Court Reform of 1977: The Wisconsin Supreme Court Ten Years Later

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On April 5, 1977, the voters of the State of Wisconsin overwhelmingly approved a number of proposed amendments to the Judiciary Article (Art. VII) of the Wisconsin Constitution. Among the amendments approved was one allowing the creation of an intermediate court of appeals. In addition, the supreme court was given supervisory authority over the entire court structure. In the November 1977 Special Session, the legislature enacted ch. 187, Laws of 1977, which provided a statutory framework for the implementation of the court of appeals. The court of appeals was sworn in on August 1, 1978. Thus, one court era ended and another began.

Nearly ten years have passed. The obvious question is whether the objectives supporting the creation of the court of appeals are being met.

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The subject of this paper is narrow: a preliminary (and admittedly not definitive) analysis and evaluation of whether some of the objectives motivating the creation of the court of appeals are being met. The focus is on the supreme court: the effect of the court of appeals on the supreme court and whether the problems experienced by the supreme court prior to the creation of the court of appeals have been alleviated.

Any evaluation, preliminary or definitive, must begin with a full understanding of the objectives sought by the creation of the court of appeals. Why was it created? What were the then existing and anticipated problems it sought to resolve? Part One of this paper attempts to answer these questions in two ways: first, by exploring the functions of the supreme court prior to the creation of the court of appeals and the problems experienced by the justices who served at that time; second, by exploring the history of the enabling legislation with particular emphasis on the committees that were formed to study the problems and suggest resolutions.

In addition to understanding the objectives sought by the creation of the court of appeals, an analysis and evaluation cannot be done without a full understanding of the present functions of the supreme court. Without a full understanding of what the court does now, it is impossible to make any reasonable judgment as to whether the objectives motivating the creation of the court of appeals are being met. Part Two of this paper explains those functions using interviews conducted by the author with each of the justices who have served on the court since the creation of the court of appeals.

Having explained the objectives sought by the creation of that court, and the present functions of the supreme court, Part Three of this paper undertakes an evaluation and analysis of whether some of those objectives are being met, as well as some concluding thoughts. It is hoped that this paper, with its review of the objectives supporting the creation of the court of appeals, and its explanation of the past and present functions of the supreme court, will provide the necessary groundwork for more definitive future analyses of the effects of the court reorganization of 1977.

I. The Objectives

A. The Supreme Court Prior to Court Reform: Its Functions and Its Problems

Before the court of appeals was in place, I often compared our circumstances tantamount to being in a row boat not far above Niagara Falls. We were rowing as hard and as fast as we could, but every
moment the stern of the boat got closer and closer to the falls. It was inevitable that one day our boat was going to go over.\textsuperscript{1} These concerns of Justice William G. Callow of the Wisconsin Supreme Court were rooted in reality. The caseload was heavy and the consequences were apparent.

The supreme court had increasingly been unable to cope with its caseload. From 1962 to 1972, the number of cases disposed of increased from 291 to 431. Simultaneously, the number of unfinished cases during the same time period went from 40 to 335.\textsuperscript{2} During the 1974 term, docketed appeals including those pending from previous terms totaled 1,038 cases, a 180 percent increase over a fifteen year period.\textsuperscript{3}

One consequence of this caseload was that a litigant had to wait eighteen to twenty-two months for a final disposition of his or her case.\textsuperscript{4} Justice Roland B. Day of the Wisconsin Supreme Court remembers: "When I first came on the court in 1974, we were two years behind in our work and falling farther behind each month."\textsuperscript{5} His observations are supported by the statistics. In the 1973-1974 term of the supreme court, despite having written 408 opinions, which translates to five to six cases per month for each justice, new filings had increased from 457 in the previous term to 611. The number of cases carried over to the next term rose to 383, nearly a full year's complement of cases.\textsuperscript{6} At that rate, the court was falling behind nearly one full year every year.

The consequences of this delay were numerous. The quality of justice at the trial court level was inconsistent.

There were county and circuit judges who recognized the difficulty and the delay in taking an appeal to the supreme court. Some were high-handed. They impliedly said, "This is the law in my court (not the people's court) and if you don't like it take it to the supreme court. You will wait two or three years and it will cost you a bundle." So there were some county and circuit judges who considered themselves pretty much the ultimate law of the county or circuit. If,

\begin{itemize}
\item \textsuperscript{1} Interview with Justice William G. Callow, Wisconsin Supreme Court, in Madison, Wisconsin (Jan. 11, 1988).
\item \textsuperscript{2} CITIZENS STUDY COMMITTEE ON JUDICIAL ORGANIZATION, REPORT TO GOVERNOR PATRICK J. LUCEY, at 77 (Jan. 1973).
\item \textsuperscript{3} National Center for State Courts, WISCONSIN APPELLATE PRACTICE AND PROCEDURE STUDY, Pub. No. R0021, 1 (Dec. 1975).
\item \textsuperscript{4} CITIZENS STUDY COMMITTEE, supra note 2, at 77.
\item \textsuperscript{5} Interview with Justice Roland B. Day, Wisconsin Supreme Court, in Madison, Wisconsin (Jan. 13, 1988).
\item \textsuperscript{6} Address by Chief Justice Horace W. Wilkie, Wisconsin Supreme Court, Joint Session of the Wisconsin State Legislature, Madison, Wisconsin (Jan. 23, 1975).
\end{itemize}
however, there was a court of appeals and a review in sixty or ninety
days, that judge would become considerably more thoughtful, con-
siderably more reasonable, and considerably more law oriented.\textsuperscript{7}

Justice Day, appointed to the supreme court in 1974, voiced a related but somewhat different concern: "The delay probably produced more forced settlements because everybody knew they were going to be sitting around for at least two years and we kept slipping farther and farther behind. Justice delayed may not always be justice denied but it makes justice irritating to say the least."\textsuperscript{8}

What was the source of the difficulty? Justice Heffernan who has served on the supreme court since 1964, supplied the answer:

Every litigant in the circuit court had a right to appeal from any final judgment as a matter of right. This meant that no matter how trivial the case, it could be appealed. And it seemed they usually were. There was only one place for that appeal to be heard: the Wisconsin Supreme Court.\textsuperscript{9}

Something had to be done. Internally, the court considered a number of alternatives, and did adopt some new procedures in an attempt to combat the ever increasing caseload.

