DISTRIBUTING DRAFT DECISIONS BEFORE ORAL ARGUMENT ON APPEAL: SHOULD THE COURT TIP ITS TENTATIVE HAND? THE CASE FOR DISSEMINATION

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I. INTRODUCTION

Attorneys at oral argument of an appeal face no easy task. Justice Robert H. Jackson, a leading appellate advocate of his time,[1] put it this way:

> I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I had planned—as I thought, logical, coherent, complete. Second was the one I actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.[2]

As Jackson's words attest, even the most skilled advocates may find themselves fumbling their way through oral argument, struggling to fashion coherent and persuasive points under the pressures of high stakes and a ticking clock.[3] The difficulty is multiplied if judges use oral argument, as many do, to

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1. *See* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 24 (1986).

2. Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951). *See also* ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS 216 (The Lawyers Co-operative Publishing Co. 1983) (stating that Jackson's description is even more valid today, "in an era of very short oral arguments before a busy but well prepared panel of judges.").

3. The stress of argument derives in part from its potential decisiveness in a case. As one practitioner observes, "several years of litigation, scores of depositions, warehouses of documents, hundreds of thousands of dollars of expense, and millions of dollars in controversy may depend on how you use 20 minutes at the lectern." Gary L.

explore with counsel new legal theories or hypothetical scenarios. "[A] short oral argument is hardly the most appropriate time to obtain a thoughtful response from counsel about a novel idea. Attorneys will be far more likely to give a reasoned response if given an opportunity to reflect on the idea, review the record, and do additional research."[4] Yet few appellate courts provide the parties with any indication of how the court is leaning before argument.[5] Thus, advocates commonly enter argument at least partly guessing which issues the court finds most important, which cases the most relevant, and which arguments the most forceful.[6] Once before the bench, attorneys parse questions and comments from the judges for clues as to the court's focus and predisposition.[7]

Of course, trying to read the court's mind assumes that the court *has* a mind, or is of *one* mind about the case. Always lurking for the appellate attorney is the threat of "appellate ambush"—the danger that one or more judges will lure the advocate into arguing in one direction, or focusing the attorney's limited time for

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Sasso, *Appellate Oral Argument*, LITIG., Summer 1994, at 27. Another concern for the advocate is the common practice at oral argument of judges seeking concessions from attorneys on factual or legal points that may prove outcome-determinative. A misstep in the attorney's response can end up losing the case. STATE BAR OF ARIZ., ARIZONA APPELLATE HANDBOOK § 2.5.3 (Hon. Sheldon H. Weisberg & Paul G. Ulrich eds., 2000).

4. Martineau, *supra* note 1, at 16; *see also* Sasso, *supra* note 3, at 24 ("Realistically, one should not expect the average attorney to respond effectively to unanticipated questions, relying solely on memory, without an opportunity to reflect on either the question or the response.").

5. Thomas B. Marvell, *Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar*, 75 JUDICATURE 86, 94 n.36 (1991). *See also* J. Thomas Greene, *Don't Forget Your Orals*, 183 F.R.D. 289, 293 (1998) (warning of tactics that advocates should avoid in their efforts to "smoke out the court's reaction to your case").

6. Commentators have suggested a variety of techniques for appellate attorneys to gain insights into a court's likely perspective on a case. *See, e.g.*, Talbot D'Alemberte, *Oral Argument: The Continuing Conversation*, LITIG., Winter 1999, at 14 (suggesting that counsel read any available press summaries about a case before oral argument, since such summaries are often taken from bench memoranda and may thus provide counsel with an idea of how the case is seen by at least one member of the court or the judge's staff); James L. Robertson, *Reality on Appeal*, LITIG., Fall 1990, at 3–4 (recommending that advocates develop a "book" on each judge before whom argument will be made, with research into the judge's previous opinions, personal background and history, and "psychological profile" factors); Albert Tate Jr., *Federal Appellate Advocacy in the 1980s*, 5 AM. J. TRIAL ADVOC. 63, 74 (1981) (stating that careful study of judges' comments and facial expressions during oral argument may reveal that the judges find significance in an issue previously thought by counsel to be unimportant). *See also* Greene, *supra* note 5, at 293 (warning of tactics that advocates should avoid in their efforts to "smoke out the court's reaction to your case").

