Oregon State Bar Approved Summary and Analysis

Appellate Process Review Committee Report

August 2004

Appellate Process Review Committee Report
Oregon State Bar Board of Governors Summary & Analysis

INTRODUCTION

The Appellate Process Review Committee was created in April 2003 as a subcommittee of the Appellate Practice Section executive committee. It was created in response to a request from the legislature to review the current operations of the Oregon appellate court system and to issue a report from the bar to the Joint Interim Judiciary Committee on its findings and recommendations. The committee charge included review of the structure, jurisdiction, timeliness, cost, and workload of the appellate courts. The report provides an overview of the function and purpose of the courts from a historical perspective and then focuses on Supreme Court operations followed by an analysis of Court of Appeals operations and recommendations. The Oregon State Bar Board of Governors ("BOG") accepted the report and acknowledged the work of the task force. The board has deemed it appropriate to add this summary and analysis and to issue its own recommendations based on those of the task force.

OVERVIEW

Oregon appellate courts and the litigants who appear before them are doing a commendable job of moving the bulk of cases toward reasonably quick resolution, given the significant volume of work involved and the limited resources available. Still, some parts of the courts' dockets do not proceed as quickly as others, and could benefit from improvement. Appellate justice must protect the deliberative process of full, fair argument and decision through high standards of professionalism that ensure a systematic approach to providing a consistent enunciation of the law.

THE BASIC STRUCTURE OF OREGON'S APPELLATE COURTS

The Oregon Supreme Court consists of seven justices elected to six-year terms. The court has mandatory jurisdiction over death penalty cases, bar and judicial discipline cases, certain labor injunctions, review of tax court decisions, certain administrative decisions, redistricting matters, and ballot title review. It has discretionary jurisdiction over petitions for review from the Court of Appeals. The Supreme Court also retains administrative responsibility for the Oregon judicial system at all levels.

The Court of Appeals has 10 judges elected to six-year terms. The court has jurisdiction over all civil, administrative, and criminal appeals with exceptions in which the Supreme Court has direct review or otherwise retains exclusive jurisdiction.

Compared with appellate courts in other states, Oregon's are quite busy and very leanly staffed. Alternative appellate court structures exist in other states, but no compelling reasons exist for the adoption of a different structure in Oregon.

OREGON SUPREME COURT OPERATIONS

I. Introduction

The Supreme Court deals with two categories of cases: (1) certain original and direct review proceedings, each of which is decided on an expedited basis because of either a legislative mandate or internal court policy and (2) discretionary review of decisions of the

Court of Appeals. The court also has substantial nonadjudicative functions, including regulatory authority over Oregon lawyers and substantial rulemaking responsibilities, which add significantly to its workload.

II. Original and Direct Review Proceedings

The Supreme Court by statute or internal practice must deal with a number of different types of cases, often on expedited time lines. These include ballot title review, mandamus cases, lawyer discipline, death penalty review, tax court appeals, and other specific issues referred by the legislature from time to time (*e.g.*, the review of the PERS reforms enacted in 2003). This caseload constitutes over 40 percent of the cases the court decides.

III. Discretionary Review

The court's discretionary docket remains its intended focus.

Petitions for review. The process to decide which petitions for review to grant constitutes at least 25 percent of the court's total work, with staff spending a higher percentage of time working on petitions than justices. The court completes its work on petitions within a reasonable time of six weeks of submission, but in so doing uses inordinate resources.

Time to decide discretionary cases on review. Based on the rules of procedure and the court's administrative considerations, a case proceeding through the normal process of discretionary review, without extensions of time to file briefs or responses, and without consideration of the time required for the court to write and issue its opinion, will consume 264 days. The period during which a case is under advisement is the period which demonstrates the court's productivity.

Over the last four years, cases averaged 834 days on the court's docket from filing to submission. When compared to the minimum period on review of 264 days, 570 days on average are spent by the parties preparing briefs on extensions of time, or by the court in drafting and considering the opinion. The briefing, decision, and total time on review periods are longer than advisable. It is unclear the extent to which the court's premium on unanimity has affected this period. While the briefing period has remained constant, the court's time to decision decreased sharply in 2003 due to decreases in the number of discretionary cases submitted for decision, a priority to eliminate the backlog of cases, and restrictions on extensions of time.

IV. Summary

- A number of options exist for changing the extent and the nature of the Supreme Court's mandatory review caseload, *e.g.,* limiting ballot title work, changing review of tax court cases to direct review in the Court of Appeals with discretionary review in the Supreme Court, and reexamining which cases are reviewed *de novo*.
- The court should consider a number actions to improve and streamline its internal functioning:
    - Institute a screening process for all petitions for review to identify those for which the preparation of a petition memo is unnecessary.

- Place reasonable restrictions on extensions for filing briefs.
- Reduce the time from when a case is at issue to oral argument.
- Impose deadlines on itself for circulation of drafts, and devote special attention to cases pending for over 12 months.
- When the court is unable to issue a majority opinion, the court should dismiss the review as improvidently granted.

OREGON COURT OF APPEALS OPERATIONS

I. Introduction

The Court of Appeals labors under few special grants of authority and has few duties other than deciding appeals from circuit court and judicial review of administrative agency orders in contested cases. The court received 3,314 new filings in 2003. Its caseload is the second highest per capita and per judge filing rate in the country.

Expedited review is required by statute in land use appeals and by internal policy in terminations of parental rights. Chronic understaffing in the public defender's office has resulted in increased time lines for filing opening briefs in criminal appeals. The "fast track" cases are complicated and cause delays in consideration of other kinds of cases.

II. Case Processing

The average time to settle the record is 3.6 months, well in excess of the statutorily required period of 30 days. This however is due largely to factors beyond the court's control: in civil cases, parties making financial arrangements with court reporters or the transcript coordinators or, in criminal cases, the defendant obtaining an order authorizing preparation of a transcript at state expense; the availability of transcriptionists at the local level; and the extent to which court reporters and transcriptionists seek extensions of time to prepare the transcript. The average time for briefing in civil cases and criminal cases is, respectively, 11.5 months and 14 months—periods that do not compare favorably to the times allotted in statute and court rule.

Oral argument in criminal appeals is held only at the request of the litigants or the court; this substantially reduces the delay inherent in hearing large numbers of criminal appeals.

The Court of Appeals dismisses on average 47 percent of its cases, most before oral argument or submission. Of the cases decided on the merits after submission, 20 percent are decided by signed opinion, 5 percent by *per curiam* decision, and 75 percent affirmed without opinion. Regardless of the form of the decision, all three judges to whom the case is assigned read the parties' briefs, participate in oral argument, and review the record as warranted.

III. Time to Decision

Since 75 percent of submitted cases are affirmed without opinion, large numbers of cases are disposed of in short amounts of time. The average time for disposition for criminal cases is 3.3 months and for civil cases is 5.5 months. In cases with signed opinions (344 in

2003), 92 percent were decided within six months of submission. Given the volume of cases, this disposition rate is quite favorable.

After issuance of the decision disposing of the case, it has taken on average about three months for the appellate judgment to issue, reflecting time to deal with petitions for reconsideration, petitions for review, certification of court appointed attorney compensation, contested cost bill and attorney fee petitions, among other things.

Motion practice in the Court of Appeals is substantial and has the potential to command substantial court resources and lengthen the time to decision.

IV. Appellate Settlement Conference Program

Established in 1997, this program has been fully funded only in 2001. The program has consistently had a high success rate, mediating settlements in complex and otherwise difficult cases, many of which would have resulted in a signed opinion. If fully funded, this program could resolve many cases and thereby reduce overall appeal disposition time.

V. Summary

- The court should consider establishing a practice to ensure that cases that have been pending for an unusually long time are promptly decided.
- The court should review its procedure for disposition of motions to focus staff and judicial resources appropriately.
- The court should work with the legislature to realize the potential of the appellate settlement conference program.

Conclusion

The Oregon Rules of Appellate Procedure Committee should undertake a comprehensive review of the appellate rules to determine whether changes should be made to appellate processes that would promote faster submission and decision of cases on appeal.

Both the Supreme Court and Court of Appeals should publish their internal practices.

As a general matter, the courts should receive adequate funding to permit them to perform their work. Funding decisions need to be balanced, so that an increase in resources in one area does not create an inefficient imbalance in another.

In measures affecting appellate court operations and jurisdiction, the legislature should take a comprehensive, systemic approach, realizing that ranking some kinds of cases above others will both expedite the high priority cases but delay all others.

An independent group should review the efficacy of the appellate courts' information technology systems. The Judicial Department should be equipped with current and adaptable technology.

OREGON STATE BAR BOARD OF GOVERNORS' RECOMMENDATIONS

1. The Oregon Rules of Appellate Procedure Committee should undertake a comprehensive review of the procedural rules solely to determine whether any changes to the courts or the appellate processes reasonably would promote faster submission and decision of appellate cases.

2. The Judicial Department must be equipped with current technology and be prepared to adapt quickly as technology changes. Technology could help improve appellate court efficiency, allow electronic case filing, improve case management, facilitate data collection, and assist other agencies (such as law enforcement agencies) that interact frequently with the Judicial Department. A committee consisting primarily of individuals independent of the Information Technology Division and including representatives of the various components of the justice system should undertake a comprehensive review of the Judicial Department's Information Technology Division. Among other things, that review should include an examination of the Division's Legacy system and its capacity to deliver the technology services the courts need.

3. The courts need stable funding to provide adequate staff and resources to help move cases expeditiously through the judicial system and particularly through the appellate process. This requires that the legislature adequately fund appellate prosecution and indigent defense services as part of a systemic approach to the more effective operation of the Judicial Department.

4. At this time, the courts should remain separate, at their present sizes of seven Supreme Court justices and ten Court of Appeals' judges, and based in Salem. Currently, factors such as existing facilities and resources, efficiencies from operational centralization, and limited financial resources constrain or preclude other recommendations.

5. If the legislature considers new direct appeals to the Supreme Court or new expedited appeals to either appellate court, the Judicial Department should advise the legislature of the effects of such measures on the appellate courts' workload. The Legislature should review existing statutory provisions to decide whether to continue existing provisions or to add new ones. A specific legislative committee should review those priorities every session.

6. The legislature should appoint a task force to study issues relating to review of ballot titles and to formulate alternatives, including whether to shift more of the work to senior judges. The task force report should be made to the Interim Judiciary Committee.

7. The Oregon State Bar should request that the Oregon Law Commission consider conducting a study concerning direct review of tax cases to the Court of Appeals, with discretionary review in the Supreme Court.

8. The Oregon State Bar should request that the Joint Interim Judiciary Committee consider convening a workgroup to perform a comprehensive review and to make recommendations concerning appellate procedures, jurisdiction, and funding in death penalty cases.

9. The Supreme Court should consider instituting a preliminary screening process for petitions for review to identify those that require the preparation of an extensive petition memorandum and those that the court can decide without a written memorandum.

10. The appellate courts should continue to restrict in a reasonable manner the number of extensions of time granted to parties to file briefs.

11. Both courts should continue to permit oral argument with existing time limitations to permit the courts and the parties to sharpen the focus on the issues a case presents. The Supreme Court should consider scheduling oral argument more frequently than at present so as to reduce the period from when a case is at issue to when the Court takes it under advisement. The court generally should consider refusing to grant requests to set over oral argument absent extraordinary cause shown and, then, only once. The court should not permit matters filed after the merits briefs have been filed to affect the oral argument date. The Court of Appeals should be cautious in scheduling oral argument less frequently than at present.

12. Regarding the time from argument to decision, the appellate courts should consider imposing upon themselves a 90-day deadline from argument to the circulation of an initial discussion draft opinion. The courts should implement an enhanced tickler system to advise assigned chambers when their cases reach certain benchmarks on review. For cases under advisement for a year, the courts should devote all means necessary to ensure that the cases are decided within the next three months. The courts should dispose of cases in which an even number of justices or judges are participating when it becomes apparent that a majority decision is doubtful.

13. The Court of Appeals should consider ways of devoting more resources to deciding motions and to differentiate motions for handling by judges and staff (for instance, having judges review in the first instance motions for summary affirmance and having staff review in the first instance *pro se* filings.)

14. The court should work with the legislature to fund, enhance and realize the potential of the Appellate Settlement Conference Program.

15. The Oregon State Bar should appoint a group to study the types of cases subject to *de novo* review to determine what standard of review would be appropriate.

16. Both courts should update and republish general statements of internal practices describing the courts' operations and procedures for deciding cases.

17. In three years, the Oregon State Bar should appoint a task force to revisit this report and study ways in which the courts and the bar can increase the effectiveness of the court operations.

APPELLATE PROCESS REVIEW COMMITTEE REPORT and RECOMMENDATIONS CONCERNING THE OREGON APPELLATE COURT SYSTEM

June 2004

A Report to the Executive Committee,
Appellate Law Section of the Oregon State Bar

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I. INTRODUCTION

A. The Committee

The Appellate Process Review Committee was created to review the current operations of the Oregon appellate court system and to report its findings and recommendations to the Executive Committee of the Appellate Practice Section and to the Joint Interim Judiciary Committee.[1] The membership of the Committee of the whole consists of: Edwin A. Harnden, Chair; Thomas W. Brown; Keith M. Garza; Edward J. Harri, Reporter; Mark Johnson; Susan M. Leeson; James Nass; Peter A. Ozanne; William L. Richardson; Robert K. Udziela; and Mary H. Williams.[2] The Committee membership represents a cross-section of Oregon lawyers and includes public and private appellate practitioners, two senior judges (one from each appellate court), and an academic representative. The Committee divided into subcommittees to study particular aspects of appellate court operations: court structure, jurisdiction, time to decision (internal procedures), and political considerations.[3]

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[1] The Appellate Process Review Committee, which was created in April 2003, is comprised of volunteer lawyers and judges. The specific charge was: "The Appellate Process Review Committee is created as a subcommittee of the Executive Committee of the Appellate Practice Section. The Appellate Process Review Committee is charged with the responsibility to review the current appellate court system in Oregon including court structure, jurisdiction, delay, cost and workload and report the Committee's findings and recommendations to the Executive Committee of the Appellate Practice Section by November 1, 2003." Although the Committee has been reporting periodically to the Appellate Practice Section Executive Committee and other Oregon State Bar groups as to the Committee's progress, the breadth and complexity of the undertaking prevented the Committee from meeting the November 1, 2003, target for completing its work.

[2] Keith Garza, the Supreme Court's senior staff attorney, and James Nass, legal counsel to both appellate courts, were active and invaluable participants in the work of the Committee but did not vote on the recommendations of the Committee.

[3] Although there were many issues worthy of study, the Committee's volunteer lawyers and judges had no funding or staff, and thus the Committee limited its endeavors to a focus on Oregon appellate court operations without an extensive comparison of other jurisdictions. Given the Committee's charge and the time and budgetary constraints, the Committee did not deal with issues concerning judicial selection, the judicial election process, or judicial salaries. Those issues did not

The issues surrounding the operation of appellate courts are multifaceted. To understand the valuable role that the judicial branch plays within our constitutional structure, it is necessary to understand the context and fundamental purposes of the operations of the courts. This report consists of the following parts: an Introduction, which discusses generally the purposes, functions and history of appellate courts; a section on Supreme Court operations; a section on Court of Appeals operations; a Summary and Recommendations. The functioning of the courts is a complex matter and changes to one part of the courts' operations affect operations in other parts, often adversely.

B. Purposes and Functions of the Court System

The Oregon Judicial Department is one of the three independent branches of government. The court system reflects society's view that litigants (individuals and organizations) should have an opportunity for an orderly, predictable method by which to resolve disputes according to the rule of law. The trial court system is a form of dispute resolution for civil and criminal cases available when disputants cannot resolve their disagreements through other means. It provides litigants with an opportunity to present their evidence and witnesses in a predictable fashion to a jury of their peers. Trial courts deal with finding facts and with resolving the parties' disputes. They also adjudicate the criminal law. The appellate court system reflects the general view that litigants should have at least one appeal as a matter of right. Appellate courts deal primarily with correcting errors in prior proceedings and with explaining the law.

A court system has a number of advantages over other dispute resolution processes. It provides a viable, sound alternative to violence. It tempers the physical, economic, or political

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appear to affect appellate court "productivity" directly. Other models of appellate court structure did not appear to offer advantages in "efficiency" over the Oregon court structure. However, more study would be appropriate regarding the ratio of appellate filings to state population and court size.

advantages one party may have over another by providing a somewhat level playing field with neutral decision makers. The relative uniformity and predictability of the procedures attempts to ensure that all will receive equal treatment before the law. The law, in turn, provides an objective standard by which to measure or judge human and institutional behavior. The respect the public affords the courts' decisions means that the courts' judgments end the arguments. At the same time, the predictability and stability of the law, rather than ad hoc case-by-case decisions, yield legal precedent to which individuals and institutions can conform their future behavior.

Appellate courts deal with issues of law, the correct and uniform interpretation of the law and its consistent application, the ongoing development of the law through interpretation, and the evolution of the common law. Appellate courts usually review the trial court or administrative record and the parties' arguments and issue written opinions rather than rendering rulings from the bench. The written opinions of the appellate courts are interpretations of law and settle the parties' disputes. They also set precedent that has a binding effect on everyone else in the state. Thus there is a great need to reach the right legal result.

Appellate courts also serve an error-correction function. They review lower court and administrative agency actions, thus mitigating arbitrary decision making and, at the same time, providing support for and validation of trial court and agency decisions.[4] The appellate courts engage in a process of institutional review or self-regulation, so that individual decisions enjoy greater uniformity, predictability, and consideration of the decisions' broader consequences. The appellate courts thus operate within a deliberate decision-making process, which, not unexpectedly, moves at a pace different from trial court decisions. It is not that appellate courts cannot or do not

[4] *See generally* DANIEL J. MEADOR & JORDANA S. BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES (West 1994); PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL (West 1976).

operate efficiently. The process of deliberate decision making that occurs at the appellate level necessarily means that decisions on appeal normally will not occur on the same day as argument.

C. Consultative Decision Making

Appellate judging is an inherently interdependent enterprise.[5] An effective method of reaching the correct legal result at the appellate court level is consultative decision making. This is a process of ordered deliberation that helps to create conditions for principled decisions by allowing for discussion and consideration of all points of view.[6] Consultative decision making is a dynamic process of discussion and dialog among the judges charged with the responsibility of reaching the correct legal result.[7] This approach reflects the conventional wisdom that "two heads are better than one." The process is not unique to appellate court practice. For example, committees study different problems and file reports with recommendations. Juries decide questions of fact. Legislative bodies debate issues and enact laws. Executives have cabinets of advisors.

There is wide-spread acknowledgment that the best practices in significant decision making require the use of the consultative decision-making model to guarantee the best possible results. Consultative decision making provides bright people with the opportunity to share their ideas and thus, more options and solutions are available for consideration. There is better discussion of the problem because of the variety of experiences and points of view of all those charged with making the decision. There also is better consideration of the ramifications and consequences of any

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[5] Honorable Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1646 (2003).

[6] *Hearing Before the Subcommittee on the Judiciary: Hearing on H.R. 1203*, 31 (July 23, 2002) (statement of Honorable Diarmud F. O'Scannlain) (acknowledging role of collegiality in making decisions at the appellate level). *See* Honorable Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1360 (1998).

[7] Edwards, *supra* note 5, at 1645, 1665; Edwards, *supra* note 6, at 1360.

particular solution and the best ideas emerge. There is better agreement on the crafting of language to avoid problems, both foreseeable and unforeseeable.

Diversity in background and experience brings as many points of view to the table as possible. Thus, the results are not pre-ordained. The process fosters the legal objectivity that provides for the mitigation or avoidance of potential political or personal agendas and it is more likely that the court will decide the controversies that come before it solely on their legal merits.[8] The appellate court is accountable for the application of logic and an understanding of core legal principles in a way that encourages honest discussion. Careful internal deliberation, rather than pressure from outside forces, helps to attain the correct legal result, one that can survive critical scrutiny. The deliberation process engenders strong accountability because all judges are accountable for the court's opinion. This in turn provides greater accountability to the public.

Consultative decision making is not a matter of a judge "compromising" his or her views to the prevailing majority. Instead, until the court reaches a final judgment, judges participate as equals in the deliberative process with each judicial voice carrying weight because each judge will hear and respond to different positions. All the judges are engaged in the common enterprise of applying the law to find the right answer.[9] Because each judge and panel is engaged in the over-arching mission to determine where a particular case fits within the law of the jurisdiction, the goal is to find the best answer, not the best partisan answer, to the issues the appeal raises. Judges engage in a process that accepts feedback and promotes more insightful decisions. The process also means that dissents are as effective as possible because dissents often facilitate the clear exposition of the law.

