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California Appellate Court Reform— A Second Look

SETH M. HUFSTEDLER*

Most commentators familiar with the administrative pressures placed upon the appellate process in California, due to the massive number of cases appealed from trial court determinations, are in agreement that substantial reform of the appellate system, in one manner or another, is of practical necessity. A debate, however, has arisen with respect to the precise form such revision ought to assume. In 1972, a special committee of the California State Bar, chaired by Mr. Hufstedler, proposed comprehensive restructuring of the appellate system. That proposal suggested, inter alia, that appellate review be divided between cases appealed for a "review for correctness" and those appealed for "institutional review." Further, the proposal recommended that the presiding trial court judge participate in the appeal process. The proposal was met with vigorous opposition, principally by Mr. Jack Leavitt in an article appearing earlier this year in the Pacific Law Journal. Herein, Mr. Hufstedler discusses in detail the rationale supporting the proposal in light of the current trends in appellate review case loads. Mr. Hufstedler then analyzes the criticisms of the proposal and responds by submitting a modified proposal for appellate reform.

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Although I previously served as Chairman of the Special State Bar Committee re Appellate Courts, that committee is presently under the able chairmanship of Robert Seligson of San Francisco. Many of the ideas discussed in this article have been sug-

THE PAST

A little over a year ago the State Bar Special Committee re Appellate Courts proposed a new model for California appellate courts.¹ The new model was suggested, not for immediate adoption but for discussion, to focus attention upon problems in our present appellate system and to encourage consideration and development of various improvements. The proposal was successful far beyond expectation in stimulating discussions of appellate court changes. It has not, however, attracted many adherents who are prepared to put the plan into operation, at least insofar as several particulars of the proposed model are concerned.

The proposal was aimed at two emergent problems in the California appellate structure: (1) the overload of cases pending in the courts of appeal, and (2) the undue burden on the California Supreme Court, particularly in connection with reviewing petitions for hearing. It also added a few additional frills, not essential to those two basic considerations.²

Thus, as a starting point, the original proposal considered several different problems and suggested several solutions relating to those problems. Although the problems were closely interrelated, most of them could be considered and treated separately.

In the intervening period, two significant favorable trends have become discernable. First, the rapid increase in the number of cases seems to be leveling off.³ Perhaps these problems will not be as pressing in future years as originally forecast. Nonetheless, case loads are still increasing and the problem has currently developed to the point where it requires further attention.

gested by members of that committee as well as by other practicing lawyers and judges. However, the conclusions expressed herein are my personal conclusions and are not chargeable either to the State Bar or any of its committees.

1. 47 CAL. S.B.J. 28 (1972).

2. The proposal suggested that the reviewing court of two appellate judges and the trial judge should have the powers of the trial court on a motion for new trial as well as the powers of an appellate court on appeal. The reviewing court would thus have the power to reevaluate the facts, to the extent that the trial judge might on a motion for new trial.

3. Total filings in the California Supreme Court reached a high of 3400 in 1969-70. In the last two fiscal years, they were 3179 and 3238 respectively. Petitions for hearing, however, have continued to increase. In the last three years they were, respectively, 2064, 2198, and 2417, an increase of 17% in two years (and an increase of 200% from 803 in ten years). JUDICIAL COUNCIL OF CALIFORNIA, 1973 ANNUAL REPORT 173.

In the courts of appeal, appeals decided by written opinion continue to increase. In the last three years, they were, respectively, 3221, 3544, and 3997, an increase of 24% in two years (and an increase of 177% from 1442 in ten years). JUDICIAL COUNCIL OF CALIFORNIA, 1973 ANNUAL REPORT 179.

Second, some appellate courts have actually succeeded in reducing their backlogs.⁴ This fact is both comforting and misleading. It is comforting because it suggests that our courts can adequately handle the present volume of litigation. It is misleading, however, because it may not be an accurate long range reflection on the adequacy or the capacity of our present system. The reduction in backlog has occurred only because many judges have made an almost superhuman effort to bring it about, and we cannot expect judges to be able to do that indefinitely.⁵

Another factor which has stimulated increased output per appellate judge is the use of additional staff. Lawyers generally favor the efficient and adequate use of staff on matters which do not require judges' time but, rightly or wrongly, are highly suspicious of further staff increases on the grounds that the staff may be performing tasks which the judges should perform.

