appeals Court for one-year terms.

Like judges who are preparing for an upcoming argument, the law clerks receive copies of the briefs, appendices and transcripts about two weeks in advance of the argument date. Their primary responsibility is to assist their judge in the decisional process by performing legal research on the issues raised in each case, reviewing the record, and assisting in the preparation of the decision.

F. POST-APPEALS COURT REVIEW

An analysis of subsequent appellate review of Appeals Court decisions shows that, in the aggregate, the Appeals Court performs well its fundamental function of error correction. The

Supreme Judicial Court usually accepts much less than five percent (5%) (most recently, only 30 cases out of approximately 1,300, or about 2%) of the Appeals Court decisions for further appellate review. That the Supreme Judicial Court finds so few of the Appeals Court's decisions worthy of further appellate review shows quite clearly that the error correction function has been well-performed by the intermediate court. Application of the affirmance rate to the number of all possible cases that could be overturned makes Appeals Court rulings the final decision in almost ninety-nine percent (99%) of all cases it considers. Moreover, the cases that the Supreme Judicial Court takes to review are generally the more difficult or controversial cases, and these cases are sometimes flagged by a rare dissenting opinion in the Appeals Court. Therefore, while the reversal rate for those few, selected cases that are taken by the Supreme Judicial Court for further appellate review approaches fifty percent (50%), those cases demonstrate that the Appeals Court has performed its function by enabling the Supreme Judicial Court to take the comparatively few, tough cases that shape fundamentally the law of the state.

G. CASELOAD

While significant changes have taken place in the Appeals Court during its twenty-seven years of service, nothing has changed more remarkably than the size and character of the Court's caseload. To highlight the remarkable expansion of work, one need only note that appellate entries have risen from 1,370 in 1988 to as high as 2,392 in one recent year.

1. Historic Analysis

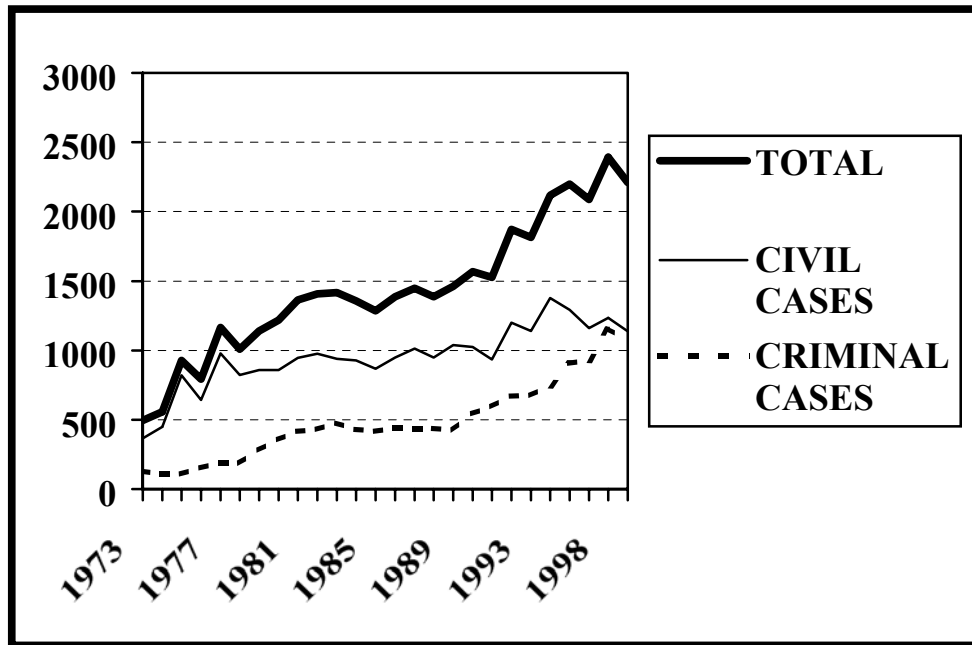
The number of cases entered on the docket of the Appeals Court has steadily risen. Particular attention should be given to the size of the caseload in 1988, when the Court was expanded to its current size of 14 justices, as compared to the current caseload with the same number of judges.