We toyed with the idea of having our court sit in panels of three with either the Chief Justice presiding or some other presiding officer. We also thought of the possibility of having court commissioners sit as hearing officers and make recommendations to us as do the U.S. magistrates. Another possibility was to add more members to the court. We finally decided that we simply could not have every case orally argued. We adopted a screening panel composed of three justices on a rotating basis.\textsuperscript{10}

In a memo to Chief Justice Heffernan, Supreme Court Commissioner Joseph M. Wilson, appointed by the supreme court in 1972, described the screening process:

The court was experiencing an increasing backlog in the appeals that were pending and ready for disposition; the Commissioner's position was created in an effort to deal with that growing backlog. Initially, the screening decision was made by the entire court. The cases were tracked onto either the oral argument calendar, the on-briefs calendar or the per curiam calendar. It quickly became apparent that involving the entire court in the screening process was cumbersome

\textsuperscript{7} Interview with Justice Callow, \textit{supra} note 1.
\textsuperscript{8} Interview with Justice Day, \textit{supra} note 5.
\textsuperscript{9} Interview with Chief Justice Nathan S. Heffernan, Wisconsin Supreme Court, in Madison, Wisconsin (Jan. 11, 1988).
\textsuperscript{10} \textit{Id.}
and counterproductive. Thus, a panel system was devised whereby three justices, assigned on a rotation basis, would meet with the commissioner and make the prescreening determinations. Those cases assigned to the oral arguments' or on-briefs' calendar went to the court for disposition. Those cases screened for the per curiam calendar were then assigned to the commissioners for disposition. The commissioner, after having prepared what was called a "calendar memo" for screening purposes, would then prepare a more elaborate and detailed "disposition memo" discussing the issues and suggesting a disposition for the case. These memos were accompanied by a proposed per curiam opinion the commissioner had prepared for the court’s approval.11

Court Commissioner James Ward Rector, describing this screening process in an unpublished speech given in 1975, pointed out that in 1972, 437 cases were screened, an average of forty-four per ten month period. However, the first four months of the 1973 term averaged nearly sixty per month. His speech concluded: "Pre-screening helps increase output by increasing input. However, there is a limit to the number of cases a court can handle, regardless of the amount of input or increased efficiency. That limit is rapidly being reached."12

None of the measures were adequate to deal with the problem. We tried these various stopgaps to handle the cases more efficiently. It was only after trying all of these things and finding that none of them really worked that we finally were convinced and we convinced other people that there was no stopgap short of a complete reorganization of the court that was going to work.13

How did the caseload affect the functions of the court? The functions of the court fell into several categories: case preparation and opinion writing; review of colleagues' opinions; writing of dissents and concurrences; and administration and supervision over the courts and the integrated bar. That the ideal time available for these functions and the actual time available for these functions were far apart is evident from the justices' responses with respect to each of those functions.

1. Case Preparation and Opinion Writing

Writing opinions undoubtedly received the largest focus of each justice simply because we had so many to write. Each judge was

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12. Speech by Court Commissioner James Ward Rector, unknown date and place (1975).
13. Interview with Chief Justice Heffernan, supra note 9.
writing at least four or five published opinions a month. There was a
year or two in which I wrote as many as 100 opinions. These were
not all published opinions, but they were full-length opinions.14

A number of the justices described the method in which cases were as-
signed, a method that received much criticism. Each month, twenty-eight
or thirty-five cases were assigned to the calendar for oral argument. A sys-
tem of rotation was instituted whereby the cases were allocated, one out of
every seven to each justice. This was done prior to oral argument. Each
justice received four or five cases, depending on the amount due for oral
argument. Each justice’s office prepared a lengthy bench memo on the
cases assigned to that office discussing the whole case, the facts, the legal
questions involved and recommendations as to how the case ought to be
decided. During the week after oral argument, the justice assigned to the
case augmented the memo, if necessary, and then distributed it to the other
justices. A decision conference was then held one week after oral argument.
The justice to whom the case was assigned would lead the discussion, giving
a summary of the case and recommendations as to the outcome of the case.
The case was discussed around the table and a vote taken with the assigned
justice voting first. Following the assigned justice’s vote, the next vote was
given by a so-called “checker judge” who was seated immediately next to
the assigned justice. This “checker judge” rotated each month from one
side of the assigned justice to the other, and in theory had the responsibility
of overseeing the assigned justice’s case. If the assigned justice’s vote re-
ceived a majority from the conference, he or she would write the opinion. If
the assigned justice was not in the majority, the first justice expressing the
view of the majority as the vote went around the table would be assigned
the opinion and one of his or her cases would be traded to the assigned
justice for writing. As discussed later in this paper, this process lent weight
to the concern that decisions were at times being rendered without full con-
sideration and collegial decision-making by the entire court.

Every justice interviewed except one15 expressed the same conclusion
with respect to the amount of time available for case preparation and opin-
ion writing. It was inadequate.

14. Id.
15. Justice Abrahamson said:
There is never enough time to do everything you might want to do. But I thought that the
cases that needed a lot of attention got it. Sometimes more, sometimes less. Sometimes
one judge thinks a case is a very important case that needs a lot of attention; another
disagrees and doesn’t think it is that important. And, then you have traditions in a court
that affect how courts handle matters that have nothing to do with time.
We were writing twenty-eight to thirty-five cases a month. We would spend one week a month in oral argument. Another four days would be spent in conference in order to discuss the cases, our decisions and the circulated opinions. That left approximately fourteen days to write your own four to five opinions, review your colleagues' opinions, consider any dissents and concurrences, and review administrative matters. It was a physical and mathematical impossibility.\(^{16}\)

Chief Justice Heffernan expressed the same concern:
I generally felt I had time to do a fairly decent first draft, though it may have been a slap-dash effort. It frequently got the approval of the court. I would say, however, that I never had an opportunity to write an opinion and to just let it sit and mature and to take a second look at it. I think none of us had the opportunity to do as good a job as we could have done now.\(^ {17}\)

The consequences of a workload of four to five opinions a month rippled through two other important functions of the collegial decision-making process: the review of colleagues' opinions and the writing of concurrences and dissents.

2. Review of Colleagues' Opinions

The fear expressed by the Citizens Study Committee (the committee is discussed in detail in the next section) that decisions were being rendered in many cases without full consideration by all members of the court, was confirmed by a number of the justices.

We and the moon were on a twenty-eight day cycle. It started with oral arguments and it ended the day before oral argument began. We had great pressure that every opinion assigned to us be mandated on the first or second day of oral argument. I can remember I was being critical of something one of my colleagues had written when I had not been on the court too long and one of the other justices that had been on longer got next to me and said "Rollie, you are going to find out that you will have all you can do to take care of your own opinions and not be worrying about everybody else's opinions." That turned out to be fairly accurate. . . unless they came out with something bizarre you let it go. There wasn't time. You were grinding out your own stuff.\(^ {18}\)

\(^{16}\) Interview with Justice Callow, supra note 1.

\(^{17}\) Interview with Chief Justice Heffernan, supra note 9.

\(^{18}\) Interview with Justice Day, supra note 5.
Chief Justice Heffernan agreed:
We had so many cases that we were barely able to write the cases that were assigned to us, let alone giving careful scrutiny to the opinions written by our colleagues. As I said when I urged the creation of the court of appeals, many of our opinions were really one judge opinions . . . although I don't want to overstate it, the opinion was frequently one that was scrutinized with complete thoroughness only by a single judge, perhaps another judge with our checking system . . . . I would look at the cases and if the opinion came out right, affirm or reverse, and if there was no major problem presented on its face, I would rather perfunctorily approve it. That is all you could do when you had that many cases. We knew what the cases were about; however, the nuances, the niceties, the discussion of what should be done in a particular case, reflection, and what it presaged for the future — all were done without sufficient collegial consideration. There was never an opportunity to discuss this fully with your colleagues and rediscuss it because we just had too many cases to do. We gave it all the time we could but I never felt that we had an opportunity to exchange ideas as freely as I would have liked or to the extent that we do now.19

3. Concurrences and Dissents

A 1971 article comparing supreme court decisions in North Carolina before and after creation of a court of appeals pointed to the quantity and quality of concurrences and dissents as being one indication reflecting quality of work product.20 It asserted that with the additional time available and more important questions in the balance, a justice can be expected not only to formulate his or her own conceptions of the case, but also to express this conception in a concurring or dissenting opinion.