These encouraging trends and steps relate to the overload of cases only in the court of appeal, for the pressures on the supreme court have not abated, and the load on our supreme court justices is already too high. If we expect the justices of our supreme court to have that distant vision necessary to decide the fundamental problems of the day, we must give them adequate time for reflection.

The proposals and considerations of the State Bar Special Committee re Appellate Courts are therefore still relevant; the problems are current and pressing, although the rate of increase may have slowed. We still require answers.

THE PRESENT

A. Key Points in the Prior Proposal

The prior proposals for discussion considered several basic points. First of all, they were based upon an analysis of the function of the appellate courts.⁶ The opinions of the appellate courts serve two dif-

4. The average elapsed time from "ready for calendar" to "filing of opinion" in the 13 divisions of the court of appeal dropped from about eight and a half months for the quarter ending June 30, 1970, to about six months for the quarter ending June 30, 1972. JUDICIAL COUNCIL OF CALIFORNIA, 1971 ANNUAL REPORT 97; 1973 ANNUAL REPORT 183.

5. In the fiscal year 1971-72, the 42 full-time judges authored an average of 69 individual opinions compared to 65 the year before. In addition there were 872 "by the court" opinions.

Although a breakdown of authorship of the "by the court" opinions is not presently available, if each judge averaged 18 of them, the average total opinions per judge would exceed 85, compared to 77 the year before. JUDICIAL COUNCIL OF CALIFORNIA, 1973 ANNUAL REPORT 177, 179.

6. The functions are discussed in more detail in the original report, 47 CAL. S.B.J. 28, 30-31 (1972).

ferent functions: (1) to review the judgment of the trial court for correctness ("review for correctness") and (2) to establish the law of the jurisdiction, not only in matters of statutory and constitutional interpretation, but in the development of the common law and the regulation of the judicial structure ("institutional review").

The institutional concept is old; indeed, it is simply a recognition of the application of the doctrine of stare decisis to the review for correctness.

The review for correctness is essentially a procedure for the benefit of the parties, to determine whether or not the trial court reached the fair and correct decision for the litigants. That determination should advise the parties of the result and the reasons for the result so that they and society generally will accept that determination as an appropriate resolution of the particular controversy. It does not necessarily follow that that decision should be contained in a formal opinion, published in the law books and constituting a part of the precedential law of the jurisdiction.

On the other hand, some cases do lay down rules which should have an institutional effect; that is, they should become the guiding law of the jurisdiction. Those cases must of necessity be carefully drafted in a formal opinion which is published and available to those persons governed by it.

The basic thesis of the Special Committee's Report was that the appellate process should be more closely tailored to the functions it serves. So long as we allow any party to seek review on appeal, all cases must be reviewed for correctness if the parties demand that review. However, all cases do not require institutional treatment. Only those which do decide new or important issues should be treated as institutional opinions.

Of course this distinction is now recognized in the California Rules of Court, which provide that opinions will not be published unless they meet criteria which, in effect, show that they should be treated as institutional cases.⁷ Unfortunately our law is decidedly unclear as to whether or not unpublished cases are legal precedent, and whether or not courts are required to take judicial notice of them under our statutes.⁸ Furthermore, we have not taken advantage of other simplifications

7. CAL. R. CT. NO. 976(b) provides that an opinion of the court of appeal shall not be published unless it "(1) establishes a new rule of law or alters or modifies an existing rule, (2) involves a legal issue of continuing public interest, or (3) criticizes existing law."

8. Seligson & Warnlof, *The Use of Unreported Cases in California*, 24 HAST. L.J. 37 (1972).

which may be possible in the procedure, especially treatment of cases solely for the review for correctness.

In essence, therefore, the prior proposal recommended that cases be promptly and simply reviewed for correctness under an expedited procedure which would result only in informing the parties of the appropriate result and the reasons for it. No formal opinion was to be written, nothing was to be published, and the determination was not to be considered precedent. The proposal also recommended that the review for correctness be made by three judges, two appellate judges and the judge who presided over the case in the trial court.

After the review for correctness, the prior proposal would have allowed the parties to petition for a further hearing in a newly created court, the "Court of Review." That court would hear only those cases which it determined were suitable for institutional review, and would write an opinion which would be published and would be precedent. The supreme court would then grant or deny hearing after the determination by the court of review.