(a) Total Number of Cases

ANNUAL CASELOAD DATA

| Calendar Year | Total Entries | Civil Cases | Criminal Cases/ (% of total) |
|---------------|---------------|-------------|---------------------------------|
| 1973 | 496 | 366 | 130 (26.2%) |
| 1974 | 557 | 448 | 109 (19.6) |
| 1975 | 928 | 819 | 109 (11.7) |
| 1976 | 793 | 642 | 151 (19.0) |
| 1977 | 1166 | 978 | 188 (16.1) |
| 1978 | 1008 | 821 | 187 (18.6) |
| 1979 | 1139 | 858 | 281 (24.7) |
| 1980 | 1217 | 859 | 358 (29.4) |
| 1981 | 1364 | 947 | 417 (30.6) |
| 1982 | 1407 | 977 | 430 (30.6) |
| 1983 | 1416 | 939 | 477 (33.7) |
| 1984 | 1357 | 927 | 430 (31.7) |
| 1985 | 1284 | 867 | 417 (32.5) |
| 1986 | 1387 | 949 | 438 (31.6) |
| 1987 | 1449 | 1013 | 436 (30.1) |
| 1988 | 1387 | 949 | 438 (31.6) |
| 1989 | 1463 | 1038 | 425 (29.0) |
| 1990 | 1568 | 1024 | 544 (34.7) |
| 1991 | 1527 | 934 | 593 (38.8) |
| 1992 | 1871 | 1200 | 671 (35.9) |
| 1993 | 1814 | 1140 | 674 (37.2) |
| 1994 | 2119 | 1376 | 743 (35.1) |
| 1995 | 2199 | 1292 | 907 (41.2) |
| 1996 | 2088 | 1160 | 928 (44.4) |
| 1997 | 2326 | 1257 | 1069 (46.0) |
| 1998 | 2392 | 1235 | 1157 (48.4) |
| 1999 | 2210 | 1138 | 1072 (48.5) |

These data may be further considered in graph form, noting the dramatic incline of total appeals and, in particular, criminal matters.



(b) Number of Judges

When the Appeals Court was created it consisted of just six judges. In 1978, wholly in response to increased workload, the General Court increased the Court to ten.

The original Court did not have the power to recall retired judges. Of course, at the time, the demands on the Court were far less. In the 1978 expansion legislation, the General Court wisely included the power to recall judges. This additional capability assisted the Court in its battle to move cases expeditiously.

The Court's caseload continued to grow and in 1988 four new judgeships were created to meet the increasing appellate docket. These new positions were not filled until 1990, bringing the Appeals Court's roster to its current 14 statutory judges.

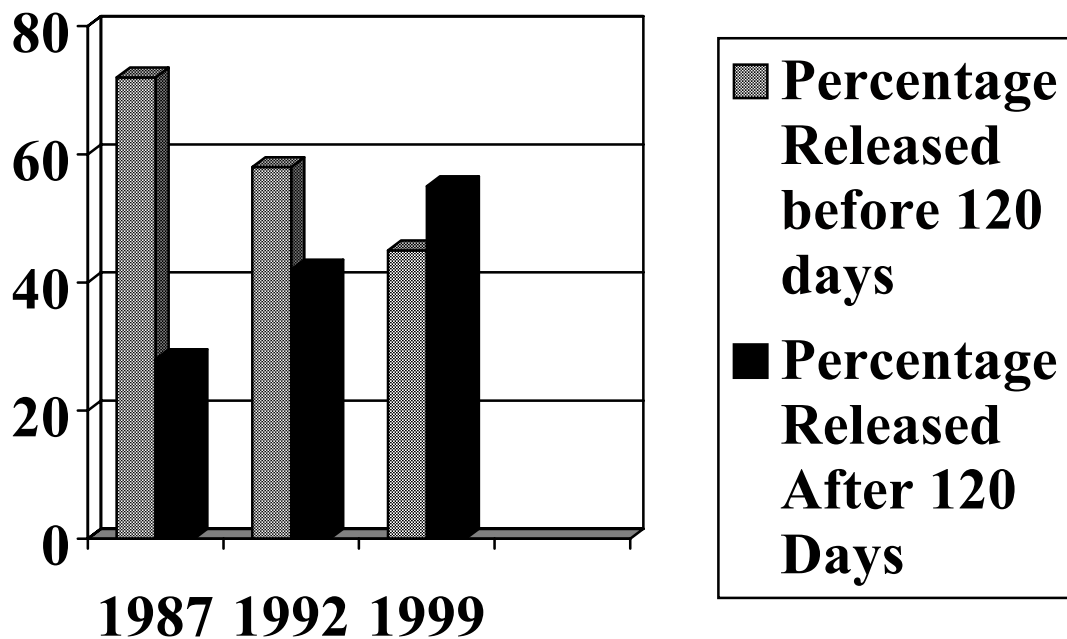
To keep pace with the growing docket, without attempting to reduce the backlog, the chief justice must field five full panels of three judges per month, with each panel considering 30 cases each month, and exclusive of the single judge. Even with the help of four recall judges,

illness, vacancies, and removing judges who are behind schedule in producing opinions, prevents the fielding of five full panels with regularity.

(c) Timeliness of Oral Arguments/Decisions

The following, based upon only full opinions, is a brief comparison of how much time elapsed between the time of oral argument and the time a decision is released. Specifically, the following chart highlights the increase in the number of decisions that are released more than 120 days after argument is heard.

The Appeals Court, by Supreme Judicial Court Standing Order, “should” release a



decision within 130 days of the hearing. This rule, unfortunately, has taken on greater flexibility with judges often docketing waivers of the rule because the demands of the appellate caseload are too great. Furthermore, cases that are fully briefed by February 1 are supposed to be argued or considered by June of that year. Largely due to the substantial backlog in the Appeals Court

and likely perhaps due to significant other factors such as the increasing complexity of litigation, that aspect of the Standing Order has not been met in the Appeals Court since 1988.