A summary comparison of three full terms of the supreme court in Wisconsin prior to the creation of the court of appeals and three full terms after reveals the following data. The 1975, 1976 and 1977 terms resulted in a total of 845 published opinions. Of those, sixty-nine full concurrences or dissents were filed. The 1984, 1985 and 1986 terms resulted in a total of 241 published opinions. Of these, 115 full concurrences or dissents were filed. Thus, in the three terms studied prior to the creation of court of appeals, fewer than ten percent of the opinions produced alternative approaches to the law. In the three years studied after the advent of the court

19. Interview with Chief Justice Heffernan, supra note 9.
of appeals, nearly fifty percent of the opinions produced alternative approaches to the law. Another way of stating this is that in the three years studied after the court of appeals was created, the number of opinions was reduced to nearly one-quarter while the number of full dissents and concurrences nearly doubled.

Why did fewer than ten percent of the published opinions attract an articulated alternative approach to the law expressed in the majority opinion? The answer was supplied by the justices — inadequate time.

Chief Justice Heffernan stated: "[Y]ou did not have much opportunity for new research on concurrences and dissents. We would have an opinion conference on Friday. On Friday you would announce whether you had a dissent. You were expected to have it circulated the following Monday." Justice Callow put it nearly the same way:

Because of the large number of cases, one had to be very highly motivated almost to the point of being appalled at the majority opinion before you would take the time to write a dissent. If you did, there was insufficient time to write as thorough and as scholarly a dissent as it should be to expose the public to the alternative reasoning that prompted it. The same held true for concurring opinions.

4. Conclusions

The comments of the justices who served prior to the creation of the court of appeals were echoed in the concerns expressed by the committees that made recommendations to the legislature concerning court reorganization. There were too many cases, delays resulted, and there was little time for concurrences or dissents. Whether the quality of the decisions suffered — whether the "law-developing" function of the court (as opposed to the "case-deciding" function) suffered — I leave for others to judge. The conclusion appears almost inescapable, however, that a diminution of quality was an inevitable consequence. Something needed to be done, and it was.

B. The History of the Enabling Legislation

"[T]he improvement of the administration of justice is not for the short-winded." Thus prophetically spoke Chief Justice E. Harold Hallows of the Wisconsin Supreme Court at the Wisconsin judiciary meeting in January of 1971.

21. Interview with Chief Justice Heffernan, supra note 9.
22. Interview with Justice Callow, supra note 1.
Public awareness of the need for reorganization of the judicial branch of government had been growing for some time. The entire system appeared to need an administrative overhaul. However, the debate surrounding court reform tended to center around the particular problem of work overload in the supreme court. Patrick J. Lucey, as a successful candidate for governor in 1970, supported creation of an intermediate appellate court.\(^{24}\)

In his speech at the Wisconsin judiciary meeting in 1971, Hallows continued the process of alerting the public to the problems of supreme court overload. Notwithstanding a work output record well above the national average for state supreme courts, the court was falling further and further behind. In its 1968-1969 term, the court had to defer ninety-four appeals to the following term. In its 1969-1970 term, it had to defer 138 appeals, despite having published 293 cases, a workload of over forty-four cases per justice. In its 1968-1969 term, the court issued, in addition to its opinions, 169 unpublished opinions. In the 1969-1970 term, the number of unpublished opinions rose to 249 despite new efforts to handle post conviction criminal remedies in the trial courts. “At this rate,” Hallows said in 1971, “and before a few more years have passed, an appeal will not be reached for argument for a year after it is ready for argument, or approximately one and one-half years after the appeal is taken.”\(^{25}\)

Hallows did not have to wait long to see his worst expectations come true. In January of 1975, Hallows’ successor, Horace W. Wilkie, appeared before the Wisconsin Legislature seeking its support for court reform, and specifically its support for creation of an intermediate court of appeals. Hallows’ prediction of a year and a half wait was now fact. “After an appeal is taken to our court, it normally takes about six months to perfect the record and to file the briefs of counsel. After this is accomplished, the average civil litigant must wait for approximately a year for his cause to be considered and decided by our court.”\(^{26}\) The filings had grown even more numerous, and consequently, the cases carried over from term to term had increased precipitously.

During the 1973 term our court wrote 408 opinions, 25% more than just two years ago . . . new filings in the same period went from 457 to 611, a growth of 33% . . . the cases carried over to the next term went . . . to 383 in this past year, an increase of 162% \(^{27}\)

\(^{24}\) Id. at 16.
\(^{25}\) Id. at 15.
\(^{26}\) Wilkie, supra note 6.
\(^{27}\) Id.
Thus, in just the few short years from 1971 to 1975, carry-over cases had gone from 138 to 383. Chief Justice Wilkie must have yearned for the days of Hallows’ tenure.

Following Hallows’ speech, one of the state’s major newspapers, in a seven part editorial series in February 1971 entitled *Making Our Courts Work*, spearheaded the media support for a complete overhaul of the system.

The judicial branch of government in Wisconsin is in trouble. . . .

Timid halting patchwork — a few new rules, a few new courts — won’t repair it. The trouble is pervasive. It ranges through all the aspects of judicial selection, structure, administration, procedure, ethics and discipline. Only thorough drastic overhaul, including constitutional change, can restore competency and efficiency.\(^{28}\)

In its editorial series, the Milwaukee Journal pointed out several specific problem areas that needed reform, starting with the creation of an intermediate court of appeals.

To begin at the top, the State Supreme Court, despite its long record of diligence, can no longer keep up with its workload. The steady rise in this backlog of deferred decisions is irreversible under present arrangements. It is forced, even so, to scrimp on the time required for top quality decision making and opinion writing.\(^{29}\)

Both Hallows and the Milwaukee Journal editorial series called for the institution of a study committee.

I think the most hopeful approach to a solution to the overall problem would be the creation of a high-level blue-ribbon committee of high-minded citizens, independent of the three branches of the state government — yet having their cooperation, a committee adequately staffed and with financial resources for research and expert assistance.\(^{30}\)

What they got was not just one study committee, but three: a Legislative Council Report to the 1973 Legislature on Court Reorganization; a Citizens Study Committee on Judicial Organization; and a Wisconsin Appellate Practice and Procedure Study (WAPP) done by the National Center for State Courts.

The first study was done under auspices of the Legislative Council.\(^{31}\) At its March 16, 1970 meeting, the Legislative Council directed that an advi-


\(^{29}\) Id.


\(^{31}\) The Legislative Council is an agency of the state legislature. It is composed of six members of the joint committee on legislative organization; the senate and assembly chairpersons; the
sory committee be appointed to study court reorganization. Although the Committee had its initial meeting on May 14, 1970, its long range focus did not begin until after Chief Justice Hallows' speech in January of 1971. Altogether, the Committee held twenty meetings and completed its work at its December 16, 1971 meeting. 32

The second study was the Citizens Study Committee on Judicial Organization. It was established by Governor Patrick J. Lucey on April 23, 1971, by his Executive Order No. 13. 33 His charge was put in the broadest possible terms:

The Committee shall investigate the adequacy and efficiency of the present judicial system in the State of Wisconsin, and shall make recommendations to my office on suggested changes in the operations, organization, procedures, judicial selections, and any other matter which might be germane to the improved efficiency of Wisconsin's judicial system. 34

John C. Geilfuss of Milwaukee was made its chairman. The membership of the committee consisted of forty citizen members, all appointed by the governor. Fourteen were practicing attorneys, four were with the two Wisconsin law schools, and others had backgrounds in business, labor, law enforcement, social work, journalism and accounting. 35

A predominant portion of the Committee was not in any direct or financial manner associated with the judicial system of Wisconsin. By design, no judges or legislators were included on the Committee, but the Committee liberally solicited their testimony and expectations as required. 36 The Committee, working in five subcommittees, completed its work in December of 1972 and submitted its report to the governor in January of 1973.