The final objectives of the system were as follows:

- (1) A prompt review in sixty to ninety days following judgment, on appeal, to review the determination for correctness.
- (2) Provision for a further careful review for those cases which would constitute precedent and involve institutional issues.
- (3) The court of review would relieve the supreme court of the initial burden of screening cases, thus allowing the supreme court more time for consideration of more important cases.

B. Criticisms of the Prior Proposal

In his recent thoughtful article,⁹ Jack Leavitt discusses the basic objections which have been raised to the prior proposal. He designates "two vulnerable innovations" of the proposal, describing them as (1) "the use of the trial judge as part of the appellate board" and (2) "creation of a buffer court to establish statewide policy until the supreme court decides to act."¹⁰

1. Use of Trial Judge on the Review Panel

The committee's suggestion that the trial court judge sit as one of the reviewing panel of three has undoubtedly attracted the most attention and, I would say from my unscientific evaluation of the com-

9. Leavitt, *The Yearly Two Foot Shelf: Suggestions For Changing Our Reviewing Court Procedures*, 4 PAC. L.J. 1 (1973).

10. *Id.* at 11.

ments, has been strongly disfavored by a majority of people who have reviewed the proposal.

The purpose of having the trial judge sit on the panel was primarily because of the assistance it would give in expediting the hearing. The review for correctness could be held following substantially the same procedure as is now used for the motion for new trial, perhaps within thirty to sixty days of the judgment or verdict in the case. In most cases, trial counsel would participate in that hearing, and they, together with the judge, could resolve the factual problems which were critical to the review. Thus, in many cases, the hearing could be held without the necessity of a reporter's transcript.

The inclusion of the trial judge had the collateral advantage that the trial judge and the two appellate judges would review the case together, so that the appellate judges would have the benefit of the trial judge's thinking. Also the trial judge, in acting on the case in the first instance, would presumably be less arbitrary since he would know that he would sit down with the appellate judges to review his determinations.

The objections to the inclusion of the trial judge on the review panel are based upon the contention that it is likely the appellant would not get a fair shot if one of the three judges had already decided the case against him. In this case, the trial judge and the respondent would need to persuade only one of the other two judges that the determination was correct, whereas now two new judges must be so persuaded.

Furthermore, so the argument goes, the trial judge would become an advocate for the respondent, admitted to the confidential discussions of the court, while the appellant would not be similarly represented. Finally, it is urged that judges would not want to reverse the trial judge in face-to-face discussions and there should be more remoteness between the trial judge and the appellate court to encourage a more objective review.

The points are well taken and cannot be entirely dispelled. With able judges, the problems would probably not occur; with arbitrary or recalcitrant judges, the inclusion of the trial judge on the panel might be a mistake.

It is therefore my personal opinion from my own informal evaluation of the comments that this feature of the plan should be dropped at this time because of the strong opposition to it. A pilot project, at some future date, might be designed to test the validity of this concept in practical application.

2. Difficulty of Proceeding without a Transcript

One of the advantages of including the trial judge on the review panel

was the possibility of proceeding without an entire reporter's transcript. A motion for new trial is generally heard without the transcript or, on occasion, using only excerpts from it. The elimination of the trial judge from the review panel brings us back directly to the question of the necessity and adequacy of the transcript on appeal.

Lawyers and judges all apparently have strong feelings about transcripts on appeal, and the opinions are widely diversified. One reason may be that all lawyers and judges are, or consider themselves to be, experts on the questions of transcripts.

Nonetheless, after extended discussion on the problems of transcripts, most observers seem to agree on two or three basic principles:

(1) The appellate process should not be delayed for months because of the preparation of the transcript.¹¹ The delays now caused by transcript preparation require solution, and we should devote the time and the money necessary to prevent appellate delay due simply to the delay in preparation of the transcript.

(2) Full transcripts are generally not necessary on appeal. Appellate judges report that in many cases they never need refer to the transcript at all. In many more cases, they need refer only to a few pages of the transcript. In a few cases, the entire transcript is required.

(3) We require, therefore, a mechanism to determine how much of the transcript is necessary for each appeal, and then a means to have that transcript prepared within a matter of a few weeks at most.