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[8] Edwards, *supra* note 6, at 1645.

[9] *Id.* at 1646.

Judicial deliberations are a process of dialog, persuasion, and revision. The judge's job is not self-expression through the law; rather, it is to decide cases accurately and clearly, in concert with colleagues.[10] A court engaged in consultative decision making becomes greater than the sum of its diverse parts.[11] Attorneys for the parties also play a significant role in this process. They can and should assist the court by providing thoughtful, useful briefs and arguments that will help the appellate courts deal with the issues in a case and make a decision that reaches the correct result under the law.

D. Challenges Facing Appellate Courts

An appellate judge's job is to decide cases accurately and clearly, in concert with colleagues. Because of the distinctive role that appellate courts play, judging issues of law is consultative rather than autonomous, and appellate courts operate in that manner.[12] The increasing volume and complexity of the law across the board has made the task of reaching the right legal result even more challenging and time consuming and has placed an even greater premium upon the time and talents of the judges charged with that responsibility. Hard cases are hard because existing precedents and policies allow for more than one plausible outcome.[13] Appellate courts must answer the direct questions the parties raise and the courts are not in a position to delegate or to evade the difficult task of explaining the law.

The increasing volume and complexity of appeals also threatens the institutional function that appellate courts play in the judicial system. The rising complexity and political significance of

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[10] *Id.* at 1660-61.

[11] *Id.* at 1670.

[12] Honorable Rudolph J. Gerber, *Collegiality on the Court of Appeals*, 32 ARIZ. ATT'Y 19, 23 (Dec. 1995).

[13] *Id.* at 20.

many appellate cases diminishes concepts of judicial independence and orderly deliberation. The rendering of consistent opinions and the development of consistent precedents can become difficult. In addition, the increasing volume and complexity of appellate cases can increase the sense of separation between trial court and administrative law judges who thereby become less connected with the overall litigation process by focusing on more narrowly specialized roles.[14]

Consistent with the principles of due process, appellate justice must continue to protect the deliberative process of full, fair argument and decision through high standards of professionalism (i.e., impartiality, diligence, and honest debate), and a systemic and systematic approach to providing a consistent enunciation of the law. If appellate judges lose the ability to consider cases and litigants individually, one at a time, as fellow human beings, the overall processes of both error correction and legal interpretation suffer. Undue haste makes waste. Thus, the integrity of the appellate process is in fact quite fragile.[15]

At the same time, the court system as an equal branch of government needs independence if it is to discharge its role properly. As Montesquieu said, "[T]here is no liberty, if the judiciary power be not separated from the legislative and the executive."[16] Judicial independence or impartiality is "the principle that judges should be free to use their best judgment to interpret and apply the law without fear of punishment. When truly independent, judges are not influenced by personal interests or relationships, the identity or status of the parties to a case, or external economic

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14 *See generally* CARRINGTON, *supra* note 7.

[15] *See generally id.* at 12.

[16] BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 152 (Thomas Nugent trans. 1900) (1748).

or political pressures. The principle is the core of judicial authority and extends to all functions of the court system that are necessary to the exercise of constitutional judicial powers."[17]

E. History of Oregon's Appellate Courts

The judicial branch is one of three co-equal and independent branches of Oregon government. The judiciary has a long-standing history in Oregon. In 1841, settlers in the Oregon territory selected a "Supreme Judge" with probate powers." In 1843, Oregon's provisional government established a Supreme Court consisting of a Supreme Judge and two Justices of the Peace with both original and appellate jurisdiction. By 1845, Oregon's provisional government modified the Supreme Court to consist of one judge which the House of Representatives elected and who was to exercise, for the most part, appellate jurisdiction only. In 1848, Congress provided for a territorial Supreme Court with a Chief Justice and two Associate Judges. The original Article 7 of the Oregon Constitution created an Oregon Supreme Court of four Justices, who had mixed responsibilities including trial and appellate duties. In 1878, the Oregon Legislature reduced the number of Justices from four to three, and in 1909 it increased the number from three to five. By 1913, the Legislature increased the number of Justices from five to seven, the Court's current size. Amended Article 7 of the current Constitution creates a Supreme Court with seven justices elected to six-year terms with review and appellate functions.

Presently, the Oregon Supreme Court has mandatory jurisdiction over death-penalty cases, certain labor-law injunctions, direct review of Tax Court decisions, bar and judicial discipline cases, certain administrative decisions, re-districting matters and ballot title review. It has discretionary jurisdiction over petitions for review from the Court of Appeals and, after 1981, certified appeals

[17] National Center for State Courts, COURTOPICS (JUDICIAL INDEPENDENCE) (2002).

from that Court. The Supreme Court also retains responsibility for the Oregon judicial system at all levels. The Court carries the ultimate responsibility for explaining and interpreting the State's laws.

The Oregon Court of Appeals deals more essentially with error-correction and narrowing of issues so that the Supreme Court may concentrate on legal interpretation should it grant a petition for review. The Legislature created the Court of Appeals in 1969 with five judges and expanded it to six judges in 1973. In 1977, it obtained its present size of ten judges elected to six-year terms with increased jurisdiction. The ten judges sit in panels of three. The Court of Appeals has a staggering workload. For years, Oregon's intermediate Court has averaged approximately 4,000 filings per year, consistently placing Oregon second or third in the nation for filings per judge and per capita. Consequently, the Court of Appeals writes opinions in relatively few cases and most cases are dismissed or "affirmed without opinion." The Court of Appeals has jurisdiction over all civil, administrative, and criminal appeals with exceptions in which the Supreme Court has direct review or otherwise retains exclusive jurisdiction.

The Oregon appellate court system is similar to other states' and the federal system, reflecting a multi-tiered court structure for division of appellate labor and a separation of powers of government. However, given the different legislative enactments of the fifty states and the federal government and varying court workloads, it is not clear that any other court system is directly analogous to Oregon's, or that any other state or the federal system has a direct analogy to some other state. No single standard for assessing performance can fit all situations. Any standard must account both for quality (as determined by the thoroughness and integrity of the process and the decision) and for volume. Within the context of appellate review, this report next addresses the operations of Oregon's appellate courts and makes recommendations regarding them.

II. ALTERNATIVE APPELLATE COURT STRUCTURES

Given the time and resources available to the Committee, the Committee could not study alternative court systems more exhaustively. Instead, the Committee offers the following observations.

The table at the end of this section summarizes the kinds of appellate court structures operating in the fifty states. As the table illustrates, forty states use the structure of one or more intermediate appellate courts and a supreme court, which also is the federal court structure. Of those states, twenty-four, like Oregon, have a single intermediate appellate court and a supreme court, *i.e.*, a two-tiered appellate court system.

One alternative structure, having an intermediate court in Southern or Eastern Oregon, or both, might respond to the concern of citizens in those parts of the state who may feel that Oregon's single appellate court and single supreme court located in Salem dilutes their legal representation. However, a substantial majority of Oregon's citizens live in Portland and the Willamette Valley, and it does not appear that Southern and Eastern Oregon, alone or combined, generate sufficient numbers of cases to justify a separate appellate court.[18] States that have multiple intermediate courts arranged geographically tend to be more populous states, such as California, Florida, Illinois, New York, Ohio, Pennsylvania, and Washington.

Another possible court structure would be to establish one or more specialized appellate courts such as a court that handles only criminal, post-conviction relief, habeas corpus, and parole review cases, or a court that handles only domestic relations, juvenile, and adoption cases. Over the

[18] About 70% of Oregon's population is located in the Portland-Willamette Valley area. Even assuming that 30% of the Court of Appeals case load comes from areas outside the Portland-Willamette Valley area, 30% of the Court of Appeals case load over the past nine years is about 1220 new cases per year. Although that may be enough cases to support a separate three-judge intermediate appellate court, it remains problematic where such a court would be located to make it even relatively convenient for litigants living in eastern Oregon, Southern Oregon, and those parts of Western Oregon not included in the Portland-Willamette Valley area.

past nine years, the Court of Appeals judges, after submission, have disposed of an average of 2,330 cases per year. On average, each three-judge department of the Court decides approximately 777 cases per year. (*See* the second part of Part IV E, Table 1a). The only category of case generating that kind of case load per year is criminal law. Thus, in Oregon, criminal law is the only category that generates sufficient cases to justify a three-judge court devoted solely to one category of case. Even then, a three-judge criminal court of appeals would appear to be insufficient given that, on average, over the last nine years criminal cases accounted for about 2,000 new filings each year (with the possibility of more if such a court were assigned other cases that technically are civil but involve convicted persons, such as appeals in post-conviction relief cases, parole review cases, and inmate habeas corpus petitions). As Table 1a shows, no other category of case generates enough cases to keep a three-judge intermediate court supplied with a sufficient number of cases.

The other conventional model for state appellate courts is a single appellate court. The challenge that Oregon presents for such a model is the sheer volume of cases filed. As Table 1a demonstrates, combining the case load of the two courts and dividing that number by, for instance, the 17 judges that collectively now make up the Court of Appeals and Supreme Court, results in a filings-per-judge rate of 128 new filings per year per judge. That rate would be the second highest filing rate of any appellate court in the nation, and several times higher than the filing rate of any state court that now has a single appellate court system.

As the statistical information for the Supreme Court reported in Part III shows, the process of seeking review, briefing cases and deciding cases anew in the Supreme Court adds a substantial amount of time to final disposition of those cases for which the Court grants review. That information suggests that returning to a single appellate court might significantly reduce appellate delay and expense. However, parties seek review in substantially fewer than all cases, and the Supreme Court allows review in only about seven percent of the cases in which the parties seek

review. Considering cases arising from review of Court of Appeals cases together with all other kinds of cases and matters the Supreme Court considers, cases from the Court of Appeals become an even smaller percentage of the overall appellate workload. For those cases in which review is never sought or in which review is sought but denied, the Court of Appeals decision is the final appellate decision in the case. Likewise, as to cases exclusively within the Supreme Court's jurisdiction, the Supreme Court's decision is the only decision in the case.

As Part III of this report illustrates, the Supreme Court has a substantial number of responsibilities in addition to deciding cases initially heard and decided in the Court of Appeals, including constitutional and mandatory jurisdiction cases (such as reapportionment review and ballot title review), direct appellate jurisdiction cases (such as death penalty, tax, and lawyer and judge discipline), bar admission cases, and rule-making authority. Eliminating the Court of Appeals would require a single court to handle all of these matters along with all of the cases that the Court of Appeals presently hears.

Handling the case load generated by a single appellate court probably would require a court of at least 16 to 19 judges (assuming that the court would continue to sit in panels of three judges to hear most cases). A court system consisting of ten intermediate court judges and seven supreme court justices seems better able to maintain collegiality and yet to work efficiently in banc. It appears that a single appellate court with sixteen to nineteen, or more, judges would tend to lose both collegiality and efficiency.

Lastly, separating appellate court functions of an intermediate appellate court and a supreme court tends to enhance three distinct appellate functions: sharpening the focus of legal arguments in a case, correcting trial court error, and announcing new law on issues of statewide importance. Collapsing the existing two-tiered appellate court system into one court would tend to compromise those important functions.

Appellate Court Structures of the Fifty States

Appellate Court Structure	Number of Jurisdictions
Type 1 Single appellate court (supreme court)	10
Type 2 Single intermediate appellate court and a supreme court	
a. Appeal of right to intermediate court; supreme court has discretionary review jurisdiction	22
b. Appeal of right to supreme court; supreme court remands select cases to intermediate appellate court for decision	2
TOTAL	24
Type 3 Multiple intermediate courts and a supreme court	
a. Intermediate courts arranged by geographic location	12
b. Intermediate courts arranged by specialty (civil and criminal appellate courts) or by a combination of a criminal appellate court and one or more intermediate appellate court arranged geographically	4
TOTAL	16

III. OREGON SUPREME COURT OPERATIONS

A. INTRODUCTION

1. Preliminary Considerations

This assessment of the Oregon Supreme Court's operations follow the temporal and jurisdictional considerations that affect the Court. There are several caveats. First, the data upon which the analysis is based are rough and likely not accurate in every respect. Nonetheless, the figures appear sufficiently reliable to permit the drawing of at least broad conclusions about the Court's workload and productivity. Second, the core statistics set out below are averages that derive from samples that often are small enough to be affected, at times significantly, by atypical cases.

2. General Jurisdictional Considerations

Respecting jurisdiction, the Oregon Supreme Court has (1) constitutional and statutory original jurisdiction, some of which is mandatory (*e.g.*, reapportionment, ballot title) and some of

which is discretionary (mandamus, habeas corpus, quo warranto); (2) statutory direct appellate jurisdiction (*e.g.*, death penalty, tax, lawyer/judicial discipline); and (3) statutory discretionary review jurisdiction (Court of Appeals' decisions, certified questions, certified appeals). The Court also has regulatory authority over Oregon lawyers, to a large extent, and over Oregon judges, to a lesser extent, and is responsible for appointing pro tempore and senior judges, and members of the Board of Bar Examiners and Disciplinary Board (among others). In addition to its adjudicative and regulatory duties, the Court also has substantial rulemaking responsibilities. Finally, as a public body composed of elected officials, the Court and its judges must devote some time to the matters that pertain to that status (such as responding to inquiries from the public and attending governmental functions). The administrative and governmental elements of the Court's workload fall most heavily on the Chief Justice, who, in addition to managing the Supreme Court, is the administrative head of the Oregon Judicial Department.

The non-adjudicative components of the Court's workload often demand a considerable amount of the Court's attention and should be considered when assessing the Court's productivity. For example, the Oregon State Bar recently proposed replacing generally the Oregon Code of Professional Responsibility with the American Bar Association's Model Rules of Professional Conduct. The Court resources, both judge and staff, required to address that proposal have been substantial, consuming hundreds of hours of the Court's and its personnel's time. The Court also reviews and approves amendments to the Oregon Rules of Appellate Procedure, the Rules for Admission of Attorneys, the Code of Professional Responsibility, the Oregon State Bar Rules of Procedure, the Code of Judicial Conduct, the Mandatory Continuing Legal Education Rules, the coordination of the class action component to the Oregon Rules of Civil Procedure, and certain others as well (*e.g.*, Uniform Trial Court Rule concerning cameras in the courtroom, certain uniform citations). The Legislature mandated almost all of these matters for Supreme Court responsibility.

3. General Timing Considerations

Respecting timing, for certain categories of cases, the constitution or statutes require that the Court decide cases on an expedited basis. In some instances, there exist specific deadlines for issuance of a decision (*e.g.*, reapportionment review, Energy Facility Siting Council review, appeals from interlocutory orders in aggravated murder proceedings). Work on those "fast-track" cases often causes the Court to table consideration of the other cases on its docket. The Court is meagerly staffed, however, with one law clerk per justice and a handful of central court lawyer personnel. The impact of transitions in staff (*e.g.*, the loss of a staff attorney who was replaced, due to budget considerations, with a petitions law clerk; the partial furlough in 2003) and justices (often a position will remain vacant for a period of months) can affect significantly the Court's ability to render its decisions promptly.

The period during which a case is under advisement, *i.e.*, the time between argument and decision, is the period which demonstrates the Court's timeliness. From a definitional standpoint, the concept of prompt adjudication is inexact and can vary depending both on subjective expectations and on the nature of the matter before the Court. An overview of the procedural and administrative considerations under which the Court operates demonstrates what occurs while a case is pending on review in the Supreme Court. Although the times vary depending upon the particular case type, those periods set out below are those for a typical discretionary review from a decision of the Court of Appeals.

a. Court of Appeals Decision to Petition for Review

The 35-day period to file a petition for review may be extended on motion Oregon Rules of Appellate Procedure ("ORAP") (ORAP 9.05(2)) (2004) and also can be affected if one or more of the parties petitions the Court of Appeals to reconsider its decision. ORAP 9.05(3). A party's decision to seek review in the Oregon Supreme Court is not merely a matter of filing a notice

appealing a disappointing Court of Appeals' decision. The party seeking review must provide a concise statement of the legal question or questions on review and a proposed rule of law if appropriate; a concise statement of each reason asserted for reversal or modification of the Court of Appeals, including appropriate authorities; a brief statement of relevant facts; a brief argument related to each reason for review; and a statement of specific reasons why the issues presented have significance beyond the particular case and require decision by the Supreme Court. ORAP 9.05(7).

The Oregon Rules of Appellate Procedure set out specific criteria for granting discretionary review. The reasons include: whether the case presents a significant issue of law (*e.g*. constitutional or statutory interpretation); the constitutionality of a statute or the legality of an important governmental action; jurisdictional issues relating to the court system; questions dealing with trial and appellate court procedure; perceived or actual inconsistencies in lower court interpretations of law; and whether the issue is one of first impression or there are other related issues pending. ORAP 9.07. Thus, 35 days is a short period of time within which parties must make decisions and file petitions with arguments regarding the possible next step in the litigation of disputes.

b. Petition for Review to Response to Petition for Review

A respondent on review has 21 days within which to file a response and may move the Court to extend this period. However, the usual period is *short* and, as this report later discusses, does not delay the process.

c. Response to Petition to Decision on Petition

The Court normally receives approximately 800 petitions for review per year, which result in about 135 memoranda addressing the merits of the petitions per justice annually. Fifty-five days is the average time the Court has taken over the last three and one-half years to reach a decision on a

petition for review. Concerning the Court's evaluation of the petitions for review, following administrative processing by records office staff, petitions for review are assigned randomly to one of six chambers. (The Chief Justice, due to his other responsibilities, is not assigned petitions for review, although he does vote on their disposition.) The assigned chamber is responsible for the preparation of a petition memorandum for each petition for review. The justice's law clerk, a law student extern, or a petitions law clerk who reports to the senior staff attorney usually prepares the petition memorandum for the assigned justice who then makes a recommendation at the Court's conference.

Once a petition memorandum has circulated, the case is placed on the Court's petitions agenda for consideration at conference. (The Court's conferences are discussed further below.) If the Court does not vote to allow the petition, an order issues seven days thereafter. If the Court votes to allow the petition, the case is passed for the petitions law clerk to prepare an "allow" memorandum verifying, to the extent possible at that point, a number of qualifying conditions for Supreme Court review: jurisdiction, preservation of error, and procedural considerations that might affect the appropriateness of Supreme Court review. The "allow" memorandum is due in time for consideration at the next conference, and a final decision issues thereafter.

d. Allowance of Review to Opening Merits Brief

The 28 days to file an opening merits brief almost always is extended by the party seeking review. If the Court allows review, the petitioner's brief on the merits must contain concise statements of the legal question or questions presented on review and the rule of law that the petitioner on review proposes, without being argumentative or repetitious. The brief also must contain relevant procedural and factual history, a summary of argument and a specific request for relief. ORAP 9.17. This process represents a further refinement of the issues. It places upon the petitioner additional responsibilities for presenting an argument that assists the Court in deciding the

case. Only significant or difficult cases reach this level of appellate review, and the brief is due in only 28 days.

e. Opening Merits Brief to Answering Merits Brief

This 28-day period is amenable to extension and often is extended by the parties.

f. Answering Merits Brief to Submission

Once a case is at issue on the briefs, the next step in the process is submission of the case to the Court for decision. This period usually is approximately sixty days.[19] Normally, a case is submitted immediately after argument. Absent a special setting, the Court hears argument in the following months: September, November, January, March, and May. Thus, a case that is at issue early in April may wait only one month for argument and submission. However, a case that is at issue toward the end of April, likely will wait until September for submission. Occasionally, requests to reset oral argument will cause delays beyond the Court's next scheduled sitting. Taken together, the above variables affect when a case is set for argument.

g. Submission to Decision

The time that the Court takes to issue its decision varies considerably from case to case, and this component of the review process is discussed in further detail below. Generally, however, immediately after argument, the justices confer and take a preliminary vote as to how they should decide the case. Then, within a week of that post-argument conference, the Chief Justice assigns the case to a chambers for study and opinion. The Supreme Court writes opinions in nearly all the cases it hears. Once a draft opinion has been prepared, the justices meet at regularly scheduled Tuesday conferences to consider the draft opinion. The Court usually meets three times per month. In August, the Court normally does not schedule regular conferences (although at least one informally scheduled August conference is becoming more common). However, the Court often must respond to emergency matters during that time. Also, the period from mid-December through mid-January

[19] This figure is an estimate not based on empirical data.

often does not have a conference scheduled due to the holidays and the hearing of oral arguments early in the new year.