(d) Affirmance Data/Reversal Error Correction

As illustrated below, the affirmance rate in the Appeals Court has slowly and steadily increased over the past decade. While this change of approximately ten percent (10%) may be attributed to a number of factors (including the relative increase of criminal as opposed to civil appeals presented to the Court), there is a danger that overworked and understaffed judges are not able to evaluate cases as critically as if they were confronting a normal size caseload with the requisite number of judges and may be more inclined to defer to trial courts. In fairness, an increase in the quality of Trial Court judges may also play a role.

| Fiscal Year | Number of Decisions | Decision AFFIRMED | Decision REVERSED | Other Action Taken |
|--------------------|----------------------------|--------------------------|--------------------------|---------------------------|
| 1999 | 1394 | 1157 (83%) | 132 (9.5%) | 106 (7.5%) |
| 1998 | 1262 | 994 (78.7%) | 158 (12.5%) | 110 (8.7%) |
| 1997 | 1312 | 1001 (76.3%) | 187 (14.3%) | 124 (9.4%) |
| 1996 | 1252 | 1008 (80.5%) | 192 (15.3%) | 52 (4.2%) |
| 1995 | 1235 | 958 (77.6%) | 168 (13.6%) | 109 (8.8%) |
| 9/1/92-8/31/94 | 2181 | 1682 (77.1%) | 317 (14.5%) | 182 (8.4%) |
| 9/1/90-8/31/92 | 1763 | 1320 (74.9%) | 293 (16.6%) | 150 (8.5%) |
| 9/1/88-8/31/89 | 729 | 529 (72.6%) | 140 (19.2%) | 60 (8%) |

(e) Qualitative Type of Cases

In its early years, the Appeals Court rendered judgment in cases involving lawyers on both sides. *Pro se* litigants were the exception.

The majority of the cases presented to the Court over its first twenty years were, for the most part, not overly complicated. The Court certainly had the resources to adequately evaluate the issues presented in a timely manner. The majority of cases presented for review were civil matters. Criminal matters accounted for thirty percent (30%) or less of the Appeals Court docket

until 1983 and forty percent (40%) or less until 1995. Although criminal matters have steadily increased over the past three decades, since 1995, the number of criminal cases has sharply risen and now accounts for virtually half of the Court's business.

2. Current Analysis

(a) Total Number of Cases

The total number of matters handled by the Appeals Court has risen steadily during the Court's history. The Court is currently confronting the largest number of entries in its almost-three-decade long history. The past three years, for example, have each produced in excess of 2,200 appeals.

(b) Number of Judges

The number of judges on the Appeals Court, fourteen, has remained unchanged since 1989. As noted throughout this report, while the number of judges has been static, the work of the Court and the demands placed upon each justice have more than doubled. Each panel judge sits on approximately thirty cases each month and is responsible for ten decisions each month.

(c) Number of Opinions

Merely to keep pace with the current onslaught of appeals, without attacking its backlog, the Court must review 150 cases per month during its term. To meet the goal of 1,500 cases per year, each of five current panels of three judges must hear thirty cases per month. Of the thirty cases assigned to each panel, approximately twelve appear on the "regular list", while eighteen require either abbreviated or no oral argument. Generally, the Court does not have enough judges, in light of illness, vacancy and personal backlog in drafting opinions, to consistently field the five essential panels plus the single justice. The Court publishes approximately 250 decisions each year. The remainder of the decisions (up to 1,200) is unpublished.

(d) Qualitative Type of Cases

The demographics of current appeals are sharply different from those of previous terms. Criminal appeals have increased dramatically. As state and local governments pursue aggressive agendas to counter crime, the increased number of criminal prosecutions results in more criminal appeals. Mandatory minimum sentences, for example, almost guarantee that someone convicted of a crime is going to appeal because it is much more likely that the person opted for a trial in the first place instead of pleading guilty. Enhanced penalties for those convicted of crimes have significantly inflated the demands for post-trial relief.

On the civil side of the Court's docket, many litigants appear *pro se*. In fact, current numbers indicate that thirteen percent (13%) of all cases have at least one *pro se* party. *Pro se* cases put greater strain on the Court as it works harder to guarantee fairness for all parties. Less than forty percent (40%) of the appeals that now come up would be classified as "traditional civil appeals" with an attorney on each side and subject matter such as torts, contracts, domestic relations, administrative law, etc. Twenty-five years ago, perhaps seventy percent (70%) of the Court's caseload would have been classified as "traditional."

The Department of Social Services has provided a steady increase of cases. The Court receives approximately eighty appeals in child termination rights cases. Important resources are dedicated to making sure that these matters move through the system quickly.

Restraining orders, pursuant to M.G.L. c. 209A, are also being appealed in greater numbers.

