
CASELOAD HIGHLIGHTS

Volume 3 • Number 1

EXAMINING THE WORK OF THE STATE COURTS

A Taxonomy of Appellate Court Organization

Much has been written about how trial court structures have adapted to demographic, economic, and political conditions in the states. For example, some states use a single trial court of general jurisdiction to decide all cases, whereas other states employ a multi-tiered system composed of general, limited, or special jurisdiction courts. Courts of special jurisdiction, such as specialized courts to handle drug offenses, are in vogue now, but follow in the tradition of the specialized courts designed to meet specific state needs, such as the Water Court in Colorado or the Land Court in Hawaii.

The variety of ways in which appellate courts have changed to accommodate increasing caseloads has not been as systematically studied.ⁱ An understanding of variations in organizational responses is necessary to assist those interested in appellate courts to communicate meaningfully with each other, and to ensure that cross-jurisdictional comparisons are made fairly. States have used *all* of the approaches described below, but in various combinations, to meet their appellate responsibilities. This report uses four common organizational changes to construct a taxonomy of appellate courts.

1 Increasing the Size of the Court of Last Resort

Perhaps taking a cue from the U.S. Supreme Court, no state court of last resort has more than nine judges.ⁱⁱ Since 1950, increasing the size of the court of last resort has not been a typical response to increasing appeals. Standard 1.13 (4) of the *ABA Standards Relating to Court Organization* suggests that collegial decision making is best promoted by having seven members of the highest court, but no more than nine members under any circumstances. Although achieving some economies of scale, increasing the number of justices does not proportionately increase decision making capacity. Whether the highest court has five or nine members, all justices must do the basic work of appellate justices: read the briefs, hear oral arguments, prepare and critique draft opinions, and discuss issues in conference.ⁱⁱⁱ

2 Creating Intermediate Appellate Courts or More Geographic Divisions

The most common state response to increasing appeals is the creation of an intermediate court of appeals. Intermediate appellate courts permit many

more petitioners at least one opportunity to appeal, but also create the possibility of a second appeal to the court of last resort. According to Professor Leflar “It is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multi-judge court.”^{iv} The taxonomy presented below shows the variety of ways intermediate appellate courts are used in the states. In 11 states, the intermediate appellate court is essentially another appellate court, similar in size to the court of last resort. In 29 states, the intermediate appellate courts have more than 9 members and as many as 88 authorized members serving on panels in geographically-based districts. Geographically-based divisions provide more convenient access for counsel and court clients, but do create the possibility of “doctrinal divergence and caseload imbalance between divisions.”^v

3 Establishing Discretionary Jurisdiction

Creation of an intermediate appellate court permits the establishment of discretionary jurisdiction in the court of last resort.^{vi} Also, with the advent of discretionary jurisdiction, the courts of last resort are more likely to sit

en banc. En banc decisions are made practical in the higher courts because intermediate appellate courts are available to decide the majority of the cases. Cases that are further appealed to the court of last resort are likely to be more complex, and to have broader policy implications beyond the interests of the parties. These second appeals are likely to require more time and attention than first appeals. Intermediate appellate courts typically hear appeals of right, but some also have discretionary jurisdiction for certain types of cases.

4 Using Panels

Justices on larger courts of last resort can increase their capacity to decide appeals by sitting in panels, rather than en banc. Indeed, for large intermediate appellate courts, panels are a practical necessity. This adaptation, however, creates the possibility of inconsistency in decision making among panels, and generates the need to reconcile differences among panels. Techniques, such as conferring the opinion drafts en banc, can be used to minimize inconsistent decisions among panels.

Patterns of Response

These four structural responses can be combined to construct at least seven distinct patterns of appellate caseflow. The patterns themselves are arranged according to degree of flexibility, from least to most flexible. Theoretically, the pattern with the least flexibility is the single, five-justice appellate court with mandatory jurisdiction that decides all appeals en banc (Pattern I). At the other extreme is the nine-justice court of last resort with mostly discretionary jurisdiction that hears cases in panels of three. It sits in a structure over a large intermediate appellate court, also sitting in panels by geographic district, and that has some discretion over the cases it hears. This last combination does not occur in the United States, because states with very large intermediate appellate courts (e.g., California, Florida, Illinois, New York, and Ohio) usually have seven-member courts of last resort.