As technology improves, transcripts can undoubtedly be prepared more quickly. We simply must do the best job we can to obtain an adequate minimum transcript for each appeal in the shortest possible time.

3. *Creation of a Court of Review*

A second portion of the committee's recommendation which received the most criticism was the suggestion of the creation of a new court, the "Court of Review." That court was to be a small court of statewide jurisdiction inserted between the court of appeal and the supreme court. It was designed to serve two important purposes: (1) it would have provided a court of statewide jurisdiction for decision of institutional cases, and (2) it was to have been the preliminary screening agency for the supreme court.

The proposed court of review was to hear cases only after granting

11. See, e.g. Christian, *Delay in Criminal Appeals: A Functional Analysis of One Court's Work*, 23 STAN. L. REV. 676 (1971).

a petition for hearing, and it would have granted a hearing only in those cases which contained issues which should have been decided for institutional purposes. It would therefore have taken relatively few cases, and all its opinions would have been published and would have served as precedent.

Mr. Leavitt's article thoroughly presents the objections which have been made to the court of review. He argues that it would be "cumbersome," in that it would be time consuming and costly to the parties, that it would shift power from the supreme court to the court of review, and that screening would be wasted because it would occur too soon in the appellate process.¹²

The argument against the court of review that it is cumbersome, costly, and time consuming is on its face apparently sound. The present appellate system is criticized because it takes too long to decide cases; yet the proposal would add a new court and a possible fourth step. It follows, goes the argument, that a four-step process must be more costly and time consuming than a three-step process.

On examination, however, that conclusion need not follow. Our appellate system can be judged in many different ways, but an analysis of three basic points will probably serve our purposes: time, expense, and quality. What is the overall time necessary to reach a final answer? What is the expense to the parties and to society to receive a final answer? What is the quality of that answer?

If a four-step system can give a better answer in less time and at lower cost, it should be preferable. In other words, the answer should be determined by the cost, capacity, and capability of the relative systems and not simply by counting the number of steps involved.

The court of review proposal was based upon the proposition that a review for correctness could be required within sixty to ninety days from trial judgment. For the large bulk of cases, final determination would then have been reached in sixty to ninety days, rather than two to three years as is now the situation. The case would also have been determined at a time when it was fresh in the minds of trial counsel, and they would not have to re-prepare to write briefs and further prepare for argument many months later. About twenty percent of the opinions written by the courts of appeal are now published.¹³ If this is an indication that eighty percent of the cases do not raise institutional issues, judgment would thus be final within three to four months follow-

12. Leavitt, *supra* note 8, at 11, 13, 14.

13. In 1971-72, 79% of the majority opinions of the court of appeal were not published. JUDICIAL COUNCIL OF CALIFORNIA, 1973 ANNUAL REPORT 184.

ing the trial court judgment in about eighty percent of the cases. There would thus be tremendous savings in time and costs for the parties involved. Furthermore, so far as the parties are concerned, their purposes should better be served by a review aimed at determining the correctness of the decision below than by the present kind of review which is aimed at making case law for the entire jurisdiction from their particular problem. Therefore, certainly as to the approximately eighty percent of the cases which are finally resolved at this stage, quality for the purpose involved may well indeed be better, and the time and expense less.

Other cases remain, however, which may require one or two more steps in the judicial process. Certainly those steps will require additional time and costs to the parties. However, those are cases which must be carefully considered because they have institutional questions which the court should review. The cost involved would undoubtedly approximate that involved in the present appeal. Quality, however, should be appreciably better if our court structure permits the judges to have time to carefully consider and write opinions in a ratio of perhaps forty cases per judge rather than eighty-five as now exists. If the system were not overly crowded, the time could well be reduced from the present median time of about a year and a half in our courts of appeal.¹⁴

Critics of the proposal, including Mr. Leavitt, have pointed out the "by-pass" dilemma. They argue that if the court of review has the entire and final authority in the screening process, it means that it can control all of the cases which come to it; that if the parties may petition the supreme court for review only in cases decided by the court of review, the court of review would determine which cases may ultimately be heard by the supreme court. Thus, the critics argue, the supreme court would be greatly weakened and perhaps ultimately become somewhat subsidiary to the court of review.

On the other hand, if the supreme court retains final authority over the screening process, so that any party aggrieved by the failure of the court of review to take the case could petition the supreme court directly, then nothing has been accomplished. The supreme court would still be inundated with the same number of petitions for hearing.