The third study was commissioned by the supreme court itself. "The court decided that the entire appellate process of Wisconsin should be examined by an independent team of experts to find ways to expedite the handling of cases while preserving traditional values of collegiality and deliberation." 37 This study was the only one of the three to concentrate solely on the appeal process. The court assigned the study to the National
Center for State Courts in March of 1975. An advisory committee under the chairmanship of Justice Nathan S. Heffernan of the Wisconsin Supreme Court was appointed to work with the center. A project review committee was also appointed consisting of Professor Daniel J. Meador, University of Virginia Law School; Justice Winslow Christian, California Court of Appeals; Robert D. Lipscher, Circuit Executive for the Second Federal Circuit; and Edward B. McConnell, Director of the National Center for State Courts. The final study was submitted to the court in December of 1975.

All these studies were unanimous in their conclusion recommending the creation of an intermediate appeals court. The Legislative Council Committee, in its Report to the 1973 Legislature on Court Reorganization, recognized the growing caseload in the supreme court:

During the past few terms, the court has been faced with a growing backlog of cases. The seriousness of the present backlog is indicated by the growth in the number of cases continued or carried over to the following term. According to Judicial Statistics, now published annually by the Administrator of Courts and formerly published by the Judicial Council, 304 cases were continued to the 1972 term and 209 cases were continued to the 1971 term while, by contrast, only 72 cases were continued to the 1967 term.38

The report also indicated what the Committee perceived to be the source of the problem: "There is a statutory right of appeal to the supreme court in practically every type of case, which means that the court has no practical method by which it can limit its workload."39

The WAPP Study stated that the supreme court was confronted with an unmanageable caseload, resulting in intolerable delays. It envisioned the court of appeals as the final arbiter of most trial court decisions. The role of the supreme court would be primarily to "formulate and develop common law, resolve issues of great public importance and constitutional questions, and to supervise the judicial system of the state."40

The Citizens Study Committee made the most far reaching, and in retrospect, most influential recommendations. First proposed by Chief Justice Hallows in his 1971 speech to the judiciary, then subsequently created by the governor with a membership consisting of a wide array of highly respected Wisconsin citizens, the Citizens Study Committee had by far the greatest impact on court reorganization in Wisconsin. Senator James

39. Id.
40. Wisconsin Appellate Practice and Procedure Study, supra note 3, at 68.
Flynn, chairperson of the Special Legislative Committee that dealt with the subject of court reorganization, spoke of its importance:

I relied heavily on the Citizens Study Committee Report, most particularly during the initial considerations of the constitutional amendments. That committee identified the problems. The voters confirmed the existence of the problems. During legislative consideration of the bills, I looked at the Citizens Committee Report as a broad schematic, a framework for a justice system. The Legislative Council staff and our committee fleshed it out.\(^41\)

Attorney Daniel Fernbach was the Staff Director for the Special Legislative Committee that drafted SB 525. He also confirmed the importance of the Citizens Study Committee.

Without doubt, it was the first trumpet for court reorganization. Its report had great credibility with the legislature because of its broad membership—not just attorneys or judges who had their own interests. It brought home to the legislature what was needed and had considerable influence on those of us who worked with the Special Legislative Committee in drawing up the Bill.\(^42\)

The Citizens Study Committee on Judicial Organization prefaced its recommendation to create an intermediate court of appeals by stating what the committee felt were the basic functions of an appellate court structure:

First, appellate review should act as a check on arbitrary decisions by the trial court . . . . Second, it should provide a "second look" at decisions made during the course of trial when there is often too little time for adequate research and contemplation . . . . Third, appellate review must serve a "law-stating" function by cogently articulating the law in areas where there is confusion or an incomplete statement.\(^43\)

In addition, the committee pointed out that appeals should be reasonably available with a minimum of delay and must not be prohibitively expensive.\(^44\)

In discussing the problem of the appellate structure existing at that time, the committee started by pointing out that all appeals from the circuit and county courts (with some limited exceptions) went to the supreme court and that the workload on the supreme court had increased dramatically to the point where the court was unable to cope with its increased workload. In 1973, the court wrote 408 opinions, better than fifty-eight

42. Interview with Daniel Fernbach, in Madison, Wisconsin (Jan. 5, 1988).
43. CITIZENS STUDY COMMITTEE, supra note 2, at 78.
44. Id. at 82.
cases per justice or approximately five to six cases per month per justice for
the ten month term.\textsuperscript{45} The size of this workload concerned the Citizens
Study Committee.

The magnitude of the workload on justices of the Wisconsin court
can easily be seen by comparison to other high courts. It has been
noted that justices of the United States Supreme Court, a true
supreme court in the sense that it deals with cases of real preceden-
tial value, write only twelve to fifteen opinions per year and have the
assistance of a full staff of law clerks. Several state supreme courts,
on the other hand, demand thirty-five to forty opinions per justice.\textsuperscript{46}

In the judgment of the committee the overload of appeals in the
supreme court created a number of deficiencies in the Wisconsin appellate
system:

1) The problem of delay, and the resultant hardship on those litigants
who must wait eighteen to twenty-two months for a final disposition of their
cases.

Moreover, it has been noted that delay breeds delay. Once an appel-
late case backlog has been established, the filing rate appears to in-
crease, leading to the inference that some appeals are being filed for
tactical reasons that delay can be used to improve the bargaining
position of the party appealing.\textsuperscript{47}

2) The sacrifice of quality for quantity.

In the rush to cope with its ever-increasing calendar, the supreme
court must invariably sacrifice quality for quantity. Increasing ap-
pellate backlogs necessarily produce a dilution in craftsmanship . . . .

Moreover, a decrease in the quality of appellate decisions caused by
case backlogs produces even greater backlogs. Terse or incomplete
opinions create uncertainty as to the case law and encourage more
litigation. Cases of major precedential value may not receive the
thorough research and consideration they require. The supreme
court is cast in the role of a “case-deciding court” — one which
merely reacts to individual cases and thus slights its law-stating
function.\textsuperscript{48}

3) The inability to exercise proper administrative and supervisory lead-
ership over the trial courts and the integrated bar.\textsuperscript{49}

4) The concern that there was inadequate time for a collegial decision
in all cases.

\textsuperscript{45} Wilkie, supra note 6.
\textsuperscript{46} CITIZENS STUDY COMMITTEE, supra note 2, at 78.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
Decisions may be rendered in many cases without full consideration by all members of the court. Because of the press of business, the Wisconsin Supreme Court follows a practice of assigning cases to individual justices prior to oral argument. In theory, each justice should read the briefs in each case and participate fully in its determination. In practice, this may not be possible and there may not be adequate time for a collegial decision in all cases.50

The committee, in recommending the creation of a court of appeals, articulated five objectives that it hoped would result from the creation of a court of appeals:

First, it would substantially reduce the supreme court caseload.
Second, it would decrease the time between appeal and final determination of a case.
Third, it would allow the supreme court to function collegially by having a sufficient amount of time for discussion, research, and review, thereby insuring the best quality of decisions.
Fourth, it would allow the supreme court sufficient time to devote to its law-stating function — the formulation and articulation of a coherent body of jurisprudence.
Fifth, it would allow the supreme court to administer and supervise all state courts and the integrated state bar.51

In order to reach these objectives, the committee recommended that the court of appeals should have exclusive jurisdiction over all appeals, with two exceptions. It argued that there should be no right of appeal from the court of appeals’ decision and that the court of appeals should be the court of last resort for the vast majority of cases. It stated that it was absolutely imperative that the supreme court have discretion as to which cases it would accept.