■ Pattern I 10 states

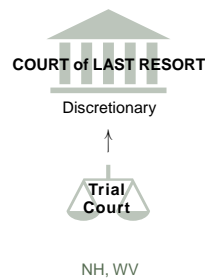
States with comparatively small volumes of appeals may be able to handle their case-loads without the need for either an intermediate appellate court or discretionary jurisdiction. Delaware, Nevada, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming are states in which a five-justice supreme court with mandatory jurisdiction handle the volume of appeals. Maine and Montana also fit this basic pattern, but have seven justices on their supreme courts. The District of Columbia, has a nine-justice Court of Appeals which often sits in panels of three.^{vii} The Delaware Supreme Court may also sit in panels of three; the Montana Supreme Court can sit in panels of five, and Maine's Supreme Court sits in panels, but only for sentence review hearings. Theoretically, the five-member, North Dakota Supreme Court can transfer cases to an intermediate appellate court, but they have not done so since February of 1994, and so are classified here. The North Dakota Court of Appeals is a "temporary court of appeals" composed of active or retired trial court judges, retired justices of the supreme court, and lawyers assigned to the court on a case-by-case basis.



DE, DC, ME, MT, ND, NV, RI, SD, VT, WY

■ Pattern II 2 states

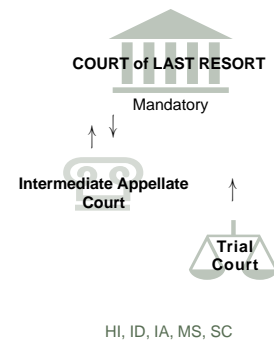
The second pattern is a single appellate court that has discretionary jurisdiction. New Hampshire and West Virginia are states that fit here. Both supreme courts are composed of five justices who sit en banc. New Hampshire uses a refereed appellate panel, composed of three retired judges, as an additional resource. At nearly 2,700 appeals, West Virginia has a high proportion of filings per judge; 48 percent of these appeals are from administrative agencies, particularly the Workers' Compensation Appeal Board.



NH, WV

■ Pattern III 5 states

Five states use the pattern of having appeals filed in the court of last resort, which then retains some and transfers others to the intermediate appellate court. Of the courts following this pattern, three (Hawaii, Idaho, and South Carolina) have five members and two (Iowa and Mississippi) have nine members. None of the five member courts sit in panels, but both of the larger courts do. The Iowa Supreme Court decides cases using two panels with one justice, on a rotating basis, sitting on both panels each month. The courts of last resort in these five states have mostly mandatory jurisdiction.



HI, ID, IA, MS, SC

■ Pattern IV 25 states

This is the most common pattern, one court of last resort with discretionary jurisdiction over an intermediate appellate court with mostly mandatory jurisdiction. In 21 states, the court of last resort has seven members and in most of these, the high court sits en banc.^{viii} Three other states following this pattern have five-justice courts. Washington state is the only nine-justice court in this set, and its supreme court sometimes sits in panels. All of the intermediate appellate courts in Pattern IV, except for Alaska, sit in panels. Intermediate courts range in size from 3 to 88 members, with most (20 of 24) having more members than their respective courts of last resort.



AK, AZ*, AR, CA*, CO, CT, FL*, GA, IL*, KS, KY, MD, MA, MI, MN, MO*, NE, NJ, NM, NC, OH*, OR, UT, WA, * WI*

■ Pattern V 2 states

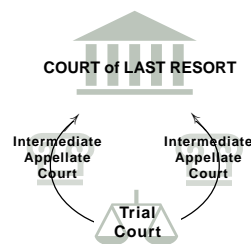
The distinguishing feature of this pattern is that both the court of last resort and the intermediate appellate courts have discretionary jurisdiction over the majority of their caseload. Virginia has seven justices on its supreme court and Louisiana has eight, seven elected and one assigned from the Louisiana Courts of Appeal. Discretionary appeals comprise 58 percent of the intermediate appellate court caseload in Louisiana and 75 percent of the caseload in Virginia. To be equivalent to intermediate appellate courts with mandatory jurisdiction one would expect a high proportion of the petitions would be granted. This is not the case. In 1995, the Louisiana Courts of Appeal granted 29 percent of the discretionary petitions and the Virginia Court of Appeals granted 16 percent of the discretionary petitions filed.



LA*, VA

■ Pattern VI 5 states

This pattern of appellate caseload is similar to the most common pattern explained in Pattern IV except that these states have two intermediate courts of appeal rather than one. Jurisdiction of the intermediate appellate courts are separated by subject matter jurisdiction. The supreme courts of Indiana and Tennessee are composed of five justices; the high courts of New York and Pennsylvania have seven. The Alabama Supreme Court has nine justices, but they can sit in panels. The intermediate appellate courts in Alabama and Tennessee are essentially divided into civil and criminal courts. Indiana uses a Court of Appeals for most appeals as well as a specialized Tax Court. In Pennsylvania the Commonwealth Court hears civil cases involving state government entities or agencies, and the Pennsylvania Superior Court reviews all other appeals, both civil and criminal. New York has intermediate appellate courts at two different levels. So appeals can go through three levels of courts: (1) the lower level, comprised of the Appellate Terms of the Supreme Court in the First and Second Judicial Departments and the County Courts in the Third and Fourth Departments; (2) the Appellate Division, the primary intermediate appellate court, and (3) the highest court, called the Court of Appeals.^{ix}