II. ANALYSIS OF THE BACKLOG ISSUE

A. PROBLEM

Using the number of fully briefed cases as its benchmark, the Appeals Court's backlog has mushroomed from approximately 500 cases as of December 31, 1989, to over 1,300 hundred cases today. An increased backlog means increased delay in reaching cases for decision. In the

late 1980's, criminal appeals were routinely scheduled for argument within one or two months following the filing of the appellee's brief, and civil cases were ordinarily reached four to five months after the appellee filed. At present, those time intervals are eight months for criminal cases and 14 months for civil matters.

B. EFFICIENT ACTIVITIES ARE CURRENTLY UNDERTAKEN

The Appeals Court has been acutely aware of its growing backlog. The Court has re-examined and revamped its operating procedures. For example, the Court relies to a greater extent on unpublished opinions, which have risen from about 500 a year in 1989 to more than 1100 in 1999, or eighty-one percent (81%) of all decisions, and considers more cases without oral argument, up from an estimated twenty-five percent (25%) in 1989 to more than fifty percent (50%) in 1999.

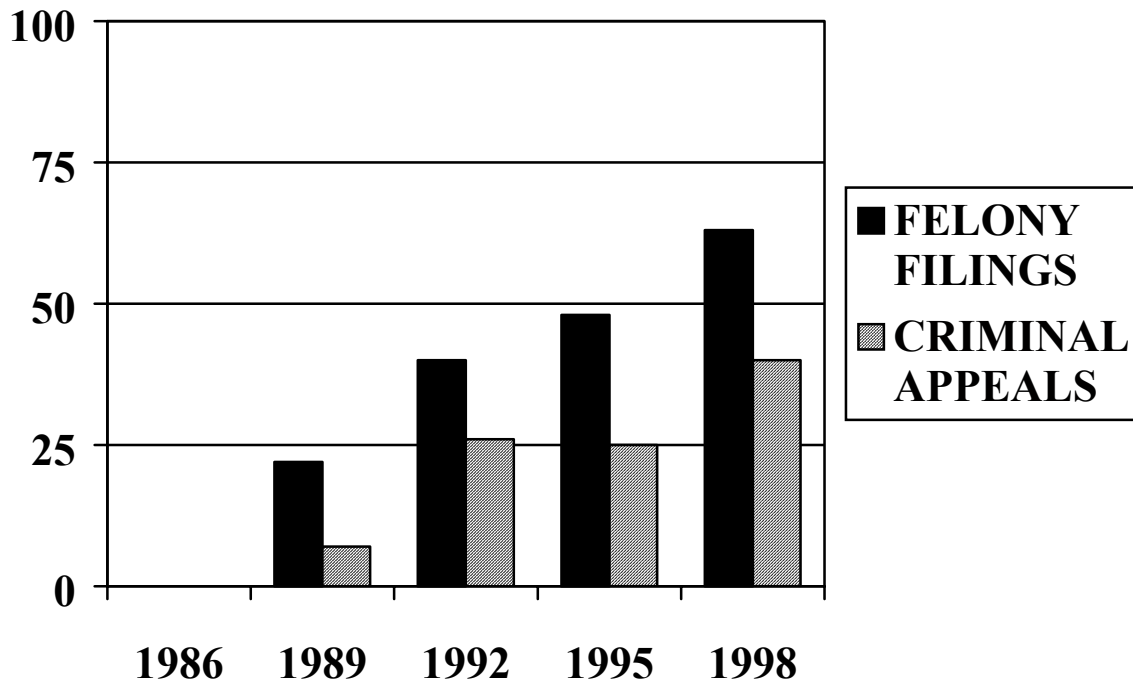
As noted above in greater detail, the Court also utilizes the Conference Program in attempt to have civil matters settled and removed from the docket. Although the program has achieved modest success, litigation at the Appellate level is difficult to mediate toward resolution and thus the program has had little impact on the backlog.

C. CONSEQUENCES OF DELAY

1. Criminal Justice

Massachusetts has witnessed a significant increase in the number criminal matters on appeal. In the first year of the Appeals Court's existence, it handled 130 criminal matters, or roughly twenty-six percent (26%) of its total caseload. In 1999, more than forty-eight percent (48%) of the Court's business was criminal appeals. Since 1980, the number of criminal appeals has consistently increased.

Based upon a National Center for State Courts survey,⁵ the which evaluated 23 states including Massachusetts, and as the chart below indicates, criminal appeals have grown nationwide by approximately thirty-five percent (35%) over the past eleven years. The graph below displays the percentage change in felony filings in state trial Courts and the percentage



change in criminal appeals entering intermediate appellate Courts like the Appeals Court. The year 1986 is used as the base (0) and percentage change is relative to 1986. While distinctions from state to state certainly exist, the overall trend in criminal appeals demonstrates an alarming issue that faces the understaffed Appeals Court.