Once the justices reach an agreement, or one or more of the justices has prepared a concurring or dissenting opinion, the case is voted "down." During the week thereafter, the opinion is finalized and sent to the records office for distribution. The Supreme Court normally releases its decisions on Thursdays. Thus, for a typical case voted "down" on, for example, January 13, the opinion would issue nine days later, on January 22.

h. Decision to Appellate Judgment

Following issuance of the decision, parties have 21 days within which to file petitions for reconsideration, statements of costs and disbursements, and petitions for attorney fees. ORAP 9.25(1), 13.05(1), 13.10(1). If any one of those is filed, issuance of the appellate judgment is suspended until the matter is resolved, and the opposing party has 14 days within which to respond (except for petitions for reconsideration, in which response is by Court invitation). If no such document is filed, the appellate judgment normally issues within three weeks of the expiration of that period. The delay results from the fact that the Supreme Court shares with the Court of Appeals the limited number of records personnel who issue appellate judgments. Thus, for those cases uncomplicated by post-decision filings, the parties can expect an appellate judgment to issue within 42 days from the date of the Court's decision. However, the average time of 72 days is substantially higher than the 42-day target and was computed based upon the criminal and civil cases that the Court decided in 2002, suggesting that post-decision filings occur in most cases. In some instances, moreover, the Court stays issuance of the appellate judgment pending the filing of a petition for writ of certiorari with the United States Supreme Court. ORAP 14.10.

Based on the foregoing procedural and administrative considerations, a case proceeding through the normal process of review – and without any extensions of time to file briefs or responses

– and without any consideration of the time required by the Court to write and issue its opinion, will consume 264 days on review. The reality, however, is that almost every case includes multiple requests for extension of time and a significant period for the Court to prepare and reach consensus (or not) as to the basis for its decision.[20]

4. General Overview

The assessment that follows has been broken down into two general categories. The first category comprises certain original and direct review proceedings, each of which is decided on an expedited basis either because of legislative mandate or internal court policy. Because these matters must be considered ahead of the Court's other cases, it is appropriate to evaluate them separately. The second category consists of discretionary review proceedings that arise on petition from disappointed litigants in the Court of Appeals. Because the Supreme Court as it currently is structured is intended primarily to be a law announcing court with discretionary jurisdiction, this component properly deserves separate consideration. Finally, for each category, efforts have been made to break down the period on review into the time from filing to submission, the time from submission to decision, and the total time under the Court's jurisdiction.

B. EXPEDITED PROCEEDINGS

The Court's mandatory and expedited review caseloads have been increasing over time. Together, they account for between forty and fifty percent of the Court's opinion workload.

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[20] The 264-day figure can be contrasted against the American Bar Association's *Standards Relating to Appellate Courts* (1994), which suggest a reference model for courts of last resort and which set as goals the disposition of 50 % of discretionary and mandatory appeals within 290 days of filing and the disposition of 90 % of such appeals within 365 days of filing. As noted in footnote 29, *infra*, the reference model leaves some question as to which cases should be counted for purposes of the model. For a fuller discussion of the ABA's reference model, *see* Roger A. Hanson, *Time on Appeal* 19-25 (National Center for State Courts 1996). In light of the realities under which the Oregon Supreme Court operates, application of the ABA's guidelines appear unrealistic at this time and, except as noted below, the Committee has not considered them further in preparing this assessment.

1. Original Jurisdiction Cases

a. Ballot Title Review Proceedings

(i) Timing

	2000 Cycle	2002 Cycle	2004 Cycle[21]
Filing to Submission	39 days	51 days	27 days
Submission to Decision	27 days	44 days	29 days
Total	66 days	95 days	56 days

(ii) Number of Filings

2000 Cycle	2002 Cycle	2004 Cycle[22]
92 cases	96 cases	90 cases

Commentary: Numbering between forty and fifty cases per year, ballot title review proceedings consume a considerable amount of the Court's time and resources.[23] Because the Court by statute is required to rule on the sufficiency of the ballot title "expeditiously" (Oregon Revised Statute Section 250.085(7)(2003)), the briefing and reconsideration cycles for these matters are truncated. The Attorney General is permitted five business days to respond to the petition (ORAP 11.30(6)), but that period may be extended and, as the figures above demonstrate, extensions are sought in most cases. Over the last three election cycles (with the 2004 cycle not yet complete when these figures were collected), the time for briefing and submission has averaged between five and six

[21] For proceedings decided through December 2003.

[22] Projection based on filings through December 2003

[23] The Court also has mandatory jurisdiction to review explanatory and fiscal impact statements. The Court normally receives a handful of those cases each election cycle and, although the Court must decide the petitions on a highly accelerated time table, their number are not sufficient to warrant separate statistical consideration.

weeks. It usually takes the Court about one month to decide the matters. Litigants can expect the certification of a challenged ballot title between two and three months from the date the petition is filed.

In an attempt to alleviate the burden on the Court that these cases impose, the Court has participated in legislative efforts to change the ballot title process over the last three legislative sessions. In particular, the Court and others have noted that many of these proceedings involve ballot titles that have been "shopped" (*i.e.*, the title is very similar to other titles for nearly identical proposed measures). Furthermore, many of the ballot titles that the Attorney General has taken the time to prepare and the Court to review never are circulated for signature. Regardless, thus far, none of those legislative efforts has met with any success. However, to avoid the Court having to decide the constitutionality of modifying ballot titles that do not comply substantially with statutory standards (on the theory that to do so would violate separation of powers principles), the Legislature amended the ballot title review statutes to permit the Court to refer noncompliant titles to the Attorney General for modification. (ORS 250.085(8) to (10)). The Court has used that alternative since and, although the process avoids a constitutional decision, the legislation has had the effect of lengthening the time to decision for these proceedings by adding a new process that before did not exist.

With the absence of legislative modification, the Court at the end of the 2002 election cycle implemented two internal changes aimed at reducing time on review and the workload generally in ballot title matters. First, the Court eliminated oral argument as a matter of course for ballot title review proceedings, although it has reserved to itself the discretion to request argument. Second, the Court discontinued its past practice of issuing short, *per curiam* opinions certifying compliant ballot titles. Instead, in those instances, the disposition now is by order. Those changes appear to have had at least some salutary effect: the time to submission has been reduced to 27 days on average (from

39 and 51 days for the 2000 and 2002 election cycles, respectively), and the time for decision is down more than two weeks when compared to the 2002 cycle.

The Committee believes that the ballot title review process is working as well as can be expected under the existing statutory framework. Although ideally the Attorney General generally would be required to request extensions of time to file answering memoranda that matter appears to be resource driven. Moreover, it does not appear that delays in the ballot title review process significantly affect the ability of chief petitioners to advance their proposed measures toward the ballot, except when they file the petitions late in the election cycle. Accordingly, the Committee has no recommendations concerning the handling of these matters, but does recommend that the Legislature and those who also are interested in the initiative process continue to work toward reforms that will make the Court's and the Attorney General's substantial efforts in this area as meaningful as possible and, failing that, to provide the Attorney General primarily and the Court secondarily with more resources to handle these time-consuming proceedings.

b. Mandamus Proceedings[24]

(i) Time from 1992 to June 2003 in proceedings in which writ issued

Filing to Alternative Writ	57 days
Alternative Writ to Submission	146 days
Submission to Decision	97 days
Total	300 days

(ii) Number of Filings

[24] Under OR. CONST., art. VII, § 2, the Court also has discretionary original jurisdiction in habeas corpus and quo warranto. The Court receives, on average, approximately two dozen habeas petitions and a handful of quo warranto petitions each year. The Court, however, rarely issues writs on those petitions and, for that reason, no figures have been provided for those case categories.

1999	2000	2001	2002	2003
87	70	101	78	76

Commentary: The number of mandamus petitions filed has not steadily increased over the years. Instead, the number of filings fluctuates over time with no apparent reason for a higher number of filings one year and a lower number the next. Moreover, the Court issues writs in approximately five percent of the cases filed. From an opinion workload perspective, therefore, those cases are not particularly significant. However, the petitions do require substantial staff effort to evaluate and Court time to consider. Also, due to the nature of relief involved, mandamus petitions often are filed under emergency circumstances, which may require the Court to divert its attention from other matters to consider a petition. The handling of mandamus cases is fast-tracked pursuant to internal Court policy.

As far as timing is concerned, mandamus cases normally require seven months from filing to judgment. In those proceedings in which the Court issues an alternative writ of mandamus, the writ normally issues within two months of the filing (which period includes 14 days for the filing of a memorandum in opposition).[25] Briefing following issuance of an alternative writ usually takes five

[25] Approximately 95 % of the time, the Court denies the petition. When petitions are filed, the Records Office randomly assigns the petition to one of the six associate justices' chambers. That chamber then is responsible for preparing a memorandum to the Court analyzing the petition. Normally, the chamber's staff attorney monitors the progress of the petition and prepares the analytical memorandum. Absent unusual circumstances, the staff attorneys complete their work so that the Court can consider the petition at the first regularly scheduled conference after the petition is at issue. In attorney-filed and some pro se cases, petitions are at issue once the memorandum in opposition has been filed or the period within which to do so has expired. In pro se criminal and prisoner cases, because the Appellate Division of the Department of Justice usually does not file a memorandum in opposition, the petition is considered at issue once filed, unless the Court requests a response.

The Court sits in conference on average three times per month (on Tuesdays) and because matters must be placed on the agenda the preceding Thursday for consideration, it can take up to a month or more for the Court initially to consider a petition. Also, once the Court decides the petition, the order does not issue until the following Tuesday. Thus, a substantial amount of the time taken to process these proceedings is consumed waiting for either a response, a conference, or the

months, and the Court's decision after submission another three months on average. In light of the complexity of some of the proceedings, the time for briefing and decision seems well within objective expectations.

For those reasons, the Committee has no specific recommendations in regard to this category of case. However, the Committee is aware that some attorneys have suggested that statutory amendments should be considered that would provide for discretionary, interlocutory appellate review by the Court of Appeals. If such an amendment were enacted, presumably the number of petitions for writs of mandamus (which almost always are from interlocutory trial court orders) would decrease. At the same time, however, the impact of such a change on the workload of the Court of Appeals (and of the trial courts as well) should be considered together with the overall efficiency of adding an exception to the rule of finality that currently applies to almost all appeals.

Also, a substantial percentage of the original jurisdiction petitions filed in the Supreme Court come from pro se litigants. These proceedings require substantial time to consider because of the nature of the presentation. Some courts in other jurisdictions have staff specially devoted to handling such submissions, and allocating such a resource to the Supreme Court would permit the Court to handle the high volume of these filings more efficiently by concentrating expertise in the issues that pro se litigation recurrently presents in one or more staff persons. The overall number of pro se submissions in the Supreme Court (in the form of petitions and motions practice) however, probably does not warrant the addition of an additional, full-time staff person.

2. Direct Review Proceedings

a. Lawyer Discipline Review

(i) <u>Time from April 1993 to April 2003</u>

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order to issue.

Filing to Submission	228 days
Submission to Decision	196 days
Total	424 days

(ii) Number of Matters

	Opinions	Other Matters
2000	11	69
2001	7	75
2002	16	53
2003	11	37

Commentary: Lawyer discipline and admissions review proceedings constitute a significant part of the Court's docket, both respecting opinions written and other matters considered (such as suspensions pending disciplinary proceedings, Form B resignations, and reinstatements). (The Court also decides approximately one judicial disciplinary matter each year.) Review of lawyer discipline proceedings is a time-consuming process, in part because the Court reviews the matters de novo. Legislation enacted in 2003 removes automatic review in those cases in which a sanction in excess of six months' suspension is imposed. Instead, the parties in all instances (whether a public reprimand or disbarment is involved) may petition the Court for review, in which case the Court must review the proceeding. Time will tell whether the legislation will have a significant impact on the Court's lawyer discipline docket.

Briefing in these matters usually is complete within seven or eight months. Decisions take another six months or so on average. The Committee has not studied or recommended any changes to the lawyer discipline process because the Legislature and the Bar both have made substantial changes to the process recently. Evaluation of the affects of these changes is necessary before making recommendations for additional changes.

b. Death Penalty Review Proceedings

(i) From 1983 to Early 2000

Filing to Argument	939 days
Argument to Decision	250 days
Total	1,189 days

(ii) From 2000 Through 2003

Filing to Argument	1,600 days
Argument to Decision	266 days
Total	1,866 days

Commentary: The Court decided six death penalty cases in 2000, three last year, and one each in the two years in between. Although comparatively few in number, these direct and automatic review cases exhaust a disproportionate amount of the Court's resources. They are both complex (usually involving at least two dozen assignments of error per case) and near or at the top of the expedited consideration list. The written opinions that these cases invariably produce are usually among the longest that the Court issues.

The Court usually decides death penalty cases between eight and nine months from argument. In light of the nature of the inquiry and the issues involved, that figure appears to fall within reasonable expectations. The time that it takes to move a case from filing to submission, however, is extremely long. The average over the past few years has been between four and five years to complete the transcripts and briefing. By almost any measure, that length of time is unreasonable. It should not take as long to settle the transcripts as it does to prepare and file a brief. (Perhaps that is a matter that the Court could regulate more aggressively, as the transcriptionists report to the Court.) Nor should it take a period of years for the briefing to be complete. The considerations that underlie that element of the delay in capital sentencing review, however, appear largely resource driven (the Attorney General defends the cases, and almost all capital defendants are represented by appointed counsel). In light of the nature of those delays, the complex nature of the inquiry, the varying interests at stake, and the limits on the Court's ability to control all aspects

of the review effectively by itself, the Committee recommends that a study group or commission, consisting of all interested groups, be convened to address the issues dealing with death penalty cases comprehensively.

c. Tax Court Appeals

The Court issued 21 opinions in direct appeals from the Oregon Tax Court during the four-year period from 2000 to 2003. The time on appeal for those matters is set out below. Because of the small sample size, the figures have been calculated based both on the total cases filed and, in parentheses, by eliminating the highest and lowest numbers from each calculation.

Filing to Argument or Submission	336 days (337)
Argument or Submission to Decision	176 days (141)
Total Time on Appeal	512 days (478)

In these proceedings, the Supreme Court acts in the same capacity as an intermediate appellate court with the docket varying widely and including extremely complex cases, each of which the Court must hear and decide. The cases take, on average, 11 months to submit and five to six months to decide. In total, the appeals normally spend a year and one-half in the Court. When contrasted against the periods for deciding cases in the Court of Appeals as well as the longer periods for deciding discretionary review proceedings, these figures suggest that the Court functions efficiently even when handling its docket over which it does not have complete control. Moreover, the longer periods required both to brief and to decide discretionary review cases suggests that those cases are more complex from the Court's and the litigants' perspectives.

The Committee has no direct recommendations with respect to the manner in which the Court processes direct appeals from the Tax Court. However, the Committee suggests that the Oregon State Bar, together with the persons and groups interested in these cases, consider whether it would be appropriate to align the appeals in Tax Court cases with those from circuit courts, *i.e.*, have

the Court of Appeals decide the initial appeal with a petition for review thereafter. The legal issues that these appeals present generally do not require any particular expertise with tax law (even if they did, the appeals arise with such infrequency that it is difficult to develop and maintain any significant level of expertise) and, if an appeal presents questions of statewide moment, then the Court of Appeals could certify the case to the Supreme Court.

3. Other

Brief mention is warranted of some of the other mandatory review cases that the Court must consider. The Court has mandatory review over the issuance of injunctions in labor disputes (ORS 662.120), prison siting decisions (ORS 421.630), Energy Facility Siting Council rules and site certificates (ORS 469), and Marion County Circuit Court decisions invalidating constitutional initiatives (ORS 250.044). Also, the Legislature at times has directed the Court to decide the constitutionality of specific, significant enactments. Examples include waste disposal siting legislation in 1985, light rail funding in 1995, and last year's reforms to the Public Employees Retirement System. Although the total number of these proceedings, either as individual categories or collectively, is not significant enough to permit meaningful statistical analysis regarding time to decision, these matters have a substantial impact on the Court's ability to decide its other cases. These cases often are extremely complex, exhaustively litigated, of paramount importance to decide, and, it appears, increasing in frequency to the point at least one such matter usually is pending on the Court's docket at any given time.

Concerning grants of original and special jurisdiction, the Committee recommends, consistent with the Committee's more general discussions and ideas about those aspects of the Court's jurisdiction, that caution be exercised when providing the Court with such jurisdiction and that the Legislature consider such matters systematically rather than in isolation. Providing that any

bill that would add to the Supreme Court's jurisdiction be referred to one specific Legislative committee would be one way to promote comprehensive, rather than piecemeal, consideration.

C. DISCRETIONARY REVIEW

As noted, the Supreme Court as presently structured primarily is intended as a law announcing court of last resort with the discretion to decide which cases to hear on review. Although the Court's increasing mandatory review caseload now accounts for more than 40 percent of the cases that the Court decides each year, the Court's discretionary docket remains its intended focus. That continues to be the case notwithstanding that the Court often must move its discretionary cases further down the queue for decision in favor of the Court's expedited mandatory review docket. In examining the time to decision for the Court's discretionary, non-expedited cases, the assessment that follows looks at the petition for review process separately from the process of deciding those cases over which the Court has assumed jurisdiction, both because of the substantial amount of work that the petitions for review docket requires and because a decision to deny review can be as significant as a decision allowing review. Also, the assessment of time on review provides separate breakdowns for civil and criminal cases.

1. Petitions for Review

a. Generally

	2000	2001	2002	2003 (6 mos.)
Filing to Submission	31 days	28 days	25 days	11 days
Submission to Decision	48 days	61 days	57 days	56 days
Total	79 days	89 days	82 days	67 days

Because the Court's decision to deny a petition for review will leave intact the opinion of the Court of Appeals, and because that opinion will bind the Court of Appeals (absent overruling) and the lower Oregon courts, the Court expends a considerable amount of its resources selecting which cases to decide. Estimates place the amount of time that judges and staff spend reviewing,

analyzing, and deciding petitions for review at between 25 to 40 percent of the Court's total work, with staff spending a higher percentage of their time working on petitions than the justices.

Before 2003, petitions for review normally required about a month from the date of filing until the records office assigned a petition to a chambers for the preparation of a petition memorandum. The reason for that administrative holding period was to permit the filing of a response to the petition for review and, in those instances when the petition for review was filed shortly after the Court of Appeals decision, to ensure that no other party to the appeal decided to seek review. In that way, the Court was assured of working on a case that no longer presented a moving target. In 2003, the Court eliminated that practice, in part because responses are infrequent (particularly in criminal and prisoner cases) and also to expedite the process. Now, records staff assigns and forwards the petitions as soon as they have been entered in the case register and all jurisdictional and procedural requirements are satisfied. The results of that change are reflected in the figure computed for the first six months of 2003, which indicates an average reduction of two weeks (from 25 to 11 days) in the time that a petition spends in the records office before being submitted to the Court for study and decision.

On average, it takes approximately two months to prepare a memorandum, consider the petition, and issue a decision. Approximately two weeks of that period is accounted for by the lag time between when a petition is placed on the agenda and considered at conference, and the time after decision before an order issues. Effectively, therefore, the Court completes its work on petitions within six weeks of submission. That timing appears to be reasonable.

Notwithstanding the Court's relatively quick decisions on these matters, the Committee found noteworthy the amount of effort that the process consumes. Records that the Court provided indicate that a large percentage of the total petitions filed in a given year consist of criminal, post-

conviction, habeas corpus appeals.[26] Although the Court accepts on review a significant number of criminal cases each year, it rarely allows review in post-conviction and habeas corpus cases. In light of the fact that there appear to be categories of cases that almost never result in review being allowed, some of which must be brought nonetheless to preserve later claims in federal court, some of the Committee have questioned whether all petitions should receive the same amount of work-up. At the same time, there are concerns about fairness in treating different categories of cases differently. Moreover, for the litigants involved, each case is personally significant.

In an effort to find middle ground, the Committee recommends that the Court consider whether it might benefit from the implementation of a screening system for *all* petitions for review (which would address, at least in large part, any claim of disparate treatment by case category). Under such a system, on assignment to a chambers, either the justice or the justice's law clerk could review the petition quickly to see whether a clear recommendation to deny manifests itself quickly. In those instances, instead of having the clerk or other staff expend the effort of preparing a detailed petition memorandum, the petition simply could be given to the justice to present orally at conference. In that way, the justices would need to review only the petition materials, which they do anyway, and the chambers' resources will be freed up to pursue other work. At conference, if all agree that the Court should deny the petition, an order would issue. However, if any justice questioned that recommended disposition, the petition would be referred for a full work-up.