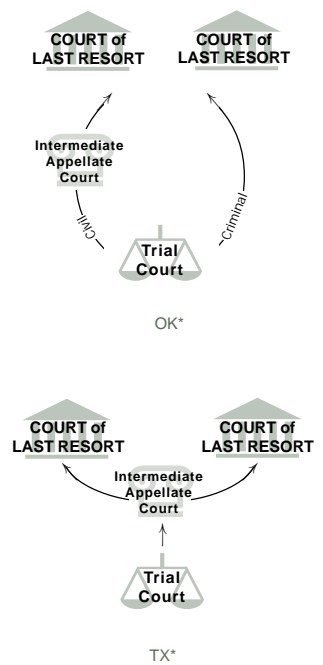


AL, IN, NY, PA, TN*

* Denotes intermediate appellate court that sits in geographical divisions.

■ Pattern VII 2 states

Texas and Oklahoma have one intermediate appellate court, but two courts of last resort with different subject matter jurisdiction. Each state has a supreme court with largely civil jurisdiction and a specialized court of last resort for criminal appeals. All of these courts sit en banc. The intermediate appellate court in Texas has both civil and criminal jurisdiction, the intermediate appellate court in Oklahoma has civil jurisdiction only.



Conclusions

This issue of the *Highlights* series is an attempt to catalog the various state responses to increases in appellate caseloads. Four common state responses to increasing appeals were used to construct a taxonomy of seven patterns. The usefulness of the taxonomy can be determined by comparing appellate outcomes by pattern, although a systematic comparison is beyond the scope of this article. Nevertheless, as a start it should be noted that the patterns are related to state populations. This is an important connection because population is directly related to number of trial court filings which in turn are related to number of

appeals, and consequently to workload (dispositions).^x

In states with the smallest populations, one appellate court with mandatory jurisdiction appears to be sufficient to handle the workload. As size of population, and number of appeals, increase some states adapt by using discretionary jurisdiction (Pattern II), experiment with intermediate appellate courts, or establish an intermediate appellate court to which cases are transferred from the court of last resort (Pattern III). The next stage are courts of last resort and a full-fledged intermediate appellate court, usually with mandatory jurisdiction (Pat-

tern IV), but occasionally with discretionary jurisdiction (Pattern V). Finally, some states have adapted to case-

load by creating multiple courts of last resort (Pattern VII) or multiple intermediate appellate courts (Pattern VI).

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^x This overview is intended to cover the appellate workload of courts of appeal. Many of these courts have jurisdiction over original proceedings, but these are a comparatively small part of their workloads and are not used to construct this taxonomy.

^y Most state courts of last resort have seven members, 18 have five justices, and only 7 have nine-justice courts. A history of the number of state supreme court justices in 34 states can be found in E. Curran and E. Sunderland, *The Organization and Operation of Courts of Review*, **Third Report of the Judicial Council of Michigan** 52, 61-62 (1933). Only New Jersey and Virginia have ever had more than nine judges. The Virginia Supreme Court had 11 judges from 1779 to 1788, but served also as a trial court. The New Jersey Supreme Court had 15 or 16 justices from 1844 until 1948. See Harison, *New Jersey's New Court System*, 2 **Rutgers L. Rev.** 60, 65 (1948).

^z J. Dethmers, *Delay in State Appellate Courts of Last Resort*, 328 **Annals** 153, 1158 (1960).

^{aa} R. Leflar, **Internal Operating Procedures of Appellate Courts** (Chicago: American Bar Foundation, 1976).

^{ab} Wasby, *Appellate Delay: An Examination of Possible Remedies*, 6 **JUST. SYS. J.** 329 (1981).

^{ac} See Pattern II, New Hampshire's and West Virginia's supreme courts have discretionary jurisdiction even though an intermediate appellate court has not been created in those states. Virginia had the same structure for many years until the intermediate appellate court was established in 1985.

^{ad} Information on panels is from **State Court Organization, 1993**, (US Dept. of Justice, Bureau of Justice Statistics, 1995), Table 25

^{ae} Exceptions are: Connecticut, Massachusetts, and Nebraska.

^{af} See R. MacCrate, J.D. Hopkins, and M. Rosenberg, **Appellate Justice in New York** (Chicago: American Judicature Society, 1982). Appellate Terms are classified as intermediate appellate courts. Appeals to County Courts, used in the Third and Fourth Departments, are the equivalent of appeals from a court of limited jurisdiction to a general jurisdiction court in other states.

^{ag} For a more complete discussion of appellate court caseloads and dispositions, see **Examining the Work of State Courts, 1995** (National Center for State Courts, 1997).



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