Otherwise, the judicial system would constantly be faced with a specter of double appeals, the expense and delay of the appellate process would be magnified rather than reduced, and the court of appeals would become nothing more than an “intermediate appellate court” or “bus-stop” en route to the supreme court.52

In all important respects, the recommendations made by these committees were adopted in the proposed amendments to the Wisconsin Constitution and the subsequent enabling legislation.

The reorganization of the judiciary could not be accomplished without amending the Wisconsin Constitution. This required that the proposed

50. Id.
51. Id.
52. Id.
amendments be agreed to by each house of the legislature in two consecutive sessions. Following such agreement, the proposed amendments were then submitted to the vote of the people.\textsuperscript{53}

This process of amending the Wisconsin Constitution to provide for court reorganization began on January 23, 1975, when 1975 Assembly Joint Resolution 11 (AJR 11) was introduced. It was passed by the Assembly on September 24, 1975, when AJR 11 was read a third time and sent to the Senate.\textsuperscript{54} After some skirmishes between the two houses and the appointment of a conference committee, AJR 11 was finally passed by both houses on February 26, 1976.\textsuperscript{55} The 1977 session of the legislature saw the second consideration of the proposed amendment. It took the form of Senate Joint Resolution 9, which was in all essential forms the same proposal as contained in AJR 11 of the 1975 session. Introduced on January 18, 1977, it passed both houses within a month, on February 17, 1977.\textsuperscript{56}

In April 1977, the proposed amendments\textsuperscript{57} were submitted to the people for ratification. The amendments were overwhelmingly adopted by a vote of 455,350 to 229,316.\textsuperscript{58} All that remained to be done was the enabling legislation.

The Legislative Council created a special committee on court reorganization to draft enabling legislation for the creation of a court of appeals. Chaired by Senator James Flynn of West Allis, the special committee drafted and introduced Senate Bill 525 which was enacted by the legislature in a special session in November of 1977 as ch. 187, Laws of 1977, and subsequently incorporated into Wisconsin Statutes as ch. 752. The court of appeals was sworn in on August 1, 1978. How its creation drastically changed the functions of the supreme court is the subject of the following section.

\section*{II. The Present Functions of the Supreme Court}

That the work of the supreme court has changed quite drastically since the creation of the court of appeals is apparent to any close observer of the court. However, before any reasonable judgment can be made as to whether the objectives motivating the creation of the court of appeals are

\begin{footnotes}
\item[53.] See Wis. Const. art. XII, § 1.
\item[54.] Bulletin of the Proceedings of the Wisconsin Legislature, 553-56 (1975).
\item[55.] Id. at 556.
\item[56.] Bulletin of the Proceedings of the Wisconsin Legislature, Senate, 374-75 (1977).
\item[57.] For a complete wording of the amendments, see Laws of Wisconsin, 1977, Senate Joint Resolution 9, at 891-92.
\end{footnotes}
being met, it is necessary to have a full understanding of how the supreme court has functioned since the creation of the court of appeals.

The overall work of the supreme court can be broken down into three separate functions. The first function which I will refer to as the Initial Review Function is the court's role in reviewing petitions to review, certifications from the court of appeals and by-passes filed by one or both of the parties. This is the initial determination made by the court sitting in conference to accept or deny a case for full review. Full review, with rare exception, entails oral argument and published opinion. The Initial Review Function is an entirely new function since the creation of the court of appeals. It was not a function of the court prior to that time, simply because all appeals from final judgment in the trial court came to the supreme court as a matter of right. The supreme court had no choice but to accept each appeal.

The second function which I will refer to as the Opinion Function is the decision-making process of the court with respect to cases that have been accepted for full review. It includes preparation for oral argument, oral argument, opinion writing, review of colleagues' opinions, and dissents and concurrences.

The third function is the court's administrative and supervisory role over all of the courts and the integrated bar. As will be seen in further discussion of this role, the administrative and supervisory function of the court has increased substantially since the creation of the court of appeals.

A. Initial Review Function

We brought to our decision and to the legislature and the Governor's committee some very carefully thought out ideas which were formed over a long period of time. The most basic thing we decided was that our court was to be a full certiorari court with absolute discretion in accepting cases for review.59

The discretionary power of the supreme court is reflected in Article VII, Section 3 of the Wisconsin Constitution:

(1) The supreme court shall have superintending power and administrative authority over all courts.
(2) The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction.

59. Interview with Chief Justice Heffernan, supra note 9.
(3) The supreme court may review judgments and orders of the court of appeals, may remove cases from the court of appeals and may accept cases on certification by the court of appeals.\textsuperscript{60}

Approximately 700 times a year, the court is asked to exercise its discretion and accept a case for full review. Prior to the creation of the court of appeals, this was not a function of the supreme court. It simply had to accept any appeal taken from final judgment in the trial court. Thus, no time was expended in determining whether to accept an appeal. That is not the case today. The court has absolute discretion in deciding whether to accept a case for full review. Thus, the initial decision as to whether to accept a case has taken on critical significance in the decision-making process of the court. If the court denies a petition for review, that case is concluded. Approximately 675 petitions to review are filed yearly of which approximately ninety percent are denied. Should the court deny a certification or a by-pass request, the result is not nearly as final. Those cases then are heard by the court of appeals whose decision may or may not be appealed by one of the litigants filing a petition for review. Approximately forty certifications are filed yearly, of which about sixty-six percent are accepted. Approximately forty by-passes are filed yearly, of which about twenty percent are accepted.\textsuperscript{61}

The procedure by which the court deals with the petitions to review, certifications and by-passes rarely varies.\textsuperscript{62} Upon filing in the clerk’s office, the petitions are forwarded to one of three court commissioners for analysis. Within sixty days, the commissioner to whom the case is assigned prepares and circulates to the court a memorandum containing a thorough analysis and a recommendation. Along with the memorandum, the commissioner delivers to each justice the petition itself and the briefs that have been filed supporting or opposing the request. Thus, the complete packet delivered to each justice for each case contains a six to ten page commissioner’s memo, the petition, one or two briefs approximately twenty to thirty pages in length, and an appendix containing the decision(s) of the court(s) below.

The court meets twice each month to review the petitions, certifications, and by-passes. The court considers approximately sixty to seventy of these requests each month. Each file is dealt with separately. A petition for re-

\textsuperscript{60} \textbf{Wis. Const.} art. VII, § 3 (emphasis added).

\textsuperscript{61} Statistics provided by Marilyn Graves, Clerk of the Wisconsin Supreme Court.

\textsuperscript{62} For a complete description of this procedure, see \textit{Internal Operating Procedures, Wisconsin Supreme Court} 4-6 (1986).
view is granted upon the affirmative vote of three justices. Certification and by-passes are granted upon the affirmative vote of four justices.