The benefits of such an approach on time to decision, assuming that it is feasible administratively, would be two-fold. First, with little extra work (the initial quick review), the time to decide all petitions should decrease, because some would be submitted quickly after receipt

[26] There were 258 criminal, 93 habeas corpus, and 128 post-conviction petitions in 2001 (out of 1,014 total petitions filed – both for review and as original jurisdiction matters – or approximately 47 % of the total filed). In 2002, there were 265 criminal, 48 habeas corpus, and 155 post-conviction petitions (or approximately 53 %).

without having to await the preparation of a petition memorandum. Second, the justices – but more particularly the staff who prepare the memoranda – would have more time to work on the other aspects of the Court's business.

b. Termination of Parental Rights Cases

The Oregon appellate courts have imposed on themselves, through the Oregon Rules of Appellate Procedure, deadlines for the expedited consideration of appeals involving the termination of parental rights (TPR). ORAP 10.15. Most of the deadlines in that rule apply to the Court of Appeals. However, subsection (10) provides that "[t]he Supreme Court shall not grant an extension or extensions of time totaling more than 21 days to file a petition for review" in a TPR case. ORAP 10.15(10). When added to the 35-day period already set out by statute and rule to file a petition for review, that yields a total time of 56 days. The Court received 48 such petitions for review in 2001 and 22 in 2002.[27] For petitions that the Court decided between 2001 and August 2003, the average time to file a petition for review in such cases was 44 days; the median time was 35 days. Therefore, it appears that the Court is more than meeting the 56-day deadline that it has set for itself in this area. Moreover, although the Oregon Rules of Appellate Procedure do not provide a set time within which the Court must issue its decision on a petition for review, the Court normally does so within 56 days from submission, or slightly faster than in other cases. (Central court staff provides weekly e-mails to the law clerks highlighting the petitions for review submitted that week that require expedited consideration.)

[27] Review in the Court of Appeals in termination of parental rights appeals is de novo. Moreover, under ORS 19.415(4), the Supreme Court, in its discretion, may hear such cases either anew upon the record or limit the review to questions of law. Due to the nature of the appellate review and the circumstances under which these cases arise, they are intensely fact driven, involve unusually long briefs on average, and often are accompanied by substantial records. Consequently, even though the cases do not often present novel questions of law (usually, they involve the application of settled law to disputed facts), the cases take longer to process.

2. The Time to Decide Discretionary Cases on Review

The calculations below are based on data taken from the opinions that the Court issued from 2000 through 2003. Excluded from the data for civil cases are opinions deciding lawyer and judicial discipline matters, direct Tax Court appeals, ballot title review decisions, Energy Facility Siting Council and other special statutory review decisions, summary decisions (*e.g.*, dismissals as improvidently allowed, cases that are allowed, vacated, and remanded), death penalty cases, mandamus opinions, and decisions on motions or other petitions (*e.g.*, requests for attorney fees). With respect to criminal cases, decisions in post-conviction and habeas corpus, although civil in nature, have been included. In most instances, those cases involve the state or a government official as a party and appointed counsel. Thus, the Committee concluded that those decisions most appropriately belong within the criminal category for purposes of assessing the time for decision.

Also, because of the small sample sizes involved (for example, in 2003, the Court issued ten opinions in criminal cases), the figure in parentheses represents the same calculation but has omitted the single highest and the single lowest entries. Even then, caution against reading too much into the averages is warranted. For example, in a case in which the Court grants a motion to stay issuance of the appellate judgment pending the filing and decision on a petition for writ of certiorari, the effect of such a motion is to extend by a period of months and even a year the time on which the case technically remains on review in the Oregon Supreme Court, even though, for all practical purposes, the Court has concluded its work. Moreover, cases once filed may be abated temporarily pending decision on another, earlier filed case, and, on reactivation, can yield a misleadingly high period of time to bring the review at issue.

On the other hand, in some cases, the parties proceed in the Supreme Court based on the briefing in the Court of Appeals and the materials filed in connection with the petition for review. Those cases skew the data the other way, suggesting that the cases take less time to process than

they normally do. On consideration, the Committee decided against attempting to cull from the data any cases that might be deemed aberrational for some reason or another, as a good number of cases are unusual in some respect. The numbers that follow have been calculated based on all the cases that fit into the particular category (except, of course, for the computation excluding highs and lows), whether litigated and decided very quickly or very slowly.

Finally, the compilations below are reproduced in rudimentary graphic form at the end of this section. See Tables 1, 2, 3.

Civil Cases

	Filing to Argument	Argument to Decision	Total
2000	414 (376)	437 (395)	851 (771)
2001	349 (340)	401 (395)	750 (735)
2002	375 (367)	385 (377)	760 (744)
2003	346 (321)	267 (249)	613 (570)

Criminal Cases

	Filing to Argument	Argument to Decision	Total
2000	340 (340)	640 (553)	980 (894)
2001	369 (361)	329 (323)	698 (684)
2002	468 (468)	438 (427)	906 (895)
2003	426 (400)	149 (132)	575 (532)
Total Civ./Crim. Avgs.	401 days	389 days	790 days

All Cases

	Filing to Argument	Argument to Decision	Total
2000	386 (362)	516 (477)	902 (839)
2001	356 (350)	377 (371)	733 (721)

2002	397 (392)	398 (392)	795 (784)
2003	379 (368)	218 (203)	597 (571)

The commentary that follows will be brief; the numbers, in most respects, speak for themselves.

a. Generally

Over the last four years, on average, it has taken the parties and the Court a little over a year to move their cases from filing to submission, and it has taken the Court about the same amount of time to issue its decisions. A given case can expect to remain on the Court's docket for two and one-quarter years from filing to issuance of the appellate judgment. When one compares that total average figure, 834 days, to the figure noted above for the minimum period on review without factoring extensions and the time to prepare the opinion, 264 days, that means that 570 days (19 months or more than one and one-half years) on average are spent preparing the briefs on extension of time or drafting and considering the opinion. All other things being equal, the briefing, decision, and total time on review periods are longer than advisable.

At the same time, perhaps in partial answer to that criticism and concerning the time that the Court takes to decide cases, the Committee is aware of the premium that the Court has placed on deciding cases, when possible, by unanimous opinion. The Committee also is aware of the Court's success in that regard, normally deciding over 90 percent of its cases without separate opinion. The data with which the Committee has been given to work, however, do not permit an assessment of the impact of that premium on the time to decision. Nor do they permit the Committee to factor what it understands to be the Court's internal policy of refusing to consider first drafts of opinions from justices who have had opinions from other justices under advisement (either to prepare a concurrence or dissent, or simply for further study) for more than 21 days.

Returning to the figures set out above, and respecting trends revealed in the numbers, the period for briefing has remained relatively constant over the last four years. The Court's time to decision, however, decreased sharply in 2003 and, correspondingly, so did the total time on review. The Committee attributes that decrease principally to three factors. First, the Court has been experiencing a decrease in the number of discretionary cases submitted for decision over the last several years. Second, several years ago the Court set as a priority the elimination of its backlog.[28] The product of that effort is reflected to some extent in the comparatively high figures for the disposition of cases between 2000 and 2002, and also in the dramatically lower figures for 2003 (from 516 days in 2000 to 218 days in 2003, a 58-percent decrease in the amount of time to issue a decision). Third, last year the Court began to restrict, to a limited extent, the number of requests for extension of time that it is willing to allow, which helps to bring down both the time for briefing and the total time on review. Ultimately, time and the impact of a host of external and internal considerations will tell whether the Court is able to capitalize on the gains that it has made in controlling its backlog and deciding cases more quickly.

b. Civil Cases

The time for submitting a civil case has decreased, but not dramatically, over the last four years. Last year, on average, it took a little over a year from filing to submission. The Court's time to decision, however, has shown a more marked decrease. Last year, the Court averaged nine months to decide a civil case after argument. That 2003 figure, as well as the other ones for that year, are encouraging.

c. Criminal Cases

[28] At the end of 2001, the Court had 68 cases under advisement. That number decreased to 27 at the end of 2002 and 26 at the end of 2003.

Unlike civil cases, criminal cases now take longer than they did in 2000 to reach argument, which probably is a reflection of mandated budgetary decisions. In 2000, the average time was 340 days, whereas last year it took 426 days, a 20-percent increase. The Court's time to decision in criminal cases last year, however, dropped considerably, from 640 days (one and three-quarter years) in 2000 to 149 days (less than five months) in 2003 – a decrease of over 75 percent. As noted above, however, the sample size for 2003 criminal cases was very small, only ten cases, so the figure may not be an accurate reflection of the gains that the Court has made in deciding criminal cases more quickly.[29]

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[29] The Committee undertook efforts to locate data for other jurisdictions that would permit a comparison of the Oregon Supreme Court's time to decision with the times to decision in other jurisdictions. Such comparisons are difficult to draw, however, because of the structural, jurisdictional, and staffing differences between the various courts of last resort. And, respecting the ABA's reference models, the National Center for State Courts (NCSC) indicated in a recent publication that "there are uncertainties surrounding the scope of cases covered by the ABA guidelines" and that, "[u]nfortunately, there is little data available that measure how close courts come to meeting the ABA timeliness guidelines." Roger A. Hanson, Brian J. Ostrom & Neal B. Kauder, *Timeliness in Five State Supreme Courts*, 8 CASELOAD HIGHLIGHTS (NCSC 2002). Because the Oregon Supreme Court does not track its cases against the benchmarks that the ABA has laid out, the analysis in the NCSC publication does not permit meaningful comparison of Oregon against the five courts that were the subject of the NCSC study.

However NCSC publication, Shauna M. Strickland & Brenda G. Otto, eds., *State Court Caseload Statistics, 2002* (NCSC 2003), permits a rough comparison. Tables 3 and 4 of that publication set out the clearance rate (the number of decisions versus the number of filings) across the 33 states that have both a court of last resort and an intermediate appellate court. "A clearance rate is the number of appeals resolved by a court opinion or a dismissal in a given year divided by the number of filings in the same year. A rate below 100 % indicates that fewer cases are disposed of than are filed per year, possibly contributing to a backlog." Brian J. Ostrom, Neal B. Kauder, & Robert C. LaFountain, eds., *Examining the Work of State Courts, 2002, A National Perspective from the Court Statistics Project* 75 (NCSC 2003). Conversely, a clearance rate above 100 % likely indicates that a court is reducing its pending caseload. The figures in the NCSC tables for Oregon – the data is from 2001 – are incorrect. Revised data indicate that the Oregon Supreme Court has a clearance rate of 109 % for discretionary cases and 104 % for mandatory cases. When compared against the other 33 states similarly situated, Oregon ranked eighth (8th) highest in clearance rates for mandatory cases and fifth (5th) highest for discretionary cases. The 2002 data reveal a clearance rate of 115 % for discretionary cases and 119% for mandatory cases.

Although not dealing with timeliness specifically – and with the same difficulties of accurate

d. Recommendations

The recommendations that follow by category have been broken down further according to the aspect of the review process to which they relate. As a general recommendation, however, the Committee recommends that the Oregon Rules of Appellate Procedure Committee undertake a comprehensive review of the appellate rules that pertain to practice in the Supreme Court to determine whether amendments to those rules can be made that would improve the overall timeliness of submission and decision. For example, the Oregon Rules of Appellate Procedure (ORAP) Committee should consider whether the present process, adopted in 1994, of having separate petitions for review filed apart from seeking reconsideration in the Court of Appeals has produced improvements in the decisional process sufficient to justify the time that that procedure has added to the time on appeal and review. As another example, the ORAP Committee should consider whether any of the timelines or page limits provided in the ORAP should be shortened.

(i) From Filing to Argument

The components of this segment of the review process are (1) the time to decide the petition for review, (2) the time to brief the case, and (3) the time between when the case is at issue and when the argument is held.

Respecting the time to decide petitions for review, as noted, the Committee suggests that the Court consider implementing a screening process for all petitions by which those, that after close consideration do not appear to warrant a written memorandum, would be decided based on an oral presentation by the assigned justice at the Court's regular conference.

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comparison still present – that analysis nevertheless suggests that, comparatively, the Oregon Supreme Court is well ahead of the curve in clearing both the cases that are given to it mandatorily and those that, in its discretion, it undertakes to decide.

Respecting the time to brief the case for the Court's consideration, the Committee recommends that the Court continue its efforts to limit the number of extensions of time for petitions for review, particularly in cases in which three or more extensions are sought and particularly when institutional litigants and appointed counsel are *not* involved. (Unlike private attorneys, the Appellate Division of the Department of Justice has little control over its docket and does not have independent authority to add staff to respond to increases in workload.) Parties and lawyers alike should understand that, when their case is allowed on review, it no longer belongs just to them. Instead, because of the law announcing potential that the Court has seen in the case, the issues raised more so than earlier in the litigation belong as well to all Oregonians who stand to benefit from further clarity in the law of this state.

Respecting the time between briefing and argument, the Committee suggests that the Court take steps to reduce the time from when a case is at issue to when it is argued to the Court. Perhaps the Court could hold oral argument more frequently.[30] The Court also could refuse set- overs absent extraordinary cause shown (having a case heard by Oregon's court of last resort is a significant event and should be treated as such). Finally, the Court should consider refusing to permit matters arising after the filing of the respondent on review's brief on the merits, *e.g.*, a request to file a reply brief, to affect the date on which argument is held. Once argument has

been set, the Court should resolve those matters before the setting no matter how compressed the time frame.[31]

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[30] In its publication, *Appellate Court Delay: Structural Responses to the Problems of Volume and Delay* (John A. Martin et al. 1981), the National Center for State Courts stated that "the single factor most directly affecting time [from perfection of appeal to oral argument] is the presence of artificial limitations on the number of arguments heard per court session." *Id.* at 61. *See also Id*. at 61-66 (discussing impact of oral argument scheduling on appellate delay).

[31] Many such requests come in the form of pro se submissions in cases in which the person already is represented by appointed counsel and that such persons, who normally are confined, have

(ii) From Argument to Decision

This period rests squarely on the Court's shoulders, and the Committee is mindful of the juggling act in which the Court must engage to ensure timely disposition of its discretionary cases as well as completing all the other work over which it has no choice but to accept. Of course, the Court should receive funding that is adequate to permit it to perform its work, not only as a matter of prudence but also in recognition of the Court sitting at the apex of the third branch of the State's government. Other than a general admonition to that effect, however, it is beyond the scope of the Committee's charge to make specific budgetary recommendations and of doubtful effect in any event in light of the State's current fiscal situation.[32]

At the same time, and even though the Court appears to have made significant gains recently toward deciding its discretionary cases more quickly, the Court should consider implementing measures both to protect those gains and to improve upon them. For the most part, due to the confidentiality that attends to the Court's deliberations in individual cases, it is difficult for the

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difficulty meeting short deadlines. And, it appears that the Court is more lenient than most in permitting such individuals to be heard separately from their counsel, which, it would seem, benefits other courts later in the process (including the federal courts) and the justice system generally from having to entertain at least some additional claims.

[32] Several recent publications by the National Center for State Courts help to put the court's level of staffing into some comparative perspective. *See* Roger A. Hanson *et al*. *The Work of the Appellate Court Legal Staff* (NCSC 2000); Brian J. Ostrom, Neal B. Kauder & Robert C. LaFountain, *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* (NCSC 2003). From those, Oregon was the 28th most populous state in 2001, and the Oregon Supreme Court in that year received roughly the 18th highest number of mandatory and discretionary filings for courts of last resort for the 33 states that have intermediate appellate courts. The year before, however, NCSC ranked Oregon as last in the nation for court of last resort lawyer staffing, with 1.36 total lawyer staff per justice. (Those figures, based on 1998 data, are reliable only generally. Moreover, the figure for Oregon did not account for the additional three staff attorneys that the Legislature allotted in 1999. As noted above, one of those positions has been replaced, at least temporarily, with a less expensive petitions law clerk position.) Therefore, it appears to be the case that, when compared to courts of last resort across the nation, Oregon's is quite busy and very leanly staffed. A comparison of case load and judicial salaries nationally demonstrates the financial and staffing economies at which the Oregon appellate courts operate.

Committee to make specific recommendations. However, some ideas that the Court might wish to consider are the following:

- The Court could consider imposing a deadline on an assigned chambers for the circulation of an initial draft opinion of ninety days from the date of submission. Although in some instances, a justice coming fast on that deadline in a complex matter might be required to submit something rougher than the justice otherwise might prefer, indeed even something skeletal, such a protocol might help to ensure that no case remains in a chambers without input from the Court as a whole.
- For draft opinions that a justice has passed for further consideration or the preparation of a separate opinion, the Court could consider a drop-dead deadline, again perhaps of 90 days, within which that justice must produce a change in the initial draft or a final separate opinion. Failing that, the case would be released with the justice being shown simply as concurring or dissenting, without opinion.
- The Court could implement an enhanced tickler system by which assigned chambers would be notified specifically when a case reached particular benchmarks (*e.g.*, three months, six months, and nine months). (It is the Committee's understanding that the Court already regularly tracks the progress of its cases internally.) And, for cases pending for one year after argument, special measures could be triggered – including the potential for adding additional resources to the case or reassigning the matter – to ensure that it is given top priority and, in no event, remains under advisement for more than 15 months.
- Finally, in cases in which it appears early on that the Court is unlikely to be able to issue a majority opinion (usually when there is a six-judge Court, which happens frequently in

light of the recent high turnover on the Court), the Court should be quick to dismiss the review. The hallmark of a review-worthy issue is that it will affect many Oregonians. That usually means that the issue will repeat itself. And, if not of its own momentum, then a signal from the Court that it likely has divided on a particular issue would seem to promote further litigation. The Court then could address the matter later when all the justices are available to participate in its disposition.

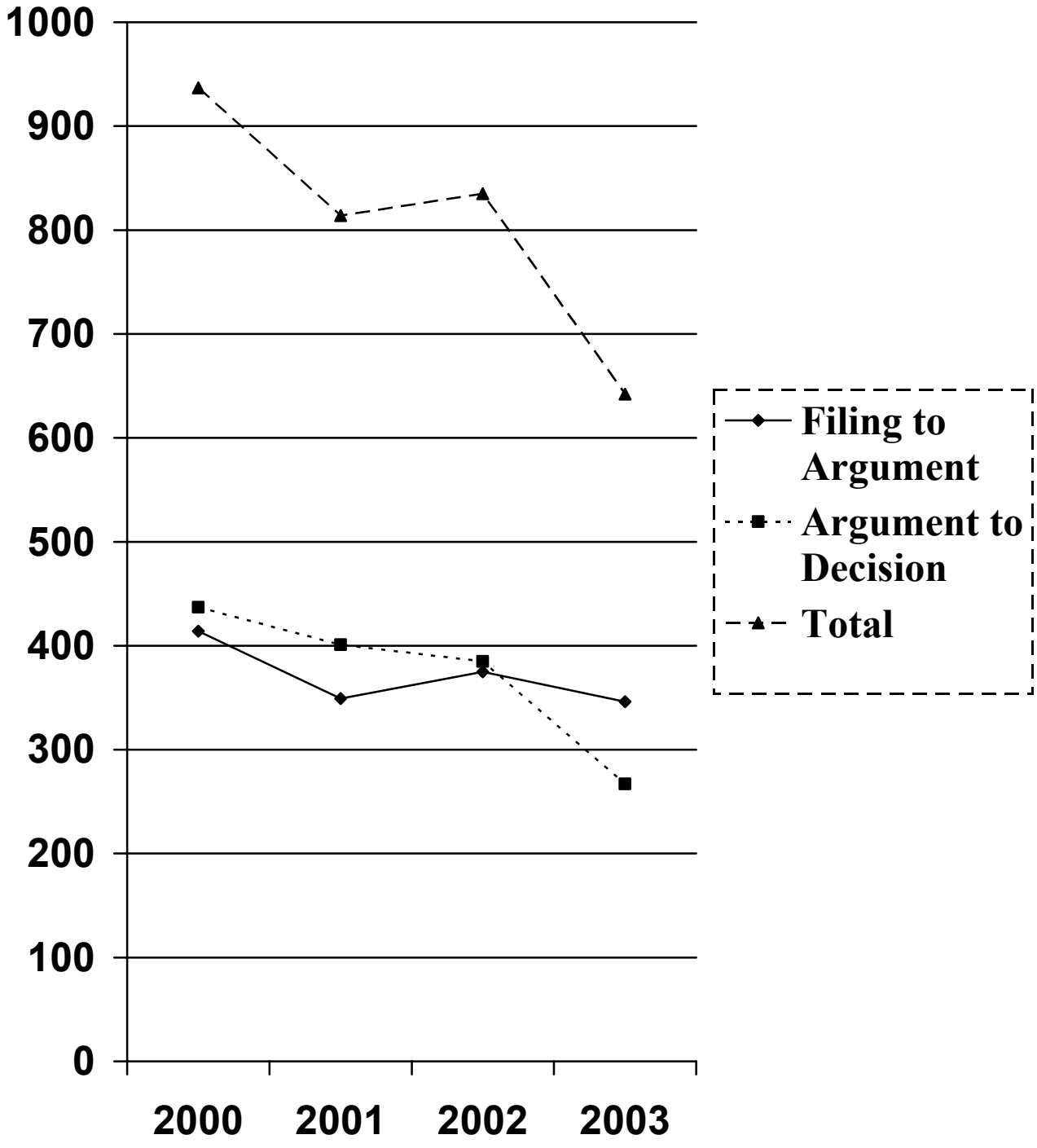
(iii) From Decision to Appellate Judgment

Ideally, the appellate judgment would issue immediately upon the expiration of the period within which to engage in post-decision practice or, if such practice occurs, upon its conclusion. Perhaps additional records staff resources could be devoted to issuing Supreme Court appellate judgments. However, the Committee has no reason to believe that such a shift of resources is feasible. Moreover, even though a two- or three-week gap is not insignificant in light of the time lines that the Court should be striving to meet, that delay is of a different quality from the others discussed above. Unlike the other points in the process, by the time for the appellate judgment to issue, the Court already has performed its primary function to announce the law of the case. Although the parties still may not act in a legal manner upon that pronouncement until the judgment issues, the fact remains that they know what the result will be, that it soon will become effective, and may act accordingly. For that reason, the Committee has no recommendations in this regard.