7. *See, e.g.*, John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 897 (1940) (suggesting that advocates at oral argument should "rejoice" at receiving questions from the court, because "a question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading, and to dispel a doubt as soon as it arises.").

argument on a particular issue, when the case will ultimately be decided on an entirely different basis.[8]

While most appellate courts keep the lawyers largely in the dark before oral argument, a minority of courts offer the parties a sort of blueprint for oral argument: specific questions[9] the court would like addressed or—much more rarely—an actual draft of the court's tentative ruling in the case.[10] This latter procedure—providing parties with a copy of the court's tentative conclusions prior to oral argument—has been praised for improving the quality of oral argument and promoting "intellectual integrity" in judicial opinions.[11] Yet despite strong praise from those judges who know the procedure best,[12] the use of tentative rulings has never gained a following nationwide. The Honorable Robert S. Thompson, Associate Justice of the California Court of Appeal, observed in 1975 that "[w]hen the subject of precalendar circulation of tentative opinions is raised at meetings of appellate judges, it is as welcomed as a porcupine at a dog show. There is a loud noise, but no one wants to get close to the intruder."[13]

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8. The term "appellate ambush" comes from Gary Schons, a senior assistant attorney general in California. He describes as an example a case he argued on appeal, where the court at oral argument asked questions solely about the merits of the case, but later ruled on a procedural issue that was never mentioned during oral argument. *See* Don Babwin, *Appealing Oral Arguments*, CAL. LAWYER, Sept. 1992, at 19. *See also* SECTION OF LITIG., AM. BAR ASS'N, APPELLATE PRACTICE MANUAL 274 (Priscilla Anne Schwab ed., A.B.A. 1992) (warning that appellate judges may engage in extended debates with counsel over issues that are not central to the case, and that advocates must seek to avoid "becoming bogged down in intellectually stimulating digressions while precious argument time ticks away.").

9. A court may grant discretionary review on a specified issue or issues, as does the U.S. Supreme Court, or it may provide more elaborate questions to be addressed by the parties at oral argument. For a discussion of how one judge poses questions to counsel prior to argument, see Martineau, *supra* note 1, at 31 n.182.

10. Thomas E. Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 SANTA CLARA L. REV. 1, 3–5 (1995). The California Supreme Court this year issued an opinion approving of the distribution of tentative opinions before oral argument by the California Court of Appeal. *See infra* notes 181–83 and accompanying text.

11. *See* Richard C. Braman, *Prehearing Tentative Rulings Promote Intellectual Integrity in Judicial Opinions and Respect for the System*, 49 APR FED. LAW. 50, 51 (2002).

12. *See, e.g.*, Hollenhorst, *supra* note 10, at 36; Patricia G. Escher, *Opinions Before Argument*?, REMAND (A.B.A. APPELLATE JUDGES CONFERENCE), Consolidated Issue 1988, at 3, 4–5.

13. Robert S. Thompson, *One Judge and No Judge Appellate Opinions*, 50 CAL. ST. B. J. 476, 518 (1975). Justice Thompson lists four principal reasons for resistance to the practice of distributing tentative opinions: 1) fear of causing delays in the court calendar; 2) concern that distributing drafts will "freeze a panel into a position from which it cannot be swayed"; 3) a "vaguely articulated fear" that releasing tentative opinions would cause more public awareness of the dependence of appellate courts upon staff for the preparation of opinions; and 4) a reluctance to turn oral argument into a forum for criticism of judges' work product. Justice Thompson concludes that these concerns are either invalid, or outweighed by the benefits to be derived from distributing draft opinions to the parties before argument. *Id.* at 519.