How important do the justices perceive this function of initial review? Most justices echoed Justice Louis Ceci's comment: "Petitions to review are, along with opinion writing, the most important work that we do. Once we have voted to deny a review that is the end of the case."

The importance that the justices place on the initial review function is confirmed by the amount of time each reportedly spends on it. On average, each justice indicated that three and one-half to five days a month are spent on this function.

B. Opinion Function

There are five collegial discussions, that is, five full reviews with everybody on the court, for every case that we finally decide. We have it on the petition for review. We have it on the preargument conference. We have it at the oral argument where there is a give and take, a collegial interchange in a sense. [We] have the immediate post-decisional conference in which [we] discuss what the tentative results will be. [We] end up with a post-opinion conference, at least one, usually more than one, determining what the decision of the court is going to be. So [we] have five opportunities for a collegial interchange of ideas and more if anybody wants to reconference it.

The Opinion Function is the decision-making process of the court with respect to cases that have been accepted for full review. It includes preparation for oral arguments, oral arguments, opinion writing, review of colleagues' opinions, and the writing of concurrences and dissents. Most justices indicated that they spend approximately fifteen to nineteen days a month on this function.

With rare exception, cases that have been accepted for full review are placed on the oral argument calendar. Oral argument is normally during


64. Justice Abrahamson indicated:
I do petitions to review in what I call dead time... when I can't be in the library and I can't be next to a word processor and have a lot of materials sorted out for writing and research. So, I do petitions when I can carry them with me. I'm being driven somewhere, or I'm at home. I do them late at night and early in the morning. So, I don't spend days at it. I try and do petitions between things. So it is piecemeal. I suppose it must take somewhere between an hour to two hours on each petition if you are going to give [it] a thorough treatment.
Interview with Justice Abrahamson, supra note 15.

65. Interview with Chief Justice Heffernan, supra note 9.
the first week of every month from September through June. Seven to four-
teen cases are normally scheduled every month, depending on the number
of reviews that have been accepted. Each justice receives the briefs for the
cases about one month prior to oral argument. Legal memoranda are pre-
pared by each office thoroughly analyzing the factual and legal issues
presented.

At 9 a.m. on each day of oral argument, the court meets in conference
to discuss the cases scheduled for argument that day. Each justice has been
randomly assigned one of the cases for the purpose of leading the discus-
sion of that case both at the preargument and the postargument conference.
At the preargument conference, the court discusses the issues, determines
what has not been adequately presented by the parties in their briefs and
determines what the parties should address at argument.66

Following each day's oral arguments, the court again meets in confer-
ence to discuss, tentatively decide and assign each case argued that day to a
justice for writing. Cases are assigned for writing by lot to a justice who has
voted with the majority in the tentative decision of the case. Thus, unlike
the system that existed prior to the creation of the court of appeals, whereby
the members knew prior to oral argument who would write the
opinion in most cases, the justices under the present system do not know
until after a tentative decision has been made who will write for the court.

Once the opinion has been written, it is circulated to all members of the
court for review at least forty-eight hours prior to the opinion conference.
During the fourth week of each month, usually Friday, an opinion confe-
rence is held at which the court discusses the circulated opinions. Opinions
may also be discussed at other conferences held during the month. After
consideration, if there are any changes to be made that are of more than
minimal importance, an opinion is recirculated and reconferenced. Any
justice who elects to write a concurrence or a dissent must complete it and
circulate it prior to circulating his or her assigned opinions that have not
been completed. Once the concurring or dissenting opinion is circulated,
the entire case is reconferenced. It is not an altogether rare occurrence that
a dissenting opinion attracts sufficient votes to become a majority. This
requires that the dissent be rewritten as a majority opinion and reconfer-
enced. Once an opinion and the dissents or concurrences are approved by
all members of the court, it is mandated promptly.67

66. See INTERNAL OPERATING PROCEDURES, supra note 62, at 11.
67. Id. at 12-16.
C. Administrative and Supervisory Function

"The supreme court shall have superintending and administrative authority over all courts."\(^{68}\)

"When I first came on the court, we spent little time on matters of discipline and rulemaking. Disciplinary matters (over the bar) have become much more time consuming. Rulemaking has become more time consuming."\(^{69}\)

The size of the bar has almost doubled since I came to the court. There have to be more than twice as many discipline cases now than there were in 1977-1978. It seems at almost every conference matters of discipline are the subject of some discussion and court attention. There were far fewer petitions for rule changes then. The State Bar has substantially expanded its activities in the education, discipline and administrative fields. All of these fall upon us to make rules.\(^{70}\)

Administrative duties were a very minute, very small matter. I cannot recall a lawyer discipline case coming up. This was a rare thing. Now every month we get a few of them. We have so many more administrative matters. Look at the amount of time we spend on lawyer discipline, on judicial discipline, on ethics codes and on procedural rules.\(^{71}\)

These and other comments from the justices reflect that from their perspective the amount of time spent by the court on administrative matters has greatly increased.\(^{72}\) The justices indicated that administrative and supervisory duties consume at least two and one-half to three days a month.

Attorney discipline cases have increased substantially. From an average of about ten lawyer discipline cases a year in 1973, 1974 and 1975 (nine, five and fourteen respectively), the court now considers an average of about forty a year.\(^{73}\) The number of lawyer discipline cases considered from 1981 to 1987 are as follows:

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68. WIS. CONST. art. VII, § 3.
69. Interview with Justice Donald W. Steinmetz, Wisconsin Supreme Court, in Madison, Wisconsin (Jan. 12, 1988).
70. Interview with Justice Callow, supra note 1.
71. Interview with Justice Day, supra note 5.
72. Justice Abrahamson expressed a somewhat different viewpoint:
   I can't tell you whether it is more or less but prior to my coming on the court, the court did a tremendous amount — rules of evidence — and other big codes. So, I think it depends on your focus. If you took a long view of the court I think you would find that maybe since the 60's, (and again, maybe I'm just wrong,) this court has been very active administratively. So I don't know whether we have gotten more or less.
   Interview with Justice Abrahamson, supra note 15.
73. See supra note 61.
Per curiam opinions in judicial and attorney disciplinary cases are prepared either by an individual justice or by the assistant to the chief justice for the court's consideration. The per curiam opinions are all conferenced by the entire court, and, when necessary, reconferenced prior to issuance.

The court's responsibility in the administration and supervision of the bench and bar extends to many other areas, listed more fully below. The court holds one or more public hearings on most of these matters, confer-

74. Matters concerning supreme court administration that have consumed significant portions of court time and attention in recent years include:
   Code of Judicial Ethics revision (pending).
   Revision of Rules and Procedures concerning the Board of Attorneys Professional Responsibility and disciplinary proceedings (pending).
   Bar Admission Rules, including moral character requirement and foreign license admission (pending).

*Rules of Professional Conduct of Attorneys:*

*Teleconferencing Rules of Procedure:*

*Revision of Continuing Legal Education Rules:*
   In the Matter of the Amendment of Supreme Court Rules Chapter 30 and 31: Continuing Legal Education, 131 Wis. 2d xviii (1987) (adopted July 1, 1986, effective January 1, 1987).

*State Bar:*
   (a) *Dues reduction for legislative activities:*

   (b) *Dues referendum:*

*Interest on Trust Accounts Program (IOLTA):*

*Plea Agreements:*
   In the Matter of the Amendment of Rules of Civil & Criminal Procedure: Sections 971.07 & 971.08, Stats., 128 Wis. 2d 422, 383 N.W.2d 496 (1986).