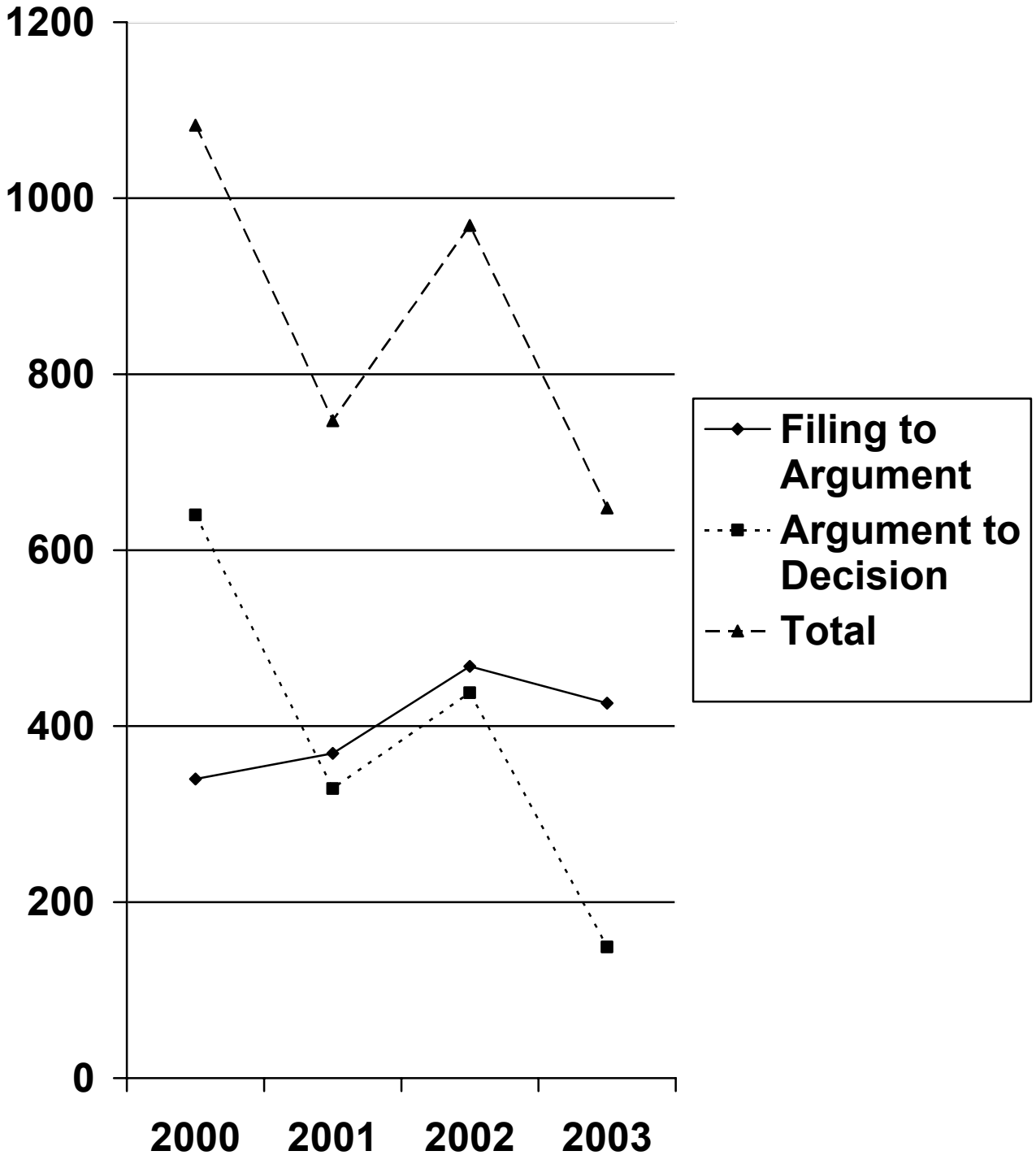
D. SUMMARY

Taking into account the significant volume of work involved and the limited resources that can be brought to bear, both generally and, for the most part specifically, the Oregon Supreme Court and the litigants who appear before it are doing a respectable, if not a better job, of moving the bulk of the cases before the Court toward a reasonably quick resolution. Some aspects of the Court's docket do not proceed as quickly as others, and all could benefit from improvement.

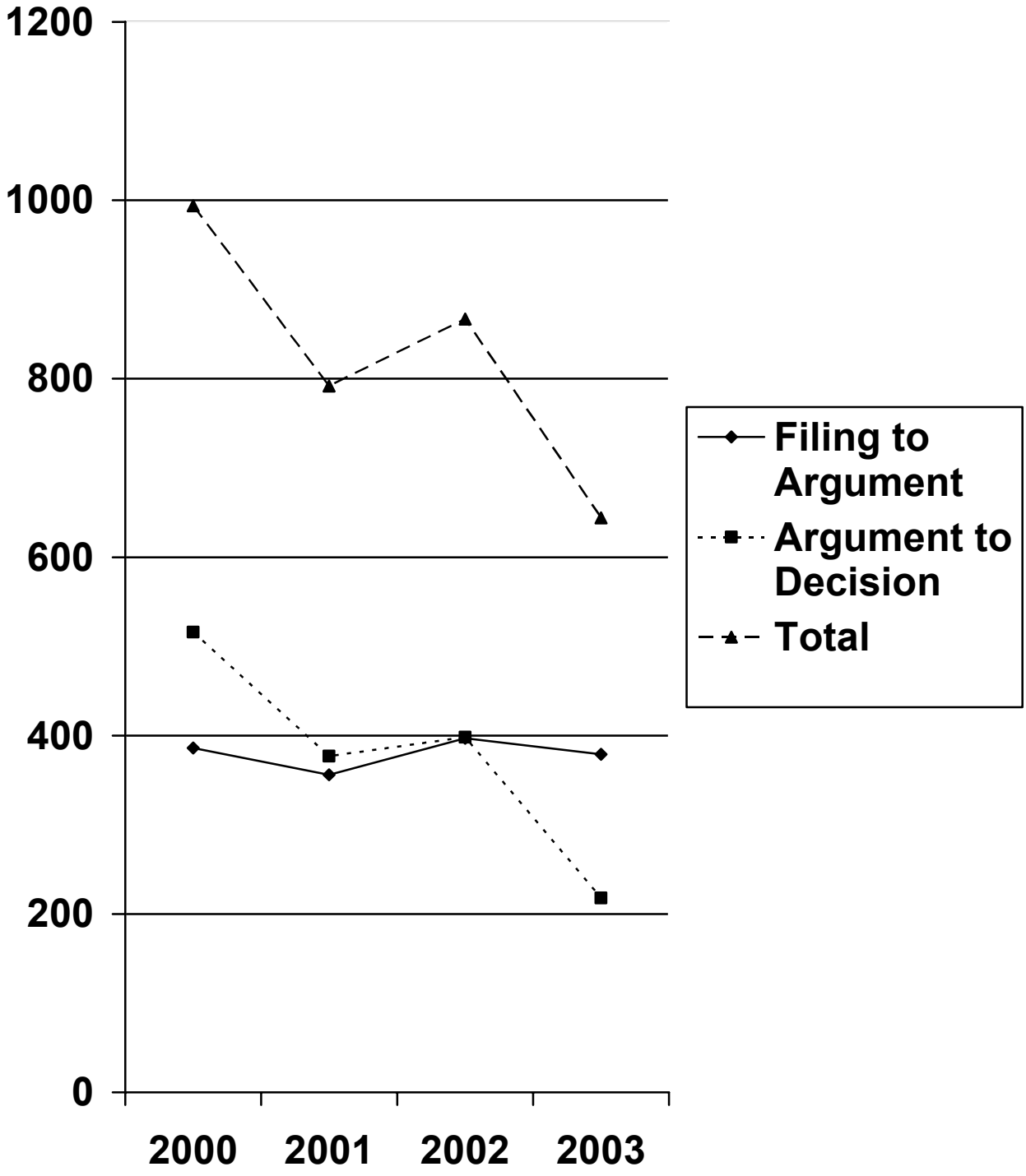
TIME TO DECISION
CIVIL



TIME TO DECISION
CRIMINAL



TIME TO DECISION
TOTAL



IV. OREGON COURT OF APPEALS OPERATIONS

A. INTRODUCTION

1. Preliminary Considerations

The data used in this report may not be totally reliable. The primary reason for that is that all Oregon circuit courts, the Tax Court, the Court of Appeals, and the Supreme Court use the Oregon Judicial Information Network (OJIN) as their computerized case register system. Installed in the mid-1980's, OJIN appears to be a good, maybe even a very good, case register system for trial courts. As a case register system, the OJIN data base contains virtually all the information needed to construct reliable and useful statistical reports. However, OJIN was not engineered with appellate courts in mind, nor was it designed to produce statistical reports of interest to appellate courts. Therefore, it does not perform that task well and the collection and reporting of statistical information more often than not is a far more labor-intensive effort than one would expect in the technology-driven environment of the 21st Century.

The Records Section of the Office of the State Court Administrator collects some data from year to year, such as the number of filings overall and in particular categories of cases and thus changes across time can be tracked. However, some of the key information that the Committee sought for this project, such as the amount of time it takes to move cases from step to step in the appellate process (*see* Table 3b), is not routinely kept and is very labor-intensive to gather. Thus, the information in Table 3b is limited to statistics gathered from a sample of cases closed in 2002.

Over the years, the Judicial Department's Information Technology Division (ITD) has begun a number of efforts to improve the appellate courts' statistical reporting abilities but, until recently, none of those efforts has come to fruition. Recently, the Court of Appeals and ITD have devoted a substantial amount of time to develop a statistical and management reporting system for that Court. That system is scheduled to begin implementation in June 2004; the Chief Judge has reported that a

trial run produced very positive results. ITD is continuing to work with the Supreme Court and with the Records Section to extend the benefits of the new system to those areas.

Circuit courts are far more numerous and deal with many more cases than appellate courts. Historically, the Judicial Department properly has devoted ITD resources to meeting the needs of the circuit courts. It is encouraging that ITD now is devoting resources to developing a useful statistical and management report system for the appellate courts. That effort should be supported and encouraged.

2. General Jurisdictional Considerations

The Court of Appeals has no constitutional jurisdiction, except as to any powers that may be inherent in an Article VII court of law. Rather, its jurisdiction is prescribed by statute. Subject to certain kinds of cases or proceedings identified in the report on Supreme Court operations for which appellate jurisdiction lies in the Supreme Court, the Court of Appeals has jurisdiction of all appeals from circuit court cases and all judicial reviews of administrative agency orders in contested cases.

With respect to actions or other proceedings against a public body, the Legislature has given the Court of Appeals authority summarily to determine which forum, if any, has jurisdiction of the action or proceeding. ORS 14.165. With respect to land use decisions, the Legislature has given the Court of Appeals authority summarily to determine whether authority to decide a land use case lies in a circuit court or with the Land Use Board of Appeals (LUBA). ORS 34.102(5). And, occasionally, the Legislature confers authority to determine specific kinds of disputes, the most recent one being enactment of ORS 421.628(7), relating to selection of arbitrators to resolve disputes over provisions of public services for construction of prison sites.

In terms of case load, these special grants of authority yield at most a handful of cases per year. Thus, unlike the Legislature's special grants of authority to the Supreme Court, cases arising under the Court of Appeals' grants of special authority do not constitute a significant portion of the

Court's work load. Similarly, the variety of cases and other duties of the Supreme Court greatly exceed that of the Court of Appeals. However, what the Court of Appeals lacks in variety of cases and other duties, it makes up for in volume. Between 1995 and 2003, the Court of Appeals received an average of over 4,000 new cases per year, the second highest per capita and per judge filing rates in the United States.

3. General Timing Considerations

The Legislature has imposed specific time limits on the Court of Appeals for deciding judicial reviews of LUBA decisions. By rule of appellate procedure, the Court of Appeals has imposed on itself expedited case processing limits in termination of parental rights (TPR) cases and, to a lesser extent, in dependency and adoption cases generally.

Several years ago, the Chief Judge of the Court of Appeals conferred with the State Public Defender (Public Defender)[33] regarding the amount of time that attorneys with that office handling direct criminal appeals would have to file the opening brief, and established the opening brief filing period at 210 days from the date the record settles. That amount exceeds several times over the amount of time that appellants in other kinds of cases have to file their briefs (49 days from the date the record settles). The extraordinary amount of time allowed to Public Defender attorneys reflects the serious and chronic lack of sufficient staff for the Office of Public Defense Services. For many years before the extended opening brief filing period was negotiated with the Public Defender's office, attorneys in that office filed motions for extensions of time like every one else. That led to the filing of literally hundreds of such motions per year, which required substantial amounts of staff time to file the motions and comparable amounts of staff time for the Records Section of the Court of Appeals and the Chief Judge to rule on the motions. To reduce the workload devoted solely to the

[33] Now titled the Legal Services Division of the Office of Public Defense Services.

task of extending time to file opening briefs of both the Public Defender's office and the Court of Appeals, the Chief Judge negotiated the amount of time Public Defender attorneys have to file opening briefs.

Over the years, the Chief Judge has pressed the Public Defender to reduce generally the amount of time it takes that office to file briefs and, on occasion, has dismissed individual cases when the Public Defender, even with greatly extended time to file the opening brief, has failed to do so. In 2003, the Public Defense Services Commission assumed responsibility for the Public Defender's office. The Commission has been working with the Public Defender, with some success, to reduce the amount of time it takes to file briefs in criminal appeals. However, the task is daunting and fiscal considerations may preclude substantial progress in this area. The Commission recently estimated that, for pending appeals, it would cost approximately $633,978 to enable the Public Defender's staff to meet the 49-day brief filing deadline, and that the Public Defender would need approximately 33% more staff at a biennial cost of $1.7 million to maintain the ability to comply with the 49-day brief filing requirement.[34]

The time limits for deciding LUBA cases, the expedited processing of TPR cases, and the amount of time attorneys in the Public Defender's office have to file the opening brief all might be considered forms of case differentiation.[35] The National Center for State Courts (NCSC)

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[34] Addressing the needs of the Public Defender to enable that office to meet the brief filing deadline would be only part of the battle. Attorneys with the Appellate Division of the Department of Justice also seek extensions of time to file briefs in criminal cases and that office would need a substantial infusion of resources to satisfy the 49-day brief filing deadline if the Public Defender were to be able to eliminate its backlog of pending cases and comply with the 49-day filing requirement on an on-going basis.

[35] Case differentiation methods involve having one or more staff attorneys or judges screen cases after the filing of a docketing statement, the appellant's brief, or both briefs. Based on factors such as case type (*e.g.*, inmate litigation, eviction) or relative complexity of the case (*e.g.*, single issue requiring briefing of ten pages or less), the Court may direct an abbreviated briefing schedule or direct that no oral argument will be held in the case. In exchange, the parties can expect a

recommends that appellate courts consider employing case differentiation methods to resolve cases more expeditiously.[36] However, most courts use expedited case disposition mechanisms to dispose of single-issue or other less difficult cases. By contrast, the two kinds of cases that the Oregon Court of Appeals handles in an expedited manner, LUBA and TPR cases, are among the most difficult the Court encounters. Such cases typically involve voluminous records and multiple assignments of error and, in LUBA cases, often new and difficult issues of law. In TPR cases, because the Court's scope of review is *de novo*, the Court devotes substantial additional time to reviewing the record.

The experience of the Court of Appeals with "fast-track" cases is similar to that of the Supreme Court, which is that consideration of such cases necessarily causes the Court to delay the consideration of other cases, thereby contributing to delay in the resolution of other kinds of cases.

Lastly, the additional time allowed for the opening brief in criminal cases *increases* rather than decreases the amount of time that the case is pending in the Court. Thus, unlike other appellate courts, whose case differentiation mechanisms are designed to reduce overall case disposition times, the case differentiation mechanisms in the Oregon Court of Appeals may have the opposite effect.

B. COURT OF APPEALS CASE PROCESSING EVENTS

1. Establishing the Record on Appeal

a. Appeals From Courts of Law

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decision in a shorter period of time than otherwise might be the case.

[36] John A. Morlin & Elizabeth A. Prescott, *Appellate Court Delay: Structural Responses to the Problems of Volume and Delay* 12-14 (NCSC 1981). *See generally,* Joe S. Cecil and Donna Steinstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeal* (Federal Judicial Center 1987).

Most appellants designate the transcript of oral proceedings in the circuit court as part of the record on appeal. By statute, the transcript is due in civil cases 30 days from the date of filing of the notice of appeal. In criminal cases, when the defendant is indigent and receives a transcript at state expense, the transcript is due 30 days from the date of entry of the court's order authorizing preparation of the transcript at state expense. In civil cases, the court reporter or transcriptionist who will prepare the transcript is entitled to ensure that appropriate financial arrangements have been made for payment of the cost of preparing the transcript and making financial arrangements with the appellant typically requires at least a few days. Likewise, in criminal cases, the process of obtaining trial court authorization to prepare a transcript at state expense consumes at least a few days. Lastly, court reporters and transcriptionists may, and often do, seek extensions of time to prepare and file the transcript. Thus, it is rare that a transcript will be filed within 30 days of the date of the filing of the notice of appeal.

By rule of appellate procedure, in all TPR cases, all adoption cases, and in any dependency case which the Court has directed be expedited, the appellant is required to make arrangement for preparation of the transcript within seven days, any extension of time for filing the transcript is limited to 14 days and, when the Court of Appeals requests that the record be forwarded, the trial court is required to forward the record within 14 days.

b. Judicial Reviews of Administrative Agency Contested Case Orders

By statute, the administrative agency in a judicial review is required to file the record, including the transcript, within 30 days of the date of filing of the petition for judicial review. Administrative agencies occasionally obtain extensions to file the record but, typically, agencies file the record within the 30-day time period.

Pursuant to statute, on judicial review of land use cases LUBA must file the record within seven days after the date of filing of the petition for judicial review.

c. Correcting the Record

By statute and rule, parties to an appeal have the opportunity to seek to correct the record, typically to correct claimed erroneous transcription of oral proceedings. A motion to correct the record is due within 15 days after the filing of the transcript (in an appeal) or the record (in a judicial review). Some time is required for either the trial court or administrative agency to rule on motions to correct the record. Regarding appeals, if the judge grants a motion to correct the record, after the correction is made, the moving party must ensure that the judge also issues an order settling the record. During the time that a motion to correct the transcript or the record is pending, the case is held in abeyance.

d. Total Time to Settle the Record

As can be seen from Table 3b[37] in Subpart E of this section, the average time to complete preparation of the transcript (or the filing of the record in administrative review cases) and otherwise settle the record was 105 days. That amount of time compares unfavorably with the statutory prescribed period of thirty days but, to a large extent, the appellate court is at the mercy of factors beyond its control: in civil cases, parties making financial arrangements with court reporters or the transcript coordinators; in criminal cases, the defendant obtaining an order authorizing preparation of a transcript at state expense; the availability of transcriptionists at the local level; and the extent to which court reporters and transcriptionists seek extensions of time to prepare the transcript.

Table 3b also reflects that, in the kinds of cases in which the Court, by statute or rule, is required to expedite preparation and filing of the transcript and record (LUBA, TPR, adoption, and expedited dependency cases), the time to settlement of the record is commensurately shorter.