In part because of judges' concern with opening their internal "work product" to public inspection,[14] only two state appellate courts have adopted procedures to distribute draft or proposed opinions to parties before oral argument in routine cases.[15] Trial courts were early modern pioneers of disseminating draft decisions.[16] The Los Angeles Superior Court began issuing tentative rulings before oral argument in its law and motion and discovery courts in the mid 1960s.[17] Administrative tribunals also have long benefited from the use of recommended or tentative decisions.[18]

The Arizona Court of Appeals, Division Two, initiated a draft-dissemination program in 1982 that was quickly declared a success.[19] The California Court of Appeal, Fourth Appellate District, Division Two, adopted a modified version of the procedure about a decade later.[20] Justices on the California appellate court also laud their tentative opinions[21] program for bringing a broad range of significant benefits: better oral arguments, more efficient use of court time, and a spirit of "openness and confidence in the system."[22] Lawyers, too, have applauded the procedure.[23] Yet to this day, no other state appellate court has followed the California or Arizona models.[24]

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14. Martineau, *supra* note 1, at 12 (observing that "[t]he confidentiality of the court's conference room, draft opinions, and communications among judges and their staffs is virtually unquestioned"). In 1980, a leading California commentator on appellate courts called distributing draft opinions a "gimmick" and predicted that "the havoc certain to ensue from public inspection of judicial working papers hitherto not only privileged but sacrosanct can scarcely be imagined." Philip M. Saeta, *Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making*, 20 JUDGES J., 20, 21 (1981). More than two decades later, the commentator had "softened" his views on tentative opinions, declaring the idea of dissemination "so bad that it might have some potential!" Hollenhorst, *supra* note 10, at 1 n.1.

15. *See infra* note 24 and accompanying text.

16. *See* People v. Hayes, 802 P.2d 376, 419 (Cal. 1990) ("Indeed, formulating and announcing tentative rulings in advance of argument is a common practice in law and motion matters.").

17. Saeta, *supra* note 14, at 20.

18. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 53 (West Publishing 1976) (citing the federal Administrative Procedure Act); *see, e.g.*, 5 U.S.C. § 557(b), (c) (West 2004).

19. Escher, *supra* note 12, at 3, 5.

20. Hollenhorst, *supra* note 10, at 1.

21. In the California Division Two Court of Appeal, panels vote on the draft opinion before its distribution, and the drafts are therefore called "tentative opinions." Hollenhorst, *supra* note 10, at 14. Conversely, in the Tucson appellate court, the panel does not confer or vote on the case before the draft is written and the drafts are termed "draft opinions" or "draft decisions." Interview with Jeffrey P. Handler, Clerk of the Court, Arizona Court of Appeals, Division Two, in Tucson, Ariz. (July 29, 2002).

22. Hollenhorst, *supra* note 10, at 36.

23. *Id.*

24. Telephone interview with Justice Hollenhorst, California Court of Appeal, Fourth Appellate District, Division Two (Jan. 31, 2003). At least one other state appellate court, in New Mexico, uses a form of tentative opinions as part of an expedited appellate procedure. *See* Marvel, *supra* note 5, at 86–87.

In the meantime, oral argument has come to play a far different role in the legal process. Once a hallmark of American appellate procedure,[25] oral argument is granted today in a dwindling percentage of cases.[26] When allowed argument, advocates are pressed for time like never before.[27] These constraints on oral argument are among the most lamented of numerous procedural changes enacted by appellate courts trying to grapple with rapidly increasing caseloads in the latter half of the twentieth century.[28] With argument now discretionary, judges grant oral argument in precisely those cases where it is necessary to assist the court in reaching a decision.[29] So there is scant time allowed for oral argument today, and much to be said. As Justice Jackson observed a half century ago: "Over the years, the time allotted for hearing has been shortened, but its importance has not diminished. The significance of the trend is that the shorter the time, the more precious is each minute."[30]

This Note considers the primary arguments that have been made for and against issuing draft opinions prior to oral argument. Part II describes the historic and evolving role of oral argument in U.S. appellate procedure. Part III explores the purposes and justifications for oral argument, as described by practitioners, judges, and scholars. Part IV describes the procedure of disseminating draft opinions followed by the Arizona Court of Appeals, Division Two. Part V describes the tentative opinions procedure used in the California Court of Appeal, Fourth Appellate District, Division Two, and discusses a recent decision by the California Supreme Court approving of the state appellate court's distribution of tentative opinions before argument, but finding that the cover letter and oral argument waiver notice mailed with the tentative opinions might have improperly discouraged litigants from requesting oral argument. Part VI discusses the benefits and drawbacks of using draft opinions from the perspective of judges on the Arizona Court of Appeals, Division Two. Part VII describes the findings of two studies comparing draft to final decisions in the California and Arizona state courts of appeal.