*Felony Sentencing Guidelines:*
ences them both prior to and subsequent to the hearings, and approves them as to form and substance prior to issuance.75

III. Evaluation, Analysis and Conclusions

Have the objectives supporting the creation of the court of appeals been realized? If so, to what extent?

The concerns surrounding the creation of the court of appeals centered on the workload of the supreme court and the effects the workload had on the appellate process. The architects of the court reform sought to achieve five objectives with respect to those concerns: 1) substantially reduce the supreme court caseload; 2) decrease the time between filing the appeal and final determination of the cases; 3) allow the court to function collegially by having a sufficient amount of time for discussion, research, and review, thereby ensuring the best quality of opinions; 4) allow the court sufficient time to devote to its law-stating, law-developing function as opposed to a case-deciding or error-correcting function; and 5) allow the court ample time to adequately administer and supervise the bar and the courts.

It was hoped that the creation of the court of appeals, together with the granting of absolute discretion in the supreme court with respect to invoking its jurisdiction, would greatly alleviate, if not resolve, all of these concerns.

As stated previously, the purpose of this paper is to determine whether some of these objectives have been met. The questions of whether the quality of the decisions has improved and whether the court is acting primarily as a law-stating, law-developing court, are questions I leave to others. Both are elusive concepts, the "stuff" of which law review articles are made. Nor are these questions ones that a member of the court can objectively answer. I invite others to do so. Answers with respect to the other objectives are not so elusive.

A. Caseload Overview

Approximately 700 cases are filed each year in the supreme court and approximately the same number of cases are disposed of each year by the court. Although this number does not deviate substantially from the total number of cases filed prior to the creation of the court of appeals, most of the cases filed then were disposed of by a full written opinion. It was that time consuming task that led to delay and to the concerns regarding qual-

75. For other matters also considered by the court, including petitions for writs and motions, see INTERNAL OPERATING PROCEDURES, supra note 62, at 7-10.
ity, lack of collegiality and inadequate time for administrative and supervisory leadership. Today, a case is disposed of either by full written opinion or a denial of the request to accept jurisdiction — a petition for review, a certification from the court of appeals, or a petition to by-pass the court of appeals filed by one or both of the parties. As the following data show, approximately twelve to fifteen percent of the 700 cases a year that are filed result in a full written opinion. The remaining cases are denied review.

For purposes of this paper, statistics from the four years of 1984, 1985, 1986 and 1987 were reviewed. The figures for those years are:

<table>
<thead>
<tr>
<th>Petitions to Review</th>
<th># Filed</th>
<th># Granted</th>
<th># Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984:</td>
<td>620</td>
<td>60</td>
<td>567</td>
</tr>
<tr>
<td>1985:</td>
<td>670</td>
<td>66</td>
<td>536</td>
</tr>
<tr>
<td>1986:</td>
<td>680</td>
<td>80</td>
<td>622</td>
</tr>
<tr>
<td>1987:</td>
<td>672</td>
<td>55</td>
<td>601</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Certifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984:</td>
</tr>
<tr>
<td>1985:</td>
</tr>
<tr>
<td>1986:</td>
</tr>
<tr>
<td>1987:</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>By-Passes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984:</td>
</tr>
<tr>
<td>1985:</td>
</tr>
<tr>
<td>1986:</td>
</tr>
<tr>
<td>1987:</td>
</tr>
</tbody>
</table>

A summary of the above tables indicates that the number of petitions, certifications and by-passes that resulted in full written opinions each year is:

1984: 88
1985: 98
1986: 103
1987: 81

These numbers, however, do not paint a complete picture of the number of full written opinions that are written. The court, in its supervisory role over the courts and the integrated bar, must review and decide judicial and bar disciplinary actions. The total number of disciplinary cases reviewed in the years studied, all of which resulted in a full published opinion by the court, is:

1984: 44
1985: 37

76. See supra note 61.
In addition to the above cases requiring full written opinions, a number of other cases are given review which also require written opinions such as when the court invokes its original jurisdiction. Thus, a complete summary of full written opinions for the years described is:

<table>
<thead>
<tr>
<th>Year</th>
<th>Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>145</td>
</tr>
<tr>
<td>1985</td>
<td>122</td>
</tr>
<tr>
<td>1986</td>
<td>94</td>
</tr>
<tr>
<td>1987</td>
<td>116</td>
</tr>
</tbody>
</table>

The reason why the number of opinions has been reduced from five to six cases per month per justice to one to two cases per month per justice is obvious. Although the court receives as many appeals, or more, as it did prior to the creation of the court of appeals, the court no longer must accept every case. As a result of court reform, the court is a full certiorari court with complete discretion. It is now free to choose those cases for full review that it perceives meet the criteria of section 809.62(1) of the Wisconsin Statutes, which states, in part:

The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

(a) [Whether] a real and significant question of federal or state constitutional law is presented.

(b) [Whether] the petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

(c) [Whether] a decision by the supreme court will help develop, clarify or harmonize the law, and

1. [Whether] the case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
2. [Whether] the question presented is a novel one, the resolution of which will have statewide impact; or
3. [Whether] the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

(d) [Whether] the court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

(e) [Whether] the court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the
passage of time or changing circumstances, such opinions are ripe for reexamination.\textsuperscript{77}

These criteria reflect the legislative concerns that the court act primarily as a law-stating, law-developing court, not an error-correcting or case-deciding court.

It is clear that the first objective, reducing the caseload, has been met, even though the number of cases appealed to the supreme court remains approximately the same. Although the general concern was with the number of cases, the specific concern centered on the fact that each case appealed to the supreme court required a full written opinion. That is not so today.

What is the result of the reduced number of opinions that are required of each justice? As the rest of this paper details more fully, the result has been substantially less delay in final resolution of appeals, greater collegiality in the consideration of cases, and a greater amount of time available to devote to the court's administrative and supervisory responsibilities. In addition, the court now must spend three to five days a month in its initial review function reviewing all the requests for the court to accept appeals from the lower courts, a function that must be exercised with great care if the court is to be something other than merely a case-deciding or error-correcting court. Each of these results will be discussed in turn.

B. Length of Time for Appeals

Delay was a primary concern of the architects of court reorganization. Prior to the creation of the court of appeals, the average litigant had to wait one and one-half to two years for his or her appeal to be heard and decided. As the following table shows, this time has been reduced dramatically.

Category One refers to the time interval between filing a petition for review and the court's decision on the request. From the years 1984, 1985 and 1986, the author randomly selected twenty-four petitions for review that were filed with the court each year. From the date of filing to the date of court disposition, the average time was less than two months. Thus, the average litigant in the years selected, after filing the petition for review with the court, had to wait a little less than two months for a decision from the court as to whether the court had granted or denied the request.

Category Two refers to the time interval between granting a petition for review to final disposition. Again, the author chose the years 1984, 1985 and 1986, and randomly selected fifteen cases from each year. What was

\textsuperscript{77} \textit{Wis. Stat.} § 809.62(1) (1985-86).
sought was the length of time from the date the court granted the petition for review to the date the court mandated the opinion.

In 1984, the average length of time was 7.5 months. The longest interval was eleven months, the shortest interval was one month, and the median was approximately eight months.

In 1985, the average length of time was 7.3 months. The longest interval was eleven months, the shortest interval was 1.5 months, and the median was approximately seven months.