Although the argument is appealing, there is a practical solution. The supreme court now has the power to bring before it any case in the courts of appeal.¹⁵ Although rules now encourage the filing of a

14. JUDICIAL COUNCIL OF CALIFORNIA, 1973 ANNUAL REPORT 183.

15. CAL. CONST. art. 6, §§4, 4a-c; CAL. R. CT. No. 20.

petition in original proceedings in the lowest court of appropriate jurisdiction,¹⁶ the supreme court can and does entertain cases of unusual importance initially.¹⁷ It does so only where the case has a special public importance or where a pressing immediacy exists.¹⁸ However, the supreme court is not inundated with such unusual petitions because there must be an extraordinary showing before the court will take such cases. A similar practice could be followed here. Screening by the court of review could be final except in unusual cases.

Another of the points raised by Mr. Leavitt also requires careful consideration and evaluation. He stated,

The real failure of the court of review . . . is its tentative supremacy. Instead of deciding each assigned case on the merits as the court of appeal does now, the justices of the court of review would first have to brood about whether they wanted to hear a particular dispute at all. The decisions to grant or withhold jurisdiction, though appropriate to the workings of our highest authority, are wasted at the lower levels.¹⁹

A superficial, but not complete, answer is that if a court in the appellate system must spend a substantial part of its time deciding not to hear cases, it is far better to have that time spent by a court below the supreme court. Estimates from various members of the supreme court concerning the time they spend on reviews of petitions for hearing vary from about twenty percent to about a third of their productive time. Since the supreme court grants only about ten percent of the petitions for hearing,²⁰ no apparent work product arises from this substantial segment of the court's time. It would be far preferable if that nonproductive time could be shifted to a court of review and leave the supreme court with all of its time, or most of it, to spend on more productive matters.

The fundamental question thus becomes whether or not another court can effectively screen cases in a manner acceptable to the supreme court. We cannot definitively answer that question until we try it. However, the supreme court usually writes approximately 150 opinions per year. If the court of review sat in four panels, and each panel handled approximately 125 cases per year, the court of review would

16. CAL. R. CT. No. 56.

17. See, e.g., *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971); *Mooney v. Pickett*, 4 Cal. 3d 669, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971); *San Francisco Unified School Dist. v. Johnson*, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309 (1971).

18. 5 WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §115 (2d ed. 1971); also see cases cited note 17 *supra*.

19. Leavitt, *supra* note 9, at 14.

20. The rate was 9.3% in 1971-72. JUDICIAL COUNCIL OF CALIFORNIA, 1973 ANNUAL REPORT 176.

select and decide 500 cases per year from the 3500 cases or so which were reviewed for correctness. Because the court of review would select those cases which have important institutional questions, the 500 cases they selected would most likely include almost all of the 150 cases which the supreme court would like to hear. The price paid is the risk that the court of review might not include within its 500 cases one or more of the 150 cases the supreme court would want to hear. Yet that risk would be overcome by the special petitioning process previously discussed.

Furthermore, a recent suggestion²¹ would provide another safeguard. It has been recommended that all orders of the court of review denying petitions for hearing should contain a short statement by the court of review, stating the reasons for denying the petition. The order denying the petition should be forwarded to the supreme court where it could be considered for thirty days. Unless the supreme court directed different action, it would then become effective.

The procedure would serve two important purposes: (1) it would preserve in reality as well as appearance the final supremacy of the supreme court in all cases, and (2) it would keep the court of review "honest" in attempting to comply with the directives of the supreme court.

On the other hand, it would not mean that the supreme court must, of necessity, review in detail all of the petitions for hearing. The court could rather promptly determine whether or not the case raised issues which it wanted to consider.

These considerations lead to the conclusion that the "tentative supremacy" of the court of review is not a drawback, but indeed an advantage; the court of review can serve the function of a preliminary screening of cases, thus preserving the supremacy of the supreme court while at the same time shifting the burden of less productive work to a court below the supreme court.

THE FUTURE: A MODIFIED PLAN

The very valuable comments received from scores of members of the bar and the judiciary have been most helpful in evaluating the proposals for a court of review. My personal opinions in this area have changed appreciably, influenced in part by what I believe to be valid criticisms and in part by what I believe to be political realities. Let me therefore suggest a modified proposal for a new model for our appellate system.