2. Briefing

[37] All references to tables in this Part IV are references to tables that appear in Subpart E of this Part.

a. Generally

By rule of appellate procedure, the opening brief is due 49 days after the record settles. See generally, ORAP 5.80. The respondent then has 49 days from the date the opening brief is filed to file an answering brief. *Id.* In most civil cases, the appellant then has 21 days from the date that the answering brief is filed to file a reply brief. *Id.* Many civil cases also involve a cross-appeal, which results in the filing of a cross-reply brief, due 21 days after the filing of the combined reply-cross-answering brief. *Id.*

In most criminal cases, as discussed earlier, an appellant represented by the Public Defender has 210 days to file the opening brief. In criminal cases and in those few kinds of civil cases in which a reply brief is not allowed as a matter of course, the appellant may seek leave of the Court to file a reply brief.

In TPR, adoption, and expedited dependency cases, the opening brief is due 28 days after the record settles, the adverse party's brief is due 28 days after the opening brief is filed, and no reply briefs are allowed. ORAP 10.15(7).

In LUBA cases, the opening brief is due 14 days after the filing of the petition for judicial review, and the failure to file the opening brief within that time will result in dismissal of the judicial review. ORAP 4.66(1). The adverse party has 14 days after the filing of the opening brief to file the answering brief. ORAP 4.66(2). No reply briefs are allowed. ORAP 4.66(3).

b. Extensions of Time

Parties may, and frequently do, seek and obtain extensions of time to file their briefs. The Court strives to act on a motion for extension of time within three working days after the motion is filed. Most motions for extensions of time do not result in the filing of an objection to the motion. When a party does file an objection to a motion for extension of time, the objection may not be filed before the Court has granted the motion. In such a case, the Court's practice is for the Chief Judge

to consider the objection and, if the Chief Judge determines that the objection is well-taken, issue a supplemental ruling either reducing the amount of time allowed, ordering that no further extensions will be allowed, or both.

By rule, in LUBA cases, extensions of time are not permitted. ORAP 4.66(3). In TPR, adoption, and expedited dependency cases, any extension of time for the filing of a brief is limited to 14 days. ORAP 10.15(7)(1).

(i) Criminal Cases and Other Cases Involving Court-Appointed Counsel

As can be computed from the data in Table 1b, from 1995 to 2001, criminal cases constituted about 50 percent of new case filings each year; more recently, that percentage has dropped to about 40 percent of new filings. Nevertheless, that one category of cases comprises a substantial portion of the Court's case load. Most such appeals are defendants' appeals, and most defendants are indigent and are represented by the Public Defender.

In addition to the 210 days the Public Defender is allowed to file the opening brief, that office, with increasing frequency, requests further extensions of time to file the opening brief. The Court of Appeals' current policy is to limit the total amount of time to 350 days. Although certainly not desirable, the Court's practice in allowing that much time is based on the practical consideration that, if the Court dismissed such cases for lack of prosecution, most defendants would seek post-conviction relief alleging ineffective assistance of appellate counsel, which relief likely would be granted, resulting in yet another appeal, another round of extensions of time, and increased work for the judicial system.

In criminal and other kinds of cases in which the client is entitled to court-appointed counsel at state expense (most notably, post-conviction relief and habeas corpus), the client often will file an objection with the Court that counsel has failed to raise meritorious issues on appeal. The Court

expects counsel to exercise professional judgment in determining whether a case raises a meritorious issue and, if so, whether to assert that issue on appeal. The Court has no realistic way, before briefing and without reviewing the entire record, to determine whether and to what extent counsel may have failed, without good cause, to raise a particular issue on appeal. Therefore, when an appellant objects to the issues counsel has raised on appeal, the Court has a practice of giving the appellant leave to file a *pro se* supplemental brief (of not more than five pages) raising other issues as the appellant deems appropriate. The Court's practice is to require such briefs to be filed through counsel so that the briefs at least are prepared in the proper form. However, one effect of that practice is to add some delay in getting such cases at issue on the briefs.

(ii) Civil Cases

Table 3b reveals that, at least in 2002, the average time it took to bring a civil case at issue on the briefs was just under a year. Reply briefs are allowed as a matter of course, therefore, the average time for completion of briefing in civil cases includes 21 days for the filing of a reply brief plus any extensions of time for the filing of the reply brief. Also, if a case presents a cross-appeal or cross-petition for judicial review, as many civil cases do, there would be at least one additional brief filed, with the attendant possibility of extensions of time.

(iii) Total Time for Briefing

In civil cases, assuming that there is only one appellant (or set of appellants) and one respondent (or set of respondents) and that briefs were filed within the number of days allowed by the Oregon Rules of Appellate Procedure, it would take almost four months to get a case at issue on the briefs. ORAP 5.80. In criminal cases, assuming that the Public Defender used its entire allotment of 210 days and that the state used its allotted 49 days, neither party requested extensions of time, appellant's counsel did not request leave to file a reply brief, and the appellant him or

herself was not given leave to file a *pro se* supplemental brief, the minimum briefing time would be 8.6 months.

The average amount of time actually taken in civil cases (excluding specially expedited LUBA and TPR cases) and criminal cases, respectively, is 11.5 months and 14.1 months. (*See* Table 3a.) The actual amount taken to brief cases fully does not compare favorably to the allotted time. However, getting cases at issue on the briefs is one of the phases of the appellate process that is almost totally in the hands of the parties. Although the Court plays a role by granting extensions of time, if parties do not request extensions of time, the Court cannot grant them. Generally, if a party files an objection to a request for an extension, the Court of Appeals allows the request at least in part and the Court's order indicates that it will not allow further extensions.

As Table 3a illustrates, the shorter times allowed for filing briefs and the non-availability or reduced availability of extensions of time in LUBA, TPR, adoption, and expedited dependency cases is reflected in the substantially shorter amount of time it takes to get those cases at issue on the briefs.

3. Oral Argument/Submission

a. Generally

With two exceptions, there is no statute or rule that prescribes how long it should take to schedule oral argument (or to submit a case without oral argument) after a case comes to issue on the briefs. The first exception is TPR, adoption, and expedited dependency cases in which, by rule of appellate procedure, oral argument is scheduled for a date within 56 days after the date of the opening brief. ORAP 10.15(8). The second exception is for LUBA cases, in which, by statute, oral argument must be held within 49 days after LUBA forwards the record to the Court. ORAP 197.85(7)(a). That time limit effectively requires the Court, shortly after the petition for judicial

review is filed, to identify an oral argument date that falls immediately after the scheduled due date of the last brief.

For all other cases, in order for the Court of Appeals' departments effectively to manage their dockets, the Court schedules cases for oral argument about three months ahead. Thus, it would be difficult to reduce the time between cases being at issue on the briefs and the date of oral argument (or submission without oral argument) below three months. The primary way to reduce the amount of time between a case being at issue and the date of submission is to schedule the case for oral argument before the last brief is filed. That is the way LUBA and TPR cases are handled because of the expedited provisions to which those kinds of cases are subject. However, the availability of motions for extensions of time and the frequency with which the parties seek extensions of time and the Court grants them in civil and criminal cases render it impractical to attempt to schedule cases for oral argument until briefing actually is completed.

b. Criminal Cases

Many criminal cases involve one issue or a handful of recurring issues that do not require oral argument. Consequently, one day each month, the Court of Appeals schedules a large number of criminal appeals for oral argument. Thereafter, each party notifies the Court of those cases for which it wishes oral argument. Likewise, if there are particular cases for which the Court wishes to have oral argument, the Court notifies the parties. Oral argument is conducted only in the cases selected by the Court or the parties. In that manner, the Court of Appeals is able to offer the opportunity for oral argument in large numbers of criminal cases and to entertain oral argument for only those cases that warrant it. Thus, the Court of Appeals reduces to a considerable extent delay that otherwise would be inherent in hearing large numbers of criminal appeals.

4. Decision

a. Form of Decision

Cases can be dismissed, either voluntarily, on jurisdictional grounds, or for failure to prosecute at any time before or after submission. However, all but a handful of dismissals take place before oral argument or submission. In the past five years, as compared to the number of new filings in a year, the Court dismissed on average 47 percent of the cases. (See Table 1a.) Of the cases that are decided on their merits after submission, at least in the last two years, about 20 percent are decided by "signed" opinion, 5-6 percent by *per curiam* opinion (generally one page or less), and 74-75 percent are affirmed without opinion (AWOP). (See Table 4.) Of course, the percentage of cases affirmed without opinion varies considerably by case type.

Regardless of the form of decision, all three judges of the department to which a case is submitted would have read the parties' briefs and researched issues before argument, discussed the case in pre-argument conference, participated in oral argument (unless the case was submitted without oral argument), evaluated the case again in post-argument conference, and reviewed as much of the record as is warranted by the issues raised on appeal. A department will affirm without opinion only if all three judges agree that (1) the assignments of error asserted in the parties' brief do not require vacation, reversal, or modification of the decision of the court or administrative tribunal from which the case arose, and (2) a written opinion would not benefit the bench or the bar. Typically, if the Court is going to affirm without opinion, it usually will do so shortly after submission of the cases. However, in some cases, the Court conducts additional review and research before deciding to affirm without a written opinion.

b. Time to Decision

In cases on judicial review from the Land Use Board of Appeals, the Court of Appeals is subject to a decision time limit; otherwise, there is no statute or rule of appellate procedure that

imposes a limit on the amount of time after submission for the Court to decide a case. A significant factor influencing the amount of time a case is pending after submission is the form of decision. As noted above, if the Court is going to affirm without opinion, it generally does so shortly after submission. Given that 74-75 percent of all submitted cases are affirmed without opinion, large numbers of cases are disposed of in a short time. Generally, civil cases are more difficult to resolve than criminal cases and, consequently, there are more criminal cases resolved by the affirmed without opinion form of decision. The more extensive use of affirmed without opinion in criminal cases results in a favorable average of 3.3 months for disposition of criminal cases. The increased degree of difficulty for resolving civil cases is reflected in the longer average decision time in civil cases (5.5 months). (*See* Table 3b.)

Of course, the fact that a large percentage of cases is disposed of by the AWOP form of decision masks to some extent the equally true fact that some cases are pending in the Court of Appeals after oral argument for longer periods than the average. One way the National Center for State Courts measures appellate court productivity and timeliness is to report case dispositions in terms of the percentage of cases that are disposed of within prescribed periods of time. As of January 2003, the Court of Appeals had 31 cases pending for more than six months from submission. That number is unusually high; generally there are about 20 to 25 such cases at any given time. All those cases are likely to result in "signed" opinions (that is, not affirmed without opinion nor decided by *per curiam* opinion). In 2003, the Court decided 344 cases by signed opinion; in 2002, the Court decided 406 cases by signed opinion. Thirty-one cases constitute about eight percent of the cases the Court decides by signed opinion in any given year. Thus, the Court of Appeals is deciding about 92 percent of its submitted cases within six months after the date of submission. Given the sheer volume of appeals filed in Oregon (second highest rate per capita and per judge in the United States, *see* Table 2a), that disposition rate appears to be very favorable.

c. Clearance Rates

One common measure of a court's productivity is the ratio of all pending cases closed to the cases filed in any given year, often referred to as a court's "clearance rate." *See* footnote 29. As Table 5 illustrates, in the past five years, the Court of Appeals has disposed of as few as 94 percent of new filings and as many as 117 percent of new filings. Table 2a shows that the Court's 117 percent clearance rate for 2001 was exceeded by only a handful of other jurisdictions.

5. Petition for Review

By statute, a party seeking Supreme Court review of a Court of Appeals decision has 35 days to file. Parties can and do seek extensions of that 35-day period. As Table 3b shows, the average time to file a petition for review in civil cases is two months; in criminal cases, 2.4 months. Again, although the Supreme Court could exercise more control over whether parties take more than 35 days to file a petition for review by denying motions for extensions of time, parties have more control over the time it takes to file a petition for review, because if parties do not ask for extensions, the Court will not grant them.

6. Issuance of the Appellate Judgment

This category measures the amount of time between the Court of Appeals decision disposing of the appeal (when no petition for review is filed) and issuance of the appellate judgment terminating the appeal, or disposition of Supreme Court review when a party files a petition for review, to issuance of the appellate judgment. Historically, after the Court of Appeals decides the case, five factors have influenced the amount of time before issuance of the appellate judgment terminating the appeal or judicial review:

- Whether a petition for review is filed;
- Whether a petition for reconsideration is filed;

- In a civil case, whether a cost bill or petition for attorney fees is filed and, if so, whether an objection is filed; in cases in which a party is represented by court-appointed counsel, whether a request for certification of court-appointed attorney compensation and expenses is filed;
- Whether a party intends to file a petition for writ of certiorari with the United States Supreme Court and, if so, seeks a stay of issuance of the appellate judgment pending the filing and disposition of the certiorari petition; and
- Staff resources devoted to closing cases.

a. Petitions for Review

Regarding the effect of petitions for review, please see Part III C of this report.

b. Petitions for Reconsideration

Under the Oregon Rules of Appellate Procedure, a party dissatisfied with a Court of Appeals decision has 14 days after the date of the decision to file a petition for reconsideration. Parties can obtain extensions of time to file a petition for reconsideration. ORAP 6.25(2). After a petition for reconsideration is filed, the adverse party has seven days to file a response. ORAP 6.25(4). However, most petitions for reconsideration do not provoke a response and the Court often does not wait for the filing of a response before considering a petition for reconsideration. Most petitions for reconsideration are denied and are disposed of quickly. Neither the opportunity to file a petition for reconsideration nor the time it takes to dispose of such petitions appears to be a significant source of delay.

c. Cost Bills and Attorney Fee Petitions

Under the Oregon Rules of Appellate Procedure, a party wishing to file a statement of costs and disbursements or a petition for attorney fees (or both) has 21 days from the date of the Court of

Appeals decision to do so. ORAP 13.04(5)(a) and 13.10(2). The adverse party has 14 days to file an objection, and the party filing the cost bill and/or petition for attorney fees has 14 days to file a reply. ORAP 13.05(5)(c) and 13.10(6). Parties may obtain extensions of time for any of these filings.

The practice of the Records Section of the State Court Administrator's office is to hold a cost bill or petition for attorney fees until the time for filing an objection expires and, if an objection is filed, until the time for filing a reply expires.

If no objection to a cost bill or petition for attorney fees is filed and if the Court has authority to award the costs, fees or both claimed, then the Records Section staff will incorporate the requested costs, fees, or both into the appellate judgment.

If a prevailing party filed only a cost bill, and the adverse party filed an objection to it, the cost bill and the objection are routed to a staff attorney who reviews the cost bill and the objection and typically makes a recommendation to the Chief Judge for a disposition. The Chief Judge acting alone will dispose of most contested cost bills. If a party objects to a cost bill on the ground that the Court designated the wrong party as the prevailing party on appeal or erred in awarding costs to a party, the cost bill and objections will be referred to the department that decided the case for a ruling.

The Court of Appeals initially established the Motions Department in part to decide significant motions, but also to serve as a leavening influence in deciding attorney fee requests. That is, there was a concern that the three departments might award significantly different amounts of attorney fees in comparable cases. The thought was that the Motions Department would even out attorney fee awards, as well as acquire expertise and "institutional memory" in contested cost bill and attorney fee matters.

However, the experience of the Motions Department has been that the recommended dispositions of attorney fee claims coming from the departments have been relatively uniform and the Motions Department rarely modifies the recommendation of the merits panel. If an objection to a petition for attorney fees is filed, as of January 2004, contested fee petitions for cases decided by a department are routed to the department that decided the case and the department decides the matter. If the merits department decides that a contested attorney fee petition is worthy of a published opinion, the merits department will prepare the opinion. Contested fee petitions for cases dismissed or otherwise disposed of before submission to a merits department are routed to the Motions Department for disposition.[38]

Also, until recently, in cases in which a party was represented by court-appointed counsel other than the Public Defender, the attorney was entitled to submit a request for certification of court-appointed attorney compensation and expenses. Those requests for certification also were routed to the Motions Department, then forwarded to the merits department for a recommended disposition, before a final decision by the Motions Department. By Legislative action, requests for certification of court-appointed attorney compensation and expenses now are decided by the Office of Public Defense Services, and issuance of the appellate judgment will no longer need to be held up for a resolution of court-appointed attorney compensation requests.

Although comparatively rare, a party dissatisfied with the Court of Appeals disposition of a cost bill, petition for attorney fees, or request for certification of court-appointed attorney compensation and expenses may petition the Supreme Court for review of such decisions. A party's

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[38] Before January 2004, the Court of Appeals' practice was to route all contested attorney fee petitions through the Motions Department, with a subsequent referral of fee petitions in cases decided by the merits department to the department that decided the case. In part because the Motions Department meets only once per month, that practice added several weeks to the amount of time to dispose of such fee petitions. The new procedure should reduce by several weeks the amount of time needed to dispose of most contested fee petitions.

filing a petition for review delays issuance of the appellate judgment pending disposition of the petition for review. If the Court allows review, the appellate judgment does not issue until after briefing, argument and decision by the Supreme Court.

d. Petitions for Writs of Certiorari

Rarely, with respect to the final decision on appeal, a party may wish to petition the United States Supreme Court for a writ of certiorari and, if a party elects to do so, it typically will request that the appellate judgment not issue until the petition is filed and the United States Supreme Court disposes of the petition. Although staying issuance of the appellate judgment pending disposition of a petition for certiorari sometimes can be a significant source of delay in individual cases, the cases in which a party seeks certiorari are so few that the need to delay the issuance of the appellate judgment pending a petition for certiorari generally is not a significant source of appellate delay.

e. Staff Resources Devoted to Issuance of Appellate Judgments

Once all matters in an appeal or judicial review are decided, including disposition of any petitions for reconsideration, petitions for review, contested cost bills, contested petitions for attorney fees, and requests for certification of court-appointed attorney compensation and expenses, a case is ripe for issuance of the appellate judgment. Depending on the number of such cases that become ripe for issuance of the appellate judgment and the number of staff available for that task, it typically takes one to three weeks thereafter for the appellate judgment to issue.

f. Total Time Attributable to End of Case Events

Although historically the events that can take place after issuance of the Court of Appeals decision disposing of the case before issuance of the appellate judgment can be a source of some delay, these tasks contribute a little over three months to the overall case disposition time. *See* Table 3b. In part, that likely reflects that relatively few cases involve any of these events or, if the case involves these events, only one or two of them. However, the shift of decision-making from the

Court of Appeals to the Office of Indigent Defense Services for requests for certification of court-appointed attorney compensation and expenses, and the even more recent streamlining of the contested attorney fees petition process in civil cases should further reduce the time elapsing between the Court of Appeals decision and issuance of the appellate judgment.

7. Motions and Own-Motion Matters

The Court of Appeals receives and decides a large number of motions from the parties and on its own motion.

a. Motions for Extensions of Time

The Court of Appeals receives about 1000 motions per month. Each requires a decision. Of that number, approximately 850-900 are motions for extensions of time. The Chief Judge has delegated to senior staff in the Records Section the authority to grant some extensions of time, such as a first request for extension of 28 days or less to file a brief, and an oral request for extension of time of seven days or less for the filing of a brief. Either the Chief Judge or, in the absence of the Chief Judge, the presiding judge of the Motions Department or the designated acting Chief Judge, rules on the remaining motions. Most motions for extensions of time are ruled on within three working days. Thus, although the sheer volume of such motions is burdensome for staff and the Chief Judge, the time to dispose of motions for extensions of time themselves is not a significant source of appellate delay.

b. Substantive Motions

(i) Typical Handling of Substantive Motions

Some routine motions, such as motions for appointment of counsel, for waiver or deferral of a filing fee, and some motions relating to preparation of the record also are handled by administrative staff in the Records Section in conjunction with the Chief Judge. The remaining,

more substantive motions, are handled by the Office of Appellate Legal Counsel and by the Motions Department.

The Office of Appellate Legal Counsel consists of an appellate legal counsel (a full-time position), an assistant appellate legal counsel (a .8 FTE position), a paralegal (a full-time position), and a clerical position (a .5 FTE position). From time to time, that office has the assistance of Plan B and senior judges, externs, or law clerks.

By Court rule, when a motion is filed, the adverse party has 14 days to file a response. ORAP 7.05(3). Although the Court will consider a reply if it is filed before the motion is reviewed, the motion is not held for the filing of a reply. The appeal or judicial review is held in abeyance pending disposition of any motion that must be disposed of before the next event in the appellate process can proceed. ORAP 7.30. Most motions are of that kind, and the effect of the rule is to delay the progress of an appeal until the motion is decided.