In 1986, the average length of time was 7.7 months. As in 1985, the longest interval was eleven months, the shortest interval was 1.5 months, and the median was seven months.

Thus, the average litigant who had his or her petition for review granted was given a final disposition of the case within seven to eight months of the date granted. Because the average briefing period (the time set by the court for the parties to file their briefs) is sixty days from the date the petition is granted, the average length of time from the date the case is ready to be heard to the date of final disposition is five to six months.

Because eighty-five to ninety percent of all appeals are disposed of in the court of appeals without further review by the supreme court, the obvious question is whether the delays experienced prior to 1978 have simply shifted to the court of appeals. The answer is no. Despite a caseload of approximately 2,400 cases a year, substantially more than was originally anticipated, the termination time for all cases in the years 1984, 1986 and 1987 was respectively 7.2 months, 5.9 months and 7.1 months, or an average of approximately 6.5 months. For those cases requiring a full authored opin-

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78. See Wisconsin Appellate Practice and Procedure Study, supra note 3.
ion, the times for those three years respectively were 10.6 months, 10.2 months and 10.5 months (1985 was unavailable).\footnote{Statistics provided by Chief Judge Burton Scott, Wisconsin Court of Appeals.}

In sum, the problem of delay appears to have been resolved. A litigant used to have to wait eighteen to twenty-two months for a final disposition. Today, a litigant who files a petition for review usually waits no more than one to three months for that decision. If the petition for review is granted, the average litigant waits seven months for a final opinion, two months of which is consumed by the filing of the parties’ briefs. Nor has the delay that used to exist in the supreme court been transferred to the court of appeals. Cases requiring a full authored opinion in that court take a little more than ten months to complete. Thus, of all cases appealed from the trial courts, approximately ninety percent of them are resolved in ten months or less. In those cases that are subjected to two full reviews, one by the court of appeals and another by the supreme court, the average time is approximately seventeen months, one month less than the minimum time it used to take for one full review in the supreme court.

\section*{C. Collegiality of the Decision Making Process}

One of the most serious concerns of the Citizens Study Committee was the inadequacy of the time available for a collegial decision in all cases. To the extent the term “collegiality” refers to the opportunity and realization of full discussion of all matters before the court by all members of the court, there is no question that the collegiality of the decision-making process is considerably improved. The justices’ responses indicate that, in essence, each case receives all the time that any member of the court seeks to give it. There is no time limit within which the assigned justice must write the assigned case. There are at least five reviews of each accepted case by the full court and more when any member desires. There is no time limit set on the justices for writing concurrences and dissents either, and the numbers of full and thorough concurrences and dissents reflect that the justices are availing themselves of the time.

\section*{D. Administrative and Supervisory Responsibilities}

At the time of court reorganization, there was a concern that the caseload of the supreme court left little or no time for the court to exercise its administrative and supervisory responsibility over the courts and the bar. The constitutional amendments passed in 1977 made it clear for the first time that the supreme court had superintending and administrative au-
authority over all courts. The responses of the justices indicate that a much greater amount of time has been devoted to this function since 1977. The administrative activities of the court over the last few years, and the increased volume (nearly four-fold) of lawyer disciplinary cases, support the justices' comments. Of equal importance is the conclusion of the justices that the amount of time available is adequate. Thus, the objective of greater supervisory and administrative responsibility over the courts and the bar is being met.

E. The Supreme Court As A Law-Stating, Law-Developing Court

An objective of court reform was to allow the supreme court to devote more time to formulating and articulating a coherent body of jurisprudence. If the supreme court is to succeed in that goal, then great care must be taken in deciding what cases to review in the first instance. From the responses of all the justices, a great deal of time and attention is paid to this function. It occupies approximately three to five days a month, time that was not spent in this regard prior to court reorganization, inasmuch as all cases appealed were automatically reviewed.

Whether the court's use of this time adequately selects out those cases which do not present the opportunity for law stating or law development is a judgment I leave to others. Nevertheless, given the amount of time available for this initial review and the amount of time available to review and work on those cases accepted for review, the tools are certainly in place for the court to emphasize this role if it chooses to do so.

IV. Conclusion

During the course of the interviews, the justices were asked a concluding set of questions: What about court reform? Is it working better than you anticipated? What, if anything, is worse? What would you do differently if you could rewrite the bill?

The justices, without exception, expressed respect and admiration for the work of the court of appeals. A typical remark came from Justice Day: "The court of appeals has been a real boon to this judicial system. You read their opinions and you know they are really grinding it out like we used to have to do. And they're doing it very well."80

However, a number of justices pointed out that the caseload in the court of appeals is substantially higher than was originally anticipated. Original estimates projected a caseload of about 900-1,200 cases a year. That esti-

80. Interview with Justice Day, supra note 5.
mate was woefully conservative. In 1984 there were 2,484 cases filed in the
court of appeals; in 1985 there were 2,434; in 1986 there were 2,275; and in
1987 there were 2,406.\textsuperscript{81} Although these figures probably indicate that the
intention of providing an easily accessible appeal at minimum expense has
been achieved,\textsuperscript{82} the justices regret that it has probably been achieved at the
expense of oral argument in the court of appeals.

I would have more judges on the court of appeals. They have a huge
volume of work they have to handle. It is regrettable that some im-
portant issues in the court of appeals do not have oral arguments at
all. Whatever number it takes, six judges in nine districts should be
given so as to allow for oral arguments.\textsuperscript{83}

One final conclusion: Recent press stories\textsuperscript{84} indicate that perceptions
still exist that the court should be judged by the numbers, more precisely,
how many cases are disposed of by full written opinion. These and other
stories indicate a lack of understanding about the functions of the present
day court, the changes that have come about, and the reasons for those
changes. The work of the supreme court under the present system is far
less public than it was prior to the creation of the court of appeals. Prior to
1978, the productivity of the court could reasonably and accurately be
judged by the number of written opinions it produced during the course of
the year. It was a "numbers" court. Writing opinions, a very visible func-
tion, was the court's primary if not sole function. Today, that is not so.

Much of the work of the court is far less visible and far less interesting
to the general public. The initial review function and the administrative
and supervisory functions are seen by and affect few people. The additional
amount of time that is spent in reviewing, discussing, writing, and critiqu-
ing within the court is not all visible to the public eye.

A measuring stick taking into account solely the number of written
opinions per year may well have been an accurate measure of productivity
prior to 1978. However, a measuring stick based on numbers alone is no
longer an accurate measure. The concept of "productivity" with respect to
the court has been changed dramatically by court reorganization. The
problem, of course, is that the changed concept of productivity makes it far
more difficult to subject the present court to objective critical analysis.

\textsuperscript{81} Id.
\textsuperscript{82} Wilkie, supra note 6; see also CITIZENS STUDY COMMITTEE, supra note 2, at 82.
\textsuperscript{83} Interview with Justice Ceci, supra note 63.
\textsuperscript{84} See Kenyon, Past Unequaled: Conflict Holds Court Back, Milwaukee Journal, Apr. 14,
1987, at 1, col. 2; Kenyon, Justices Duck State's Toughest Cases, Critics Charge, Milwaukee Jour-
nal, Apr. 13, 1987, at 1, col. 2; Kenyon, Justice Awry: Collegiality Crumbles as Temperaments
How does one measure "quality"? How does one measure whether sufficient attention is paid to "law-stating, law-developing" as opposed to "error-correcting"? It is a fertile field I leave to others.