21. Suggested by a jurist (related to me by marriage) in connection with the Freund Committee report regarding a screening court for the United States Supreme Court.

It is still my personal opinion that the insertion of a court of review, coupled with a prompt review for correctness, would greatly improve the quality of justice in our judicial system and expedite final determination. Nonetheless, I have serious doubts that such a program will be accepted in the near future. I would therefore urge for further consideration and experimentation the *concept* of a court of review but suggest here a more modified plan which does not involve the creation of the court of review.

Furthermore, it appears to me that it is impractical at this time to pursue the suggestion that the trial judge be included upon the appellate review panel. The following model does not include that proposal.

Model II would operate as follows:

1. The trial court procedure, for these purposes, is treated as independent and would not be affected. The new procedures would take effect following the entry of judgment or the rendition of verdict.

2. A motion for new trial would cease to be optional with the parties and would become discretionary with the trial judge. Any party, within ten days following the entry of judgment or rendition of verdict, could file a petition for leave to file a motion for new trial, listing but not arguing the points which he would raise on his motion for new trial. The court, without argument and within short time limits, could deny that motion, or could grant it and set it for hearing within the time periods presently allowed.

3. Within the time allowed for a notice of appeal, either party could file a notice of appeal. From that point on, the supervision of the appeal and the preparation of the record would pass to the appellate court.

4. The staff of the appellate court, working with the lawyers involved under appropriate rules of court, would supervise the preparation of the appellate record. The object would be to obtain the minimum record necessary for the appeal in that particular case, in the shortest possible time. The staff would not only seek to determine the scope of the record in conjunction with counsel involved, but would insist upon expedition.

Briefing schedules of the parties would be reduced and more closely adhered to, and the briefs would be less formalized so that the parties could use a points-and-authorities format in raising the points they wish to have the court consider on appeal.

5. Each appeal would be treated simply as a review for correctness, unless and until the court decided that the case should be treated

for institutional purposes. Treating a case as a review for correctness would not limit in any way the scope of the review; any party could raise any issue on appeal and expect the court to decide the issue as fairly and completely as now. However, unless the court decided to treat the case as an institutional case, the court would attempt where possible to decide the case from the bench at the conclusion of oral argument, with oral opinions from the judges; the judges would attempt to inform the parties in those opinions of the reasons for their determination. If the judges wished to have written memoranda or opinions, they could do so.

The object of the opinions would not be to formulate law for the jurisdiction, but simply to advise the parties why the case had been decided in the manner in which it had. The opinions would not be precedential authority and would not be published.

6. At any point the appellate court could direct that the case would be treated for institutional purposes. That determination would be based upon the court's conclusion that the issues involved justified institutional treatment. Upon making such determination, the court would then designate what other or additional steps, if any, should be taken in that case. For example, after argument the court might well conclude that the case should be treated as an institutional case. At that point, the court would decide whether or not it had adequate briefing and other information upon which to write the opinion. If it did, it simply would write a formal opinion for publication as it now does. If it did not, it could direct what further steps should be taken, including additional briefing and additional argument if desirable.

7. Such institutional opinions would be published and would become precedent.

8. After the matter had been decided by the court of appeal, whether with a precedential or nonprecedential opinion, a petition for hearing would lie to the California Supreme Court, as is now the case.

As is apparent, Model II eliminates several of the features which were most objectionable in the comments received. It seeks to salvage the principal feature of a quick, inexpensive and simple review of the determination of the trial court for the benefit of the parties. It provides a new method whereby cases which do have important points can be segregated and can be treated by a procedure tailored to the points to be decided in that particular case. It also adds staff supervision to expedite appeals.

Compared to the original proposal, it gives less relief to the supreme court. It does not reduce the number of cases in which a petition for

hearing by the supreme court could be filed. It does, however, create a psychological restriction in some cases because if the court of appeal decides that the case is not entitled to precedential treatment, it has expressed the opinion that there are no institutional issues involved in the case. The court of appeal does that now, in effect, when it refuses to elect to publish an opinion.

On balance, it would seem to me that Model II would accomplish many of the objectives of the original proposal for a court of review; it removes many objectionable features and avoids major restructuring of the appellate system.

What say you?