If no response is filed to a substantive motion, then the unopposed motion is routed to appellate legal counsel who then reviews the motion and drafts an order. If the motion is sufficiently routine, then the Chief Judge has delegated authority to the appellate legal counsel to issue the order over the Chief Judge's facsimile signature. Otherwise, the Chief Judge reviews disposition of unopposed substantive motions.

Typically, the appellate legal counsel or the assistant appellate legal counsel will review a contested motion and will prepare either a note or memorandum containing appropriate analysis for the motion and a recommended disposition. If staff is relatively confident that the Chief Judge will concur with the recommendation, then a draft order may be prepared consistent with the staff recommendation. Unless a motion is an emergency motion requiring more immediate attention, usually once every one to two weeks, the Chief Judge reviews those motions for which the Court's legal staff has made a recommendation and rules on the motion. Emergency motions are reviewed

by staff and considered by the Chief Judge on an expedited basis. An emergency motion can be ruled on as soon as the same day, typically to preserve the status quo while the adverse party files a response and the Court considers the motion and the response. In any event, if a draft order has been prepared and the Chief Judge concurs with the recommended disposition of a motion and the draft order, the Chief Judge will sign the draft order at that time; otherwise, the motion will be routed to staff to draft an order.

In the foregoing manner, the Chief Judge rules on most substantive motions. However, the Chief Judge has discretion to refer motions to the Motions Department for decision. The Chief Judge may do so, for instance, when a motion raises a novel or recurring issue that may be worthy of a published opinion deciding the matter, or when a collegial decision of judges would be helpful.

(ii) Motions Involving Evaluation of Merits of Appeal/Judicial Review

The Legislature has authorized the Court to dispose of appeals in criminal, post-conviction relief, and habeas corpus cases by motion for summary affirmance if the appeal does not present a substantial question of law. The Chief Judge has authority acting alone to deny such motions or to grant unopposed motions. However, if the staff recommendation or preliminary determination of a judge is that the motion should be granted, then such motions are referred to the Motions Department because, by statute, a contested disposition of a case on its merits requires consideration of the case by three judges and concurrence of at least two of the three judges.

On judicial review of orders of the Board of Parole and Post-Prison Supervision, the Legislature has required the petitioner to demonstrate, after the record is filed and by motion, that the judicial review raises a substantial question of law. Because many of these motions raise issues that relate to the merits of such cases, many of these motions also are considered by the Motions Department.

Together, motions for summary affirmance and motions for leave to proceed in Parole Board cases have substantially increased both the number of motions filed and the difficulty of the Court of Appeals motions practice.

Occasionally, when a significant backlog of pending motions develops, individual judges of the Motions Department will review the motions and rule on them directly or refer them to the Motions Department as appropriate. Recently, the Court of Appeals enlisted the services of a senior appellate judge who was willing to devote some "Plan B" time to deciding backlogged motions.

(iii) Time Devoted to Disposition of Substantive Motions

The Court only recently has begun keeping data regarding the amount of time the Court takes to dispose of substantive motions. The data in Table 6 reflects staff's assessment of the motions practice within the past year: During the summer of 2003, substantially fewer substantive motions were filed and the Court was relatively current in disposition of motions, but the time to dispose of motions increased substantially in the early part of 2004, reflecting what appears to be substantially more, and more difficult, motions being filed. If delay attributable to motions practice is a consistent problem, then the Court of Appeals may need to consider devoting more resources to that task, such as adding another staff attorney or continuing the use of one or more senior judges to reduce a backlog of motions.

(iv) Own-Motion Matters

Among other tasks, the Records Section screens notices of appeal and petitions for judicial review for both jurisdictional and non-jurisdictional defects, and frequently identifies defects of both kinds. Some defects are of such a routine nature that the Records Section staff has the expertise to draft orders for correction. The role of the appellate legal counsel staff in own-motion work is essential, but that role and the substantial volume of own-motion work detracts from the amount of time appellate legal counsel staff have to devote to review of motions filed by parties.

C. APPELLATE SETTLEMENT CONFERENCE PROGRAM

In 1997, the Court of Appeals initiated an appellate settlement conference program. Table 7 reflects information about the program's performance from 2001 to 2003. The year 2001 was the only year in which the program was fully funded, and the number of cases mediated in that year, as compared to subsequent years, reflects the impact on the success of the program of insufficient funding. The program consistently has enjoyed a high success rate, wholly or partially settling 60-69 percent of the cases in which mediation was undertaken. Many of the settlements also resulted in global settlements of cases not yet on appeal. Two factors make the program all the more remarkable: unlike appellate settlement conference programs in other jurisdictions, Oregon's program included custody disputes and cases involving *pro se* litigants, both being kinds of cases that are notoriously more difficult to settle.

In the experience of those who have participated in the program, the program resulted in settlement of many cases that were likely to be among the most difficult to decide on appeal. Thus, the loss of adequate funding for the program has reduced the number of cases resolved while on appeal and commensurately increased case disposition times.

The incremental loss of funding of the program over 2002 and 2003 has revealed the importance of having a minimum number of staff to operate the program (at least a half-time director, a skilled case screener, and a skilled administrative support person), as well as sufficient funds to pay for mediators in those cases in which one or both of the parties are indigent.

For those cases that do not settle, of course, the time expended in mediation contributes to appellate delay. However, under the rule establishing the program, an appeal will be held in abeyance only for 120 days after referral to the program. ORAP 15.05(4). The expectation is that the appeal will be reactivated after 120 days, unless the case has settled sooner or been reactivated if mediation proved unsuccessful. Assuming that a majority of the cases settled likely would have

resulted in disposition by "signed" opinion, it appears that, when fully funded, the appellate settlement conference program can resolve a significant number of pending appellate cases and, to that extent, reduce overall appeal disposition time.

D. EFFECTS OF CASE LOAD

The Oregon Court of Appeals operates under phenomenally high case loads. Table 2a contains data provided for the year 2001 by the National Center for State Courts showing the number of filings for each state per 100,000 population and the number of filings per appellate judge.

For ease of reference, Table 2b extracts the 15 courts with the highest filing rates. That table shows that three states have filing rates that are substantially higher than the next 12 states (Pennsylvania, Oregon and Florida), and that Oregon has the second highest filing rate both per capita and per judge. Comparing Oregon with states of comparable size illustrates Oregon's unusually high number of filings. (*See* Table 2c.)

As Table 1a reveals, except for slight increases in 2001 and again in 2003, the number of cases filed in Oregon has been steadily decreasing since 1997. The rise and fall of Oregon's total case load appears to mirror largely the rise and fall of the criminal appeals. In 2001, the Court experienced an increase of 192 new filings, including an increase of 109 criminal cases and in 2002, the Court experienced a decrease of 904 filings, including a decrease of 722 criminal filings. More likely than not, the increase in filings in 2001 was the fall-out from the passage of Ballot Measure 11, and the decrease in filings in 2002 was the result of legislation adopted in 2001 that required, with respect to cases in which the defendant pleaded guilty or no contest, the defendant to show that the appeal presented colorable claim of error before the appeal could proceed.

The Court of Appeals received 3,314 new filings in 2003. Given Oregon's estimated population as shown in the *Oregon Blue Book*, Oregon's 2003 per capita filing rate dropped to 309

cases per 100,000 population. However, even with the decrease in filings in 2003, the Oregon Court of Appeals received 331 new filings per judge, a rate exceeded by only two other jurisdictions and substantially higher than most other jurisdictions.

Any serious attempt to improve case disposition times in Oregon must include an effort to increase the resources of the Court of Appeals or to decrease the number of new cases filed. Toward the latter end, one recommendation may be for the Oregon Judicial Department to request the National Center for State Courts to undertake a study of, for instance, the five states with the highest filings per capita and the five states with the lowest filings per capita and attempt to discern which factors contribute to or detract from high case filings. Without reliable information about factors that contribute to high case filing rates, efforts to reduce case filings may be counterproductive.

One solution to the problem of volume, of course, would be to add one or more judges, up to a new three-judge department, for the Court of Appeals. While the information is not precisely reliable, using information assembled by the Judicial Department in response to legislation proposed in 2003, it appears that the approximate biennial cost of each Court of Appeals judge position is about $294,000. If a full department of three judges were added, the biennial cost for the judge positions alone would be approximately $880,000. Historically, each judge is assisted by one or two law clerks (at a biennial cost of $122,000 each) and each department would have the assistance of a staff attorney (at a biennial cost of $206,700) and one or two judicial assistants (at a biennial cost of $95,500 each). Thus, a ballpark figure for the biennial personnel costs alone for a full department of the Court of Appeals would be over $1.3 million (assuming the services of only one law clerk per judge and one judicial assistant for all three judges).

In addition to personnel costs, there would be costs for computers, furniture, and the like. Perhaps more importantly, the Court of Appeals currently fully occupies one floor of the Justice Building. Adding any new judge, let alone a new department, would require the Court either to

expand onto another floor of the building or find a new building to house the Court. Expanding onto another floor would disrupt the current ability the Court and its staff to confer with one another just by walking down the hall. Finding another facility to house an expanded Court on the same floor would require the Court to move away from is current location, where currently the Court relies on the Oregon Law Library (for legal research) and the Supreme Court Courtroom (for oral argument), both which are conveniently and efficiently located in the Supreme Court Building across the back parking lot from the Justice Building.

Apart from the expense of meeting an expanded court's logistical needs, many appellate judges believe that ten judges is the maximum number for a truly collegial court to operate effectively and that full court conferences of thirteen judges would be difficult to manage.

The Court of Appeals does not believe that any new judge positions are needed at this time, but, rather, with the addition of two or three staff attorneys, the Court can maintain and improve its productivity. Consideration should be given to adding enough judges to constitute an additional department only if case loads substantially increase over a prolonged period of time.

E. STATISTICAL TABLES

Table 1a . Court of Appeals Comparative Statistics 1995 - 2003

	1995	1996	1997	1998	1999	2000	2001	2002	2003
Adoption	4	1	6	7	7	4	4	4	1
Criminal	2150	2284	2518	2200	2046	1885	1994	1272	1155
Civil	593	618	576	524	497	454	464	503	509
Domestic Relations	185	161	178	177	226	228	224	206	219
Habeas Corpus	70	112	230	179	134	136	144	120	96
Juvenile	100	70	90	99	106	125	90	102	108
Juvenile	50	65	56	77	69	90	101	66	96
Probate	17	8	20	19	12	16	15	25	16
Post Conviction	191	225	211	261	227	236	326	251	261
Traffic	82	117	133	123	123	175	168	96	99
Administrative	233	259	230	253	178	195	221	232	236
Disciplinary Review	211	7	0	0	0	2	0	0	0
LUBA]	40	43	38	46	37	31	36	29	46
Parole Review	141	130	61	59	49	41	62	139	159
Workers'	293	302	228	245	221	247	207	129	224
Mental Commitment	79	52	56	8	86	107	108	87	89
Other	6	5	1	0	11	17	17	16	0

	1995	1996	1997	1998	1999	2000	2001	2002	2003
Total Filings	4445	4459	4632	4277	4029	3989	4181	3277	3314
Total Dismissed	2052	1720	1367	1513	1690	1780	1930	1750	1603
Total Decided	2376	2601	2590	2544	2215	2267	2003	2094	2288
Total Closed	4428	4321	3957	4057	3905	4047	3933	3844	3891
Total Pending	3610	3794	4474	4657	4781	4723	4971	4404	3827

Table 1b. Percent of Cases That Are Criminal Appeals

	1995	1196	1997	1998	1999	2000	2001	2002	2003
Criminal	48%	51%	51%	51%	51%	47%	48%	39%	35%

TABLE 2a: Selected Caseload and Processing Measures for Mandatory Cases in State Appellate Courts, 2001

(Table Reproduced from National Center for State Courts web site)

State/Court name:	Court type	Filed	Disposed	Disposed as a percent of filed	Number of judges	Filed per judge	Filed per 100,000 population
States with one court of last resort and one intermediate appellate court							
ALASKA							
Supreme Court	COLR	294	325	111	5	59	46
Court of Appeals	IAC	272	303	111	3	91	43
State Total		566	628	111	8	71	89
ARIZONA							
Supreme Court	COLR	207	189	91	5	41	4
Court of Appeals	IAC	3,367	3,593	107	22	153	63
State Total		3,574	3,782	106	27	132	67
ARKANSAS							
Supreme Court	COLR	401 C	428 C	107	7	57	15
Court of Appeals	IAC	1,158	1,275	110	12	97	43
State Total		1,559 *	1,703 *	109	19	82	58
CALIFORNIA							
Supreme Court	COLR	31	11	35	7	4	1
Courts of Appeal	IAC	14,728	18,280	124	105	140	43
State Total		14,759	18,291	124	112	132	43
COLORADO							
Supreme Court	COLR	89 A	(B)		7	13	2
Court of Appeals	IAC	2,335	2,414	103	16	146	53
State Total		2,424 *	2,414		23	105	55
CONNECTICUT							
Supreme Court	COLR	63	(B)		8	8	2
Appellate Court	IAC	1,109 B	1,199 B	108	9	123	32
State Total		1,172 *	1,199 *	102	17	69	34
FLORIDA							
Supreme Court	COLR	110	123	112	7	16	1
District Courts of Appeal	IAC	19,183	19,204	100	62	309	117
State Total		19,293	19,327	100	69	280	118
GEORGIA							
Supreme Court	COLR	642	618	96	7	92	8
Court of Appeals	IAC	2,900	2,864	99	12	242	35
State Total		3,542	3,482	98	19	186	42
HAWAII							
Supreme Court	COLR	829	688	83	5	166	68
Court of Appeals	IAC	225	198	88	4	56	18
State Total		1,054	886	84	9	117	86
IDAHO							
Supreme Court	COLR	460 C	461 C	100	5	92	35
Court of Appeals	IAC	561	588	105	3	187	42
State Total		1,021 *	1,049 *	103	8	128	77
ILLINOIS**							
Supreme Court	COLR	820	655	80	7	117	7
Appellate Court	IAC	9,266 B	8,570 B	92	52	178	74
State Total		10,086 *	9,225 *	91	59	171	81
IOWA							
Supreme Court	COLR	1,006 B	203 B	20	8	126	34
Court of Appeals	IAC	1,068	874	82	9	119	37
State Total		2,074 *	1,077 *	52	17	122	71

TABLE 2a: Selected Caseload and Processing Measures for Mandatory Cases in State Appellate Courts, 2001
(continued)

State/Court name:	Court type	Filed	Disposed	Disposed as a percent of filed	Number of judges	Filed per judge	Filed per 100,000 population
KANSAS							
Supreme Court	COLR	154	1,094 B		7	22	6
Court of Appeals	IAC	1,745 B	1,868 B	107	10	175	65
State Total		1,899 *	2,962 *		17	112	70
KENTUCKY							
Supreme Court	COLR	379	405	107	7	54	9
Court of Appeals	IAC	2,690	2,880	107	14	192	66
State Total		3,069	3,285	107	21	146	75
LOUISIANA							
Supreme Court	COLR	288	186	82	7	33	5
Courts of Appeal	IAC	3,733	4,583	123	54	69	84
State Total		3,961	4,769	120	61	65	89
MARYLAND							
Court of Appeals	COLR	255 A	247		7	36	5
Court of Special Appeals	IAC	1,893	1,825		13	146	35
State Total		2,148 *	2,072		20	107	40
MASSACHUSETTS							
Supreme Judicial Court	COLR	264	297	113	7	38	4
Appeals Court	IAC	1,731	1,703	98	22	79	27
State Total		1,995	2,000	100	29	69	31
MICHIGAN							
Supreme Court	COLR	2	(B)		7	0	0
Court of Appeals	IAC	4,074	4,149	102	28	146	41
State Total		4,076			35	116	41
MINNESOTA							
Supreme Court	COLR	113	111	98	7	16	2
Court of Appeals	IAC	2,145	2,145	100	16	134	43
State Total		2,258	2,256	100	23	98	45
MISSISSIPPI							
Supreme Court	COLR	1,189 B	648		9	132	42
Court of Appeals	IAC	36 A	567	1,575	10	4	1
State Total		1,225 *	1,215		19	64	45
MISSOURI							
Supreme Court	COLR	250	254	102	7	36	4
Court of Appeals	IAC	3,611	3,790	105	32	113	64
State Total		3,861	4,044	105	39	99	69
NEBRASKA							
Supreme Court	COLR	77	NA		7	11	4
Court of Appeals	IAC	1,347 B	1,077 B	80	7	192	79
State Total		1,424 *			14	102	83
NEW JERSEY							
Supreme Court	COLR	515	508	99	7	74	6
Appellate Div. of Super. Ct.	IAC	7,182	7,354	102	32	224	85
State Total		7,697	7,862	102	39	197	91
NEW MEXICO***							
Supreme Court	COLR	54	48	89	5	11	3
Court of Appeals	IAC	833	893 B		10	83	46
State Total		887	941 *		15	59	48
NORTH CAROLINA							
Supreme Court	COLR	94	65	69	7	13	1
Court of Appeals	IAC	1,618	1,465	91	12	135	20
State Total		1,712	1,530	89	19	90	21

TABLE 2a: Selected Caseload and Processing Measures for Mandatory Cases in State Appellate Courts, 2001 (continued)

State/Court name:	Court type	Filed	Disposed	Disposed as a percent of filed	Number of judges	Filed per judge	Filed per 100,000 population
OHIO							
Supreme Court	COLR	675	674	100	7	96	6
Courts of Appeals	IAC	10,760	11,150	104	68	158	95
State Total		11,435	11,824	103	75	152	101
OREGON							
Supreme Court	COLR	279	290	104	7	40	8
(Note: The Oregon Supreme Court are revised statistics; incorrect statistics were included in the original NCSC table.)							
Court of Appeals	IAC	4,084	3,840	94	10	408	118
State Total		4,433	3,977	90	17	261	128
PUERTO RICO							
Supreme Court	COLR	104	130	125	7	15	3
Circuit Court of Appeals	IAC	1,382	1,486	108	33	42	37
State Total		1,486	1,616	109	40	37	40
SOUTH CAROLINA							
Supreme Court	COLR	329	422	128	5	66	8
Court of Appeals	IAC	1,413	1,547	109	9	157	35
State Total		1,742	1,969	113	14	124	43
UTAH							
Supreme Court	COLR	530 B	548 B	103	5	106	23
Court of Appeals	IAC	732 B	762 B	104	7	105	32
State Total		1,262 *	1,310 *	104	12	105	56
VIRGINIA							
Supreme Court	COLR	(B)	(B)		7		
Court of Appeals	IAC	733	704	96	11	67	10
State Total					18		
WASHINGTON							
Supreme Court	COLR	73 B	59 B	81	9	8	1
Court of Appeals	IAC	3,756	3,879	103	22	171	63
State Total		3,829 *	3,938 *	103	31	124	64
WISCONSIN							
Supreme Court	COLR	45	45	100	7	6	1
Court of Appeals	IAC	3,421 B	3,519 B	103	16	214	63
State Total		3,466 *	3,564 *	103	23	151	64
States with no intermediate appellate court							
DELAWARE							
Supreme Court	COLR	582	598	103	5	116	73
DISTRICT OF COLUMBIA							
Court of Appeals	COLR	1,604	1,768	110	9	178	281
MAINE							
Supreme Judicial Court	COLR	529 B	469 B	89	7	76	41
MONTANA							
Supreme Court	COLR	562	588	105	7	80	62
NEVADA							
Supreme Court	COLR	1,803	2,001	111	7	258	86
NEW HAMPSHIRE							
Supreme Court	COLR	NJ	NJ		5		
NORTH DAKOTA							
Supreme Court	COLR	285	318	112	5	57	45
RHODE ISLAND							
Supreme Court	COLR	342	396	116	5	68	32

TABLE 2a: Selected Caseload and Processing Measures for Mandatory Cases in State Appellate Courts, 2001 (continued)

State/Court name:	Court type	Filed	Disposed	Disposed as a percent of filed	Number of judges	Filed per judge	Filed per 100,000 population
SOUTH DAKOTA							
Supreme Court	COLR	436 B	480 B	110	5	87	58
VERMONT							
Supreme Court	COLR	592	580	98	5	118	97
WEST VIRGINIA							
Sup.Court of App.	COLR	NJ	NJ		5		
WYOMING							
Supreme Court	COLR	283	271	96	5	57	57
States with multiple appellate courts at any level							
ALABAMA							
Supreme Court	COLR	NA	2,220 B		9		
Court of Civil Appeals	IAC	1,301	1,286	99	5	260	29
Court of Criminal.App.	IAC	2,704	2,688	99	5	541	61
State Total			6,194 *		19		
INDIANA							
Supreme Court	COLR	318	323	102	5	64	5
Court of Appeals	IAC	1,938	2,024	104	15	129	32
Tax Court	IAC	106	300	283	1	106	2
State Total		2,362	2,647	112	21	112	39
NEW YORK							
Court of Appeals	COLR	287	176	61	7	41	2
App.Div. of Sup.Ct.	IAC	10,023 B	17,660 B	176	56	179	53
App.Terms of Sup.Ct.	IAC	1,843 B	2,131 B	116	15	123	10
State Total		12,153 *	19,967 *	164	78	156	64
OKLAHOMA****							
Supreme Court	COLR	1,339	1,625	121	9	149	39
Court of Crim.App.	COLR	1,620	1,604	99	5	324	47
Court of Appeals	IAC	499	737	148	12	42	14
State Total		3,458	3,966	115	26	133	100
PENNSYLVANIA							
Supreme Court	COLR	419	658	157	7	60	3
Superior Court	IAC	7,839	7,944	101	15	523	64
Commonwealth Court	IAC	4,447 A	4,611 A	104	9	494	36
State Total		12,705 *	13,213 *	104	31	410	103
TENNESSEE							
Supreme Court	COLR	200	340	170	5	40	3
Court of Appeals	IAC	1,119	1,187	106	12	93	19
Court of Crim. App.	IAC	1,167	1,218	104	12	97	20
State Total		2,486	2,745	110	29	86	43
TEXAS							
Supreme Court	COLR	11	15	136	9	1	0
Court of Crim.App.	COLR	6,822	6,979	102	9	758	32
Courts of Appeals	IAC	11,700	13,129	112	80	146	55
State Total		18,533	20,123	109	98	189	87

COURT TYPE:
COLR = Court of Last Resort
IAC = Intermediate Appellate Court

NOTES:
NA = Data are unavailable. Blank spaces indicate that a calculation is inappropriate.
NJ = This case type is not handled in this court.
(B) = Mandatory jurisdiction cases cannot be separately identified and are reported with discretionary petitions. (See Table 4.)