Providing adequate judicial resources to contend with criminal matters is wholly consistent with the revived state and local emphasis on prosecuting criminals. In the case of the Appeals Court, adding more judges protects the criminal justice system and ensures that the

⁵ Brian J. Ostrom and Neal B. Kauder, *Examining the Work of State Courts, 1998: A National Perspective from the Court Statistics Project* (National Center for State Courts, 1999)

goals of the government and society are met. Eradicating delay in the process ensures a speedier conclusion of the matter for the victim of a crime. Moreover, if the Appeals Court timely orders a new trial, the value of necessary witnesses and evidence is not diminished by the passing of time.

2. Civil Justice

(a) Flight to Private Alternative Dispute Resolution Forums

Although statistical information is difficult to obtain, anecdotal evidence strongly suggests that many who can afford private adjudication are turning to private alternative dispute resolution avenues. This trend is, in part, a direct result of the backlog in the Court of Appeals. Litigants recognize that final resolution of a dispute may be delayed in the Appeals Court and, therefore, flee to more efficient private remedies. What slowly is emerging are two systems of resolution - - private adjudicatory mechanisms for businesses and individuals that can afford private solutions, and the public justice system that services criminal matters, government administrative matters and the general public.

While use of the private sector has many positive elements, the emergence of two systems of justice presents serious issues for the development and interpretation of Massachusetts law. First, parties involved in disputes will receive inconsistent remedies depending upon what private firm they employ. Private mediators are not effectively bound, for example, to follow precedent. Second, abandonment of the Court system deprives the judicial branch of the opportunity to further develop the common law and to provide definitive construction and interpretation of positive law. Consequently, judges would not have the opportunity to assist developing the common law and the role of 'judge' would be become far less appealing. As a result, Massachusetts would be unable to attract the best and brightest people to fill vacant seats on the bench.

(b) Impact on Certain Industries

Two additional consequences of the delay merit mention in this report. Although the imposition of time standards and the monitoring of those standards has actually increased the efficiency of the trial courts in handling litigation, lawyers who try sophisticated business, zoning and real estate cases are aware that even if the case can be tried expeditiously in the Superior Court or the Land Court, it will likely stall in the Appeals Court for many months or years before any sort of final and binding determination is made. Because of the financial impact of this delay, many lawyers and clients choose Alternative Dispute Resolution over litigation solely because of delay at the appellate level. While ADR has many advantages and its use is certainly not to be discouraged, the choice to use ADR as an alternative to litigating a matter should not be solely as a result of a perceived backlog at the appellate level. ADR should be an alternative, not the only financially feasible choice.

The impact of appellate delay on certain types of real estate litigation can be even more problematic. Lawyers representing opponents to a real estate development project know that the combination of the length of time it takes to try a zoning case, coupled with the length of time the case will take to be decided on appeal, can financially kill a project. Although pursuant to General Laws Chapter 40A, §17, zoning appeals are advanced on the civil docket, there is no advancement in terms of getting the decision out, either at the trial or the appellate level. Land developers in Massachusetts must comply with a multitude of environmental and zoning regulations, most of which give “persons aggrieved” rights of appeal. ADR is an unrealistic alternative for many of these cases for the simple reason that a party seeking to stop a project has absolutely no incentive to expedite the decision making process. As a result, appellate delay has unwittingly become an ally of any party seeking to halt a real estate project in Massachusetts,

thereby providing a significant barrier to resolution that is based on the merits of the litigants claims, rather than leverage from an overburdened court system.

(c) Affirmance Rate

The affirmance rate in the Appeals Court has slowly and steadily increased over the past decade. While this change of approximately ten percent (10%) may be attributed to a number of factors, the reality is that overworked, understaffed judges may not be in a position to evaluate cases as critically as if they were confronting a normal size caseload with the requisite number of judges.

3. Department of Social Services

Custody cases and other matters arising out of the Department of Social Services are placed on an expedited calendar in an effort to ensure timely resolution. The Appeals Court has dedicated a remarkable amount of resources to maintaining a somewhat reasonable timetable for these cases. The backlog causes, in some instances, unreasonable delays. And, in cases that are not mooted by delay, the Appeals Court's attention to this matters translates into sacrifice elsewhere and longer delays for typical civil and criminal cases. Children should remain a high priority of the Appeals Court. The Court, however, should not have to sacrifice the rights of other litigants to guarantee that children receive the relief they deserve.

III. THE SOLUTION

In light of its findings, the Committee strongly recommends that immediate attention be given to the passage of legislation that would rectify the grave inadequacies that currently exist in the staffing of judges on the Massachusetts Appeals Court. If the Commonwealth of Massachusetts is to meet its goal of providing its citizens with the highest standard of judicial

review, the General Court must act now. Accordingly, the Committee recommends that the following steps be taken to ensure the success of the Appeals Court:

- the General Court immediately legislate the addition of five new statutory judges on the Appeals Court;
- the General Court legislate the addition of three additional statutory judges as of January 1, 2001; and
- the General Court legislate the addition of three additional statutory judges as of July 1, 2001.

The first installation of the five new judges would make the total size of the Appeals Court nineteen. With nineteen judges, the Court could maintain six panels of three judges and the single justice session. Recall judges would fill unexpected vacancies on panels. This would allow the Court, for the first time, enough manpower to begin eradicating the backlog of cases. Once the Court grows, with the addition of eleven new judges, the Appeals Court would be able to return the days of timely, quality justice. The Court would anticipate that oral argument would be offered in more cases, that more cases would be decided by published opinion, and that each judge would be able to spend more time on each case assigned to him or her.

The Committee is cognizant that the Commonwealth's treasury is not without limits. Unlike many instances where a special interest group makes a recommendation to the General Court, (thereby silently suggesting that some other organization, agency or individual not receive the same funds), this recommendation aims to serve every citizen, agency and organization in the Commonwealth. The Appeals Court offers its services to everyone. Therefore, support for the Appeals Court certainly translates into direct support for all constituencies.

Finally, the appointment of more judges is imperative simply to maintain the quality of appellate adjudication in Massachusetts. The mission of the Appeals Court is to interpret law so

that it can be applied in a predictable fashion by citizens, lawyers and trial courts, to enforce constitutional rights against majoritarian encroachment, and to serve as the reflective engine of the common law. These enormously important tasks require both high quality and efficiency. Because the current staff of judges has refused to sacrifice the quality of its work, a backlog has developed. The system, through the addition of more qualified judges, can and should meet the two-prong goal of quality dissemination of justice in a timely fashion. As British Prime Minister William Gladstone once said: “Justice delayed is justice denied.”

A. SUPPORT FOR RECOMMENDATION

It is no secret that the situation in the Appeals Court is desperate. The Massachusetts Lawyers Weekly recognized that the Appeals Court “commonly operates with an immense caseload and has traditionally been under-supported in terms of funding and staff.”⁶ The Appeals Court itself feels the pressure in a way few can understand. Chief Justice Armstrong recently noted that he and the associate justices are constantly “nervous that we’re deciding cases so fast and with so much paper flying around here that we may be missing things or making mistakes. It’s terribly important that we get it right.”

1. The Appeals Court Has Too Few Judges

The development of a serious and increasing backlog is the product of too few judges for too much work. This is borne out by statistics that suggest that the number of intermediate appellate judges in Massachusetts is small in relation to the population. Simply in order to keep up with new filings, Appeals Court judges in Massachusetts must generate a significantly higher number of decisions than do their counterparts in other states.

It is not just the statistical evidence that supports the contention that there are too few Appeals Court judges. The current judges are simply working too hard. The Appeals Court

reports that many of the judges work six to seven days per week, often more than 60 or 70 hours per week. It is difficult to see how they could produce ten quality decision per month — as is required simply to keep up with current filings — without devoting inordinate time to the effort. To do justice to each case for which he or she has primary responsibility, the judge must review the record (the filings, the trial transcript, the lower Court decision in a bench trial), study the briefs filed by the parties, read the cases and statutes cited by the parties, conduct additional research (often necessary in cases involving *pro se* litigants or lawyers whose papers are inadequate), and write an opinion that sets forth the reasons for the Court’s decision in a manner that will provide guidance to parties in future cases. We fail to see how, in many cases, this can be done in less than thirty hours. In some cases, a conscientious judge will need much more time than that. Moreover, at least some of these tasks must be undertaken by the other two judges on the panel as well.

If thirty hours is a reasonable benchmark — we think it conservative — then we currently require conscientious Appeals Court judges to work 300 hours per month, or ten hours per day, seven days a week simply on the cases they are assigned to write. No reasonable person could view this as wise. Working 300 hours per month, for 11 months a year, results in a total of 3,300 hours. In most law firms, lawyers who work 2,400 hours per year are viewed as highly productive. The present system is forcing judges to work far harder than any major law firm demands that its attorneys work.

This kind of burden leaves no time for other essential professional activities. There is an obvious benefit to having judges participate in bench/bar activities. Moreover, all professionals, including judges, need an opportunity for continuing education and professional development. Lawyers and law students benefit enormously from judges who take the time to teach law school

⁶ Editorial, *Appeals Court ‘Time Standards,’* 27 M.L.W. 1002 (Jan. 11, 1999).

and continuing legal education classes and to write books and articles. It is impossible to see how Appeals Court judges can engage in any of these activities, given the current demands on their time.

The crush of work leaves no time for much personal life either. It is unfair to impose on any person the burden of foregoing the opportunity to read a book or go to a movie or participate in community or charitable affairs or pursue any other personal interest or avocation, if the person's routine work is to get done. Moreover, it is extremely difficult to recruit the highest quality lawyers and trial judges to serve on the Appeals Court where the burdens of the job are so heavy.