QUALIFYING FOOTNOTES:
The absence of a qualifying footnote indicates that data are complete.
* See the qualifying footnote for each court in the state. Each footnote has an effect on the state total.
** Total mandatory cases filed and disposed in the Illinois Supreme Court do not include he miscellaneous record cases
*** Total mandatory cases filed in the New Mexico Supreme Court do not include petitions for extension of time in criminal cases.
**** Oklahoma appellate data were not available for 2001. Data is repeated from 1998.

A: The following courts' data are incomplete:

Colorado—Supreme Court—Total mandatory filed data do not include some reopened cases, some disciplinary matters, and some interlocutory decisions.
Maryland—Court of Appeals—Total mandatory filed data do not include some civil, criminal, and original proceedings.
Mississippi—Court of Appeals—Total mandatory filed data do not include some civil, criminal, original proceedings, and interlocutory decisions.
Pennsylvania—Commonwealth Court—Total mandatory filed and disposed data do not include some administrative agency cases and some original proceedings.

B: The following courts' data are overinclusive:
Alabama—Supreme Court—Total mandatory disposed data include discretionary petitions that were disposed.
Connecticut—Appellate Court—Total mandatory filed and disposed data include all discretionary petitions.
Illinois—Appellate Court—Total mandatory filed and disposed data include all discretionary petitions.
Iowa—Supreme Court—Total mandatory filed and disposed data include some discretionary petitions.
Kansas—Supreme Court—Total mandatory disposed data include discretionary petitions that were disposed.
—Court of Appeals—Total mandatory filed and disposed data include all discretionary petitions.
Maine—Supreme Judicial Court—Total mandatory filed and disposed data include discretionary petitions.
Mississippi—Supreme Court—Total mandatory filed data include all discretionary petitions.
Nebraska—Court of Appeals—Total mandatory filed and disposed data include all discretionary petitions.
New Mexico—Court of Appeals—Total mandatory disposed data include all discretionary petitions.
New York—Appellate Divisions of Supreme Court—Total mandatory filed and disposed data include discretionary petitions.
—Appellate Terms of Supreme Court—Total mandatory filed and disposed data include discretionary petitions.
South Dakota—Supreme Court—Total mandatory filed and disposed data include discretionary advisory opinions. Total mandatory disposed data include all discretionary petitions that were disposed.

Table 2b. Select Appellate Courts
Filings Per Capita and Per Judge (2001)

State	Number of Cases Filed	Cases Filed Per 100,000 Pop.	Number Of Judges	Cases Filed Per Judge
Pennsylvania*	12,286	100	24	512
Oregon	4,084	118	10	408
Alabama*	4,005	90	10	400
Florida	19,183	117	62	309
Nevada	1,803	86	7	258
Georgia	2,900	35	12	242
New Jersey	7,182	85	32	224
Wisconsin	3,421	63	16	214
Texas*	18,522	89	89	208
Nebraska**	1,347	79	7	192
Kentucky	2,690	66	14	192
Idaho	561	42	3	187
Illinois	9,266	74	52	178
D.C.***	1,604	281	9	178
Kansas***	1,745	65	10	175
Washington	3,756	63	22	171

**Statistics reflect combined caseloads of multiple intermediate appellate courts.*
***No intermediate appellate court.*
****Court also has discretionary jurisdiction and the number of cases filed includes discretionary cases.*

Table 2c. Filings Per Capital and Per Judge
Five States With Populations Higher and Lower than Oregon (2001)

State	Number of Cases Filed	Cases Filed Per 100,000 Pop.	Number Of Judges	Cases Filed Per Judge
Alabama*	4,005	90	10	400
Colorado	2,335	53	16	146
Kentucky	2,690	66	14	192
So. Carolina	1,413	35	9	157
Oregon	4,084	118	10	408
Connecticut	1,109	32	9	123
Iowa	1,068	37	9	119
Mississippi	(incomplete date available)			
Kansas**	1,745	65	10	175
Arkansas	1,158	43	12	97

**Combined totals from Court of Civil Appeals and Court of Criminal Appeals.*
***Court also has discretionary jurisdiction and the number of cases filed includes discretionary cases.*

Table 3a. Average Number of Days Case Pending: Filing to Judgment 1998-2003

	1998	1999	2000	2001	2002	2003
Number of Days	420	449	477	517	532	586

Table 3b. Average Number of Days Case Pending: Cases Closed in 2002, By Event

Event	Civil	LUBA	TPR	Criminal	All Cases*
Notice of Appeal to Transcript Prep.	3.6 mo.	n/a	1.9 mo.	3.1 mo.	3.2 mo.
Transcript Prep. to Briefing Complete	11.5 mo.	1.2 mo.	3.1 mo.	14.1 mo.	10.8 mo.
Briefing Complete to Submission	3.7 mo.	.6 mo.	.7 mo.	3.0 mo.	2.8 mo.
Submission to Decision 5.5 mo.	2.0 mo.	1.5 mo.	3.3 mo.	4.4 mo.	
Decision to Petition for Review (PTRV)	2.0 mo.	1.9 mo.	1.5 mo.	2.4 mo.	2.1 mo.
Decision or Disp. of of PTRV to Judgment	3.1 mo.	3.0 mo.	2.3 mo.	3.5 mo.	3.2 mo.
TOTAL (in years)**					
All Cases	1.5 yrs.	.6 yr.	.8 yr.	1.8 yrs.	1.5 yrs.
Decided after submission					1.9 yrs.

"Civil" cases included contract, tort, property, domestic relations, juvenile, probate, mental commitment, traffic, habeas corpus, post-conviction relief, and agency review (including workers' compensation and Parole Board cases).

"Civil" and "Criminal" case statistics are taken from a random sample of 10% of the cases in those categories closed during 2002. The "Criminal" cases exclude approximately 200 "prostitution-free and drug-free zone" cases out of Multnomah County, all of which were filed between 1994 and 1997, all which were held pending disposition of three lead cases, and all of which were closed in 2002 following a Supreme Court decision in the lead cases without preparation of transcripts, briefing, or oral argument, or new decision by either the Court of Appeals or Supreme Court.

LUBA (Land Use Board of Appeals) and TPR (Termination of Parental Rights) are separated out, because, either by statute or pursuant to Oregon Rule of Appellate Procedure, LUBA and TPR cases are subject to expedited disposition provisions. Because such cases are relatively few in number, the statistics are based on a 50% sample of all LUBA and TPR cases closed in 2002.

**These numbers likely are slightly lower than they should be, because the LUBA and TPR cases are overrepresented in the sample.*

***About 45% of cases of the cases closed in any given year are dismissed at some point before full briefing and decision on the merits by the court. The first "Total" category reflects all cases, including those that were dismissed before submission. The second "Total" category reflects just those cases decided after all submission.*

Table 4. Form of Court of Appeals Decisions on the Merits

Form of Decision	2002	%	2003	%
"Signed" Opinions	406	20%	344	20%
Per Curiam	122	6%	92	5%
Affirmed Without Opin.	1487	74%	1329	75%
TOTAL	2015	100%	1765	100%

Table 5. Ratio of Case Filed to Cases Pending and Terminated
1998-2003

	1998	1999	2000	2001	2002	2003
Appeals Filed	4277	4029	3889	4181	3277	3314
Appeals Pending	4657	4781	4723	4971	4404	3827
Ratio	1.09	1.19	1.18	1.19	1.34	1.15
Appeals Terminated	4057	3905	4047	3933	3844	3891
Ratio	0.95	0.97	1.01	0.94	1.17	1.17

Table 6. Average Disposition Times for Substantive Motions v
in Court of Appeals

Month	Number/ of Motions	Filing to Staff Recom.*	Staff Recom. to Decision**	Decision to Order***	TOTAL
07/2003	36	19 days	3 days	5 days	.9 month
08/2003	33	28 days	4 days	10 days	1.4 months
09/2003	51	40 days	10 days	7 days	1.9 months
10/2003	79	45 days	24 days	7 days	2.5 months
11/2003	47	49 days	10 days	9 days	2.3 months
12/2003	47	51 days	16 days	8 days	2.5 months
01/2004	48	73 days	16 days	23 days	3.7 months

**Time elapsing between the filing of a motion and when the motion is ready for review by the Chief Judge or the Motions Department, or, if the motion is one of those reviewed directly by a member of the Motions Department, when the motion is assigned to a judge (includes adverse party's 14-day answering period).*

***Time elapsing between decision by the Chief Judge, Motions Department, or Motions Department judge and preparation of an order ready for signature.*

** * *Time elapsing between signature date and date of issuance of an order.*

Table 7. Appellate Settlement Conference Program: Case Settled

Year	Total Mediated*	Appeals Fully Settled	Percent	Appeals Partially Settled	Percent	Total Partially or Wholly Settled	Other Cases Settled**
2001	335	195	58%	5	1.5%	60%	35
2002	220	146	66%	6	3 %	69%	32
2003	98	60	61%	5	5 %	66%	20

**2001 was the only year that the program was fully funded and staffed. Budget reductions in 2002 and 2003 resulted in the loss of a person to screen appeals for referral to the program, the loss of money to pay for mediators when one or both parties were indigent, and, eventually, the loss of money to pay for mileage for mediators to attend mediations in more remote parts of the state.*

***This refers to settlement of cases not yet on appeal arising from global settlement agreements.*

V. SUMMARY

The number of cases heard by the Oregon appellate courts remains extraordinarily high per capita and relatively constant, with some variation from year to year. Both Courts try to balance the need to process cases as expeditiously as possible against the need to give appropriate attention to the cases brought before them. The Courts are quite aware that the parties have spent considerable time and money getting their case before the appellate courts and that a decision in any case may have serious personal, economic, and professional consequences. The Courts strive to give each case the attention that it deserves while recognizing the importance of a timely decision.

The Courts are conscious of the need to move cases. For example, about one year ago, the Court of Appeals was as current as it has ever been during the 18-year tenure of the current Chief Judge. Unfortunately, however, due to the cutbacks in court staff that occurred during the previous year, including necessary reductions in the settlement program, some slippage has occurred in the timeliness of decisions. The Courts remain very committed to making sure that the cases move through the appellate system as quickly as possible. At the same time, the Courts and the public need to view the various issues of appellate court operation in a larger context, rather than in isolation. Changes to one part of the operation affect other parts, often with unintended and adverse consequences.

Much of the time expended in the handling of appellate cases occurs before the case is submitted by brief or argument. The Court of Appeals has attempted to examine the reasons for this timing and is working to shorten the time that it takes for a case to be submitted to the Court for a decision. Both Courts now closely review requests for extensions of time for the filing of transcripts and briefs. If a party objects to an extension of time, unless there are unusual circumstances that justify the extension, the Courts inform the party requesting the additional time that there will be no

further extensions. In expedited cases, such as termination of parental rights cases or land use cases, no extensions of time are allowed absent extraordinary circumstances.

The Supreme Court now devotes approximately half its time to discretionary review cases and half its time to direct review, reflecting a substantial increase in direct review matters. The Court's docket is relatively current. The Supreme Court has implemented internal mechanisms to decrease the time from the notice of appeal or petition for review to decision. Some of these mechanisms include better tracking of cases in the system, a tighter policy regarding extensions of time within which to file a brief, and prompt scheduling of oral arguments. The Court continues to work to reduce the time from argument to decision.

The Court of Appeals docket likewise is relatively current, despite a crushing workload. The average time cases remain under advisement is shorter than in the past. However, sparse staffing impedes even faster disposition of cases. By comparison to other states, the Oregon appellate courts have a minimal staff and the recently mandated budget cut-backs immediately extended case disposition time. This was especially so in the Appellate Settlement Conference program. In 2002, approximately 150 cases reached settlement through the appellate mediation process. With cut-backs in staff and reduced funding in 2003, it appears as if approximately 100 cases will have attained settlement through the program. This represents fifty more cases for decision (or the equivalent of roughly one-half additional day of hearing time per month needed to resolve those cases).

The Court of Appeals found that the filing of motions with the Court results in considerable delay. The Court receives about 1,000 motions per month. While 900 are motions for extensions of time and quickly disposed of, it is difficult for the Court to stay current on the remaining 100 because of the questions they raise. Since, in most instances, a motion tolls the time for other

events in the appellate process, occasionally the Court has devoted extra staff and judge time in an attempt to stay current on motions practice, and from time to time has made considerable progress.

The Court of Appeals also has undertaken a number of measures to speed up that Court's handling of the cases that are submitted to it. In an attempt to catch up with the caseload following the staff reductions and court closures that occurred in 2003, the Court added extra panels each month to hear more cases – in particular the expedited cases. In addition, the Court constantly is monitoring the status of all cases. After submission of a case, any case that is over six months old is put on a special docket. Every effort is made to assign staff resources to the cases on that special docket and to focus the Court's attention on getting those cases decided.

The staffing level of both of Oregon's appellate courts is considerably less than that of most other states. There is no question that additional staff means additional productivity. The Court of Appeals provides in-house training for its staff attorneys and clerks and tries to take advantage of particular expertise that staff members might have. The Court of Appeals also uses Plan B and senior judges to assist with its workload. In an effort to have a better understanding of the Court's workload, members of the Court have been working for over a year with technology staff to develop a database regarding the Court's handling of cases. This database will provide critical information such as the time spent on individual cases and case type, where delays are occurring and in what types of cases. The data should allow the Court to manage its workload better and to take meaningful steps to reduce delays in the process. The Court of Appeals will continue to update computer hardware and software and to work with the Judicial Department Information Technology Division to provide integrated technology for the Court. The Records Section is moving to digital storage for closed files and ultimately to electronic filing and digital storage of open files for greater efficiency.

It appears the Courts have made perceptible headway in reducing the time from when a case is at issue to decision through the use of some internal processes and monitoring while continuing to protect the advantages of careful and thoughtful decision making.

VI. RECOMMENDATIONS

1. The Oregon Rules of Appellate Procedure Committee should undertake a comprehensive review of the procedural rules solely to determine whether any changes to the courts or the appellate processes reasonably would promote faster submission and decision of appellate cases.

2. The Judicial Department must be equipped with current technology and be prepared to adapt quickly as technology changes. Technology could help improve appellate court efficiency, allow electronic case filing, improve case management, facilitate data collection, and assist other agencies (such as law enforcement agencies) that interact frequently with the judicial department. A committee consisting primarily of individuals independent of the Information Technology Division and including representatives of the various components of the justice system should undertake a comprehensive review of the Judicial Department's Information Technology Division. Among other things, that review should include an examination of the Division's Legacy system and its capacity to deliver the technology services the courts need.

3. The Courts should have stable funding to provide more adequate staffing and resources to help to move cases effectively through the judicial system and particularly through the appellate process. The Legislature must fund appellate prosecution and indigent defense services adequately as part of a systemic approach to the more effective operation of the Judicial Department.

4. At this time, the Courts should remain separate, at their present sizes of seven Supreme Court justices and ten Court of Appeals judges, and based in Salem. Currently, factors such

as existing facilities and resources, efficiencies from operational centralization, and limited financial resources constrain or preclude other recommendations.

5. The Legislature should be circumspect in providing direct appeals or grants of Supreme Court original jurisdiction and expedited review to both Courts. The Legislature should review existing statutory provisions to decide whether to continue existing provisions or to add new ones. An example of a way to handle this matter is for a specific legislative committee to review those priorities every session.

6. The Legislature should appoint a task force to study issues relating to review of ballot titles and to formulate alternatives, including whether to shift more of the work to senior judges. The report of that task force should be made to the Interim Judicial Committee in time for consideration in the 2005 legislative session.

7. The Appellate Section and the Taxation Section of the Oregon State Bar should conduct a study concerning direct review of tax cases to the Court of Appeals, with discretionary review in the Supreme Court.

8. The Oregon State Bar should appoint a committee of interested stakeholders to perform a comprehensive review and to make recommendations concerning appellate procedures, jurisdiction, and funding in death penalty cases.

9. The Supreme Court should consider instituting a preliminary screening process for petitions for review to identify those that require the preparation of an extensive petition memorandum and those that the Court can decide without a written memorandum.

10. The appellate courts should continue to restrict in a reasonable manner the number of extensions of time granted to parties to file briefs.

11. Both Courts should continue to permit oral argument with existing time limitations to permit the Courts and the parties to sharpen the focus on the issues a case presents. The Supreme

Court should consider scheduling oral argument more frequently than at present so as to reduce the period from when a case is at issue to when the Court takes it under advisement. The Court generally should consider refusing to grant requests to set over oral argument absent extraordinary cause shown and, then, only once. The Court should not permit matters filed after the merits briefs have been filed to affect the oral argument date. The Court of Appeals should be cautious in scheduling oral argument less frequently than at present.

12. Regarding the time from argument to decision, the appellate courts should consider imposing upon themselves a 90-day deadline from argument to the circulation of an initial discussion draft opinion. The Courts should implement an enhanced tickler system to advise assigned chambers when their cases reach certain benchmarks on review. For cases under advisement for a year, the Courts should devote all means necessary to ensure that the cases are decided within the next three months. The Courts should dispose of cases in which an even number of justices or judges are participating when it becomes apparent that a majority decision is doubtful.

13. The Court of Appeals should consider ways of devoting more resources to deciding motions and to differentiate motions for handling by judges and staff (for instance, having judges review in the first instance motions for summary affirmance and having staff review in the first instance *pro se* filings.)

14. The Court of Appeals should work with the Legislature to fund, enhance and realize the potential of the Appellate Settlement Conference Program.

15. The executive committee of the Appellate Practice Section of the Oregon State Bar should appoint a group to study the types of cases subject to *de novo* review to determine what standard of review would be appropriate.

16. The Court of Appeals should update and republish, and the Supreme Court should publish, a general statement of internal practices describing the Courts' operations and procedures for deciding cases.

17. In three years, the Appellate Practice Section of the Oregon State Bar should appoint a task force to study ways in which the Courts and the bar can increase the effectiveness of the appellate courts' operations. The task force can then consider reviewing the procedures for hearing lawyer discipline cases after the effects of the recent changes to the Bar's Disciplinary Procedures can be determined.

APPENDIX

Membership of the Committee of the Whole:

Edwin A. Harnden, Chair

Edward J. Harri, Reporter

Thomas W. Brown

Keith M. Garza

Mark Johnson

Susan M. Leeson

James Nass

Peter A. Ozanne

William L. Richardson

Robert K. Udziela

Mary H. Williams.

Subcommittee Membership:

STRUCTURE: Robert Udziela, Chair; William Richardson; Edward Harri

JURISDICTION: Mary Williams, Chair; Mark Johnson; Susan Leeson

TIME TO DECISION: Peter Ozanne, Chair; James Nass; Keith Garza

POLITICAL CONSIDERATIONS and BUDGETS:
Thomas W. Brown, Chair; James Nass; Keith Garza