We have considered ways to address the backlog and current workload that do not involve increasing significantly the number of Appeals Court judges. In our view, such means either will not significantly improve the efficiency of the Court or will do so only by unacceptably compromising the quality of appellate adjudication.

For example, we do not believe that increasing the number of law clerks assigned to Appeals Court judges will significantly improve the efficiency of those judges unless the judges delegate to such clerks — typically young men and women who have just graduated from law school. — responsibilities that ought, in our view, to remain with judges. Judges themselves ought to review the record, the briefs and the pertinent precedents, decide the cases and articulate their reasons. The Appeals Court already relies on staff attorneys to draft decisions in relatively simple appeals. We do not believe that it would serve the interests of justice to place greater reliance on non-judges for the important and difficult business of deciding appeals and preparing appellate decisions.

Similarly, we do not believe that reducing the number of cases assigned for oral argument is a promising strategy. Oral argument in most cases takes only a half-hour altogether, a comparatively tiny fraction of the time that must be devoted to any given case. A judge's preparation for oral argument is time that would have to be spent on the case in any event, and the argument itself provides an often useful opportunity for the lawyers to answer questions that occur to judges as they study a case.

Nor do we believe that the time spent by Appeals Court judges reviewing and commenting on opinions prepared by other panels is time that ought to be eliminated. Judges should keep up with cases as they are decided in order to keep abreast of developments in the law, so the time is hardly wasted. Moreover, giving the entire Court the opportunity to review opinions before they are released enhances the quality of the Court's decisions and reduces the prospect of conflicting panel opinions. Nevertheless, if the Court is expanded in the manner we are recommending, it may be wise to consider whether continuation of this desirable practice will be overly cumbersome and require some modification.

Nor is it consistent with the needs of justice to suggest that the Court increase the number of cases decided under Rule 1.28, i.e. cases deemed not to present a "substantial question of law" that are decided without oral argument or precedential opinion. It is the view of the Court, a view with which many lawyers and this Committee agree, that the Court currently disposes of too many cases in such fashion, a situation that is directly related to the backlog and crush of ongoing business.

Finally, there is not a scintilla of evidence to support any suggestion that the judges themselves are inefficient given the number of cases for which each judges has responsibility

each year. Given this workload, the backlog is not surprising. What is much more surprising is that the Court produces as many quality decisions as it does.

2. The General Court Should Expand the Appeals Court

The House budget contemplates the addition of eleven new Appeals Court judges over a period of eighteen months. We think that this is the correct approach, although it may not prove to be enough and a further expansion may be required in the future.⁷

The addition of only five new judges would permit the maintenance of six panels of three judges. The principal effect of such an addition would be that the Court would be able to keep up with current business and to begin to whittle away, slowly, on the backlog. In our view, this is a short-term, stop-gap approach that will not address the medium and long-term needs of the Court. It will not significantly reduce the workload of the individual judges, a matter critical to the ability to recruit strong judges in the future and to permit the current judges to live reasonable professional and personal lives.⁸ Nor will it allow the Court to respond to events that are likely to increase the demands on the Court over time.

Even without any unusual events, the business of the Court has steadily expanded over time by a few percentage points per year. Adding only a few judges will not give the Court the leeway necessary to accommodate that normal increase.

⁷ We would support an increase of 15 additional judges now except that the Court believes that bringing on that many new judges so quickly may tax the Court's ability to train and orient so many judges. We believe that, if matters progress in the direction they seem to be taking, the Court will need more judges in a few years.

⁸ Chief Justice Armstrong acknowledges that his request for an increase of five judges was deliberately conservative in an attempt to get some immediate relief to address the current crisis. He has assured us that such an increase plainly would not address the longer term needs of the Court. Both Chief Justice Armstrong and the Appeals Court as a whole were concerned that presenting a more realistic request might have jeopardized getting judges needed immediately.

The Committee believes that the General Court can be persuaded that the public good requires a more significant expansion of the Appeals Court. The fact that the House budget included funding for eleven new judges gives us reason to think that the General Court is more receptive to addressing the genuine needs of the Appeals Court than Judge Armstrong and his fellow justices may have anticipated.

In addition, if history is any guide, there will be some developments that will generate a significant immediate increase in the Court's docket. We have seen such "spikes" with legislation that creates a new area of jurisdiction (e.g. the creation of jurisdiction over decisions of the Labor Relations Commission and the Appellate Tax Board), with the elimination of trial de novo (which caused many more criminal cases to be tried), and with the imposition of mandatory sentencing requirements in many areas of criminal law (which also increases the number of criminal trials and appeals). While it is impossible to anticipate precisely what future developments will have a similar effect, it would be surprising if no such developments occur. For example, if the legislature introduces capital punishment, the burdens on the Supreme Judicial Court will increase dramatically, and the burden of a corresponding increase in non-capital cases will fall on the Appeals Court. It is also reasonable to anticipate that the current economic boom will end at some point, and the resulting contraction will also generate additional civil business. Even with an increase of five judges, any such development affecting the caseload of the Appeals Court will simply create a new backlog.

Accordingly, we think that additional judges are needed. Adding six additional judges in 2001 would permit two additional panels, or eight in all. That would permit the more rapid reduction in the backlog and, once the backlog is eliminated, would reduce slightly the number of cases that each panel would have to dispose of each month. We view this as a reduction in the workload of each judge from brutally unfair to merely heavy. Such a reduction would permit judges once more to have lives that consist of more than simply deciding one case after another. We think the administration of justice would benefit tremendously.

It should also give the Court the flexibility to give unusually complex appeals the attention they require. It is not only the volume of cases, but also the size of cases and the

complexity of the issues presented in them, which is on the rise. The Courts are increasingly being asked to master not only legal doctrines, but also factual matters of extraordinary complexity. For example, in many civil cases, judges are being asked to assess whether proffered expert opinions in any number of physical, medical and social sciences reflect generally accepted principles in the field. Courts are being asked to manage and adjudicate mass tort cases of mind-boggling size and sweep. Just as the trial of such cases can take months, the time required to address appeals of judgments in such cases may be orders of magnitude greater than in the typical appeal. At present there is essentially no leeway to accommodate such unusual cases. The Chief Justice simply cannot assign a panel to a reduced workload month to address such a mammoth case without creating yet more delays and additional backlog.

In order to try to keep up with its caseload, the Appeals Court now narrowly restricts the length of appellate briefs and rarely, if ever, allows for enlargements. Although the present 50-page limit is adequate for most cases, it is a serious problem in major cases. As Judge Armstrong acknowledged, it is virtually impossible to give fair treatment to all of the important issues that arise in a six-week trial with many complex issues in 50 pages. Indeed, setting out the statement of material facts could consume that much space. The Appeals Court's compliment of judges must be increased substantially if the Court is to be able to provide an adequate forum to resolve matters of that sort which are now being raised.

With current caseloads, the availability of sufficient judges to staff eight panels will give the Chief Justice the flexibility to reduce the backlog in a reasonable period of time, to address cases that require more time than the typical appeal, to respond to legislative and other developments that will expand the caseload of the Court and to give the judges of the Court enough time to participate in the kind of judicial and non-judicial activities that give men and

women the kind of experience and perspective that can only enhance the quality of their judging.. We think the argument for eleven judges over eighteen months to be a compelling one.

3. State Comparisons

From the start it is important to note that state comparisons of intermediate appellate courts are difficult. In the first instance, many courts are staffed in a different manner. Pennsylvania, for example, provides each appellate judge with four law clerks. With the exception of the chief justice who has two law clerks, each associate justice on the Appeals Court has just one law clerk. Other jurisdictions record their appeals in different ways. In Michigan, for example, every count of a criminal indictment counts as a separate appeal. In Massachusetts, a criminal appeal – regardless of the number of counts in the indictment – is counted as a single appeal. The Michigan intermediate appeals court’s numbers are skewed much higher than Massachusetts for this reason. Finally, important philosophic differences exist on the various state intermediate appellate courts. Massachusetts proudly remains a jurisdiction where judges themselves articulate their decisions and the principles of law that undergird those decisions impact the law. In other states, law clerks draft opinions and, barring any glaring error, the sitting judge signs off on the opinion. It is still the case in Massachusetts that an Appeals Court judge reviews every pleading filed, researches the matter, and writes the opinion. This practice should be carefully preserved and protected because this methodology serves the interests of quality assurance and continuity – the core of our legal system.

Having noted the difficulty in accurately comparing other jurisdictions with Massachusetts, it is a fact that judges in many comparable intermediate appellate courts are responsible for approximately 40 to 50 decisions per year. The same was once true for the Appeals Court. Now, to keep pace with the influx of large numbers of entries, a judge on the

Appeals Court must produce 90 or more decisions per year, exclusive of single justice decisions. While 90 is the current goal, not all judges are able to achieve or maintain the incredible pace.

More concrete comparison of other jurisdictions, albeit limited, is available. The data demonstrate that, once again, the Appeals Court is understaffed. Specifically, there are 39 states that have an intermediate appellate Court. Of those 39 jurisdictions, Massachusetts ranks fourth in population per intermediate appellate judge with 0.441 million per judge. The national average is 0.320 million per judge. States that are demographically similar to Massachusetts all have lower figures: Connecticut, 0.365; Indiana, 0.330; New Jersey, 0.254; and Pennsylvania, 0.316. In short, comparable intermediate appellate Courts have either more judges, fewer cases or both.

IV. CONCLUSION

For all these reasons, the Committee strongly recommends that immediate attention be given to the passage of legislation that would, over the course of the next fiscal year, increase the number of Appeals Court justices by an additional eleven statutory judges along with authorization for the addition of commensurate support staff. The Committee thanks the Boston Bar Association, and particularly its Executive Council and BBA President, Thomas E. Dwyer, for the opportunity to participate in this meaningful and important project.