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25. Martineau, *supra* note 1, at 10.

26. *See* Richard Henry Mills, *Caseload Explosion: The Appellate Response*, 16 J. MARSHALL L. REV. 1, 14 (1982); Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 288–90 (1989). He observes that, of thirty-two states with available information, about half the states reduced the percent of cases argued by at least twenty percentage points between 1968 and 1984. For the thirty-two states with statistics available, the average percent of cases argued was sixty percent in 1984, down from seventy-five percent in 1975. Many states by 1984 provided argument in far less than half of appellate cases. *Id*.

27. *See* Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25, 26 (1999) ("In almost all courts, the amount of time allocated for oral argument has diminished over the years. The shrinking time allotment for oral argument may be an indicator of some courts' view of the value of oral argument.").

28. Martineau, *supra* note 1, at 3–4.

29. DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 117 (West Publishing Co. 1994).

30. Jackson, *supra* note 2, at 801. This statement came during an era when the time allowed for oral argument was still leisurely, in many courts, in comparison to the modern time allotment. *See infra* notes 43–45 and accompanying text.

In conclusion, Part VIII argues that draft dissemination furthers the purposes underlying oral argument, including the promotion of judicial transparency and accountability,[31] while also improving the quality of both oral arguments and judicial decisions. Providing the parties with a proposed draft decision before argument is consistent with the evolved role that oral argument plays in modern appellate process. Once a leisurely judicial introduction to a case, oral argument today is a lively, timed event, where judges armed with knowledge and questions about the case come to hear—and interrogate—counsel.[32] Distributing drafts to the parties beforehand can help both lawyers and judges make better use of the limited time available for oral argument on appeal.

II. THE HISTORIC ROLE OF ORAL ARGUMENT IN U.S. APPELLATE COURTS

In England, the appellate process has always been dominated by oral presentation and persuasion.[33] Historically, advocates would make their case at lengthy oral proceedings, and judges would give an oral opinion on the case immediately following argument by the parties.[34] The only writings relied upon in a case were the trial court record and the copies of reported cases cited by counsel.[35] The published English reports were often summaries of the oral proceedings, produced by stenographers present in the courtroom to sum up the arguments of counsel and transcribe the opinions issued orally from the bench.[36] To this day, the appellate process in England is dominated by oral hearings, although the hearings—from an American perspective—are more like an informal combination of oral argument by counsel and decision conferences by the judges, with argument continuing as long as the judges find it useful.[37]

English legal procedures were fundamental to the development of American appellate process, but they were also modified significantly on the new

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31. These values are especially important to preserve in light of other changes that have reduced the accountability of appellate courts, including the growing percentage of decisions issued without oral argument, the heavy reliance on staff attorneys and law clerks to write judicial decisions, and the increased issuance of unpublished memorandum decisions. *See, e.g.*, Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1385–86 (1990). Critics contend such procedural changes "have reduced the public nature and visibility of [appellate court] proceedings, and have thus reduced the accountability of the judges for their decisions." *Id*.

32. MARTINEAU, *supra* note 2, at 211–12, 216–18; *see also* Tate, *supra* note 6, at 79 (describing oral argument as a chance for the appellate advocate to serve as though an invitee at the court's conference on a case); Martineau, *supra* note 1, at 30 (recommending revisions of the format of oral argument—including providing advocates with advance notice of questions or issues the judges want to discuss—to reflect the main purpose argument now serves: "allow[ing] the judges to question counsel about the case").

33. Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 739 (1983).

34. Martineau, *supra* note 1, at 7.

35. *Id.*

36. *Id.*

37. Meador, *supra* note 33, at 740.

continent.[38] America's sparse population, vast geographic area, and decentralized government—combined with the rapid development of the commercial printer—all contributed to the rise in importance of the written and printed word, with oral communications diminishing as a centerpiece of American political and legal processes.[39] Upon the United States' separation from England, the appellate process in America still resembled that used in England, with heavy reliance on oral communications by counsel and judges.[40] With time, however, written judicial opinions came to replace oral decisions, and written briefs nearly replaced altogether the role of oral communications in appellate proceedings.[41] This trend became more pronounced in the latter half of the twentieth century, as staggering increases in appellate caseloads in the United States caused many appellate courts to further restrict the time allowed for oral argument and to screen cases for whether to allow oral argument at all.[42]

In the early nineteenth century, the time of great oral advocates such as Daniel Webster, the U.S. Supreme Court was known to hear oral arguments lasting days for a single case.[43] Until 1821, the Supreme Court did not require briefs from the parties.[44] Before 1849, the Court put no limits on the time it allowed for oral argument; that year, however, the Court enacted a rule limiting arguments to two hours for each attorney.[45] A century later, the Court acknowledged that oral argument on appeal was not a procedural due process right in all cases, but instead a matter to be considered on a case-by-case basis, according to the interests affected, the circumstances at hand, and the procedural requirements of any applicable legislative act.[46] The Court reasoned that due process of law "has never

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38. Martineau, *supra* note 1, at 8.

39. *Id.* at 9.

40. *Id.* at 10.

41. *Id.*; *see also* MARTINEAU, *supra* note 2, at 153 ("Gradually, as courts became busier they began to impose limitations on the length of oral argument. . . . As the length of oral argument was reduced, attorneys and courts began to rely more heavily on the written briefs.").

42. *See* Marvell, *supra* note 26, at 282, 288–90. Marvell observes that by the 1980s, appeals had been roughly doubling every decade since World War II. *Id* at 282. During the 10-year period ending in 1984, the number of decisions by the state courts of appeal increased 162 percent in Arizona and 82 percent in California. *Id* at 283.

43. WILLIAM H. REHNQUIST, THE SUPREME COURT 242 (Vintage Books 2002) (1987). Chief Justice Rehnquist notes that oral argument in the landmark 1824 case of *Gibbons v. Ogden* involved four attorneys addressing the Court and lasted five days of four hours each. *Id.* The brevity of the Court's early briefs, often just a few pages in length, "suggest[s] that appellate practice in the early nineteenth century placed more of a premium on oral argument than it did on written briefs." William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 2 (1999) [hereinafter *Ascendance*]. In 1884, the Court mandated for the first time that briefs include legal argument and "the modern brief was born." *Id.*

44. *Ascendance*, *supra* note 43, at 2.

45. Martineau, *supra* note 1, at 10. A decade later, the Supreme Court limited arguments to two attorneys per side, for a total of eight hours of oral argument per case. *Id.* Since 1984, after a series of additional incremental restrictions by the Court, parties have been limited to oral arguments lasting no more than one-half hour per side. *Id.*

46. Federal Communications Comm'n v. WJR, 337 U.S. 265, 276 (1949).

been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process."[47] As if to emphasize the point, the Court changed its rules in 1954 to grant oral argument in the cases it hears on a discretionary basis, with the Court's decisions to be made on the briefs alone in those cases where oral argument is not granted.[48]

Since 1979, Rule 34(a) of the Federal Rules of Appellate Procedure has authorized federal courts of appeals to dispense with oral argument and decide cases on the basis of the briefs. Such a procedure is allowed only if a panel of three judges has examined the briefs and record and unanimously agrees that oral argument is unnecessary because either: "A) the appeal is frivolous; B) the dispositive issue or issues have been authoritatively decided; or C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."[49] Adoption of Rule 34(a) in 1979 gave formal approval to a process already underway in most federal appellate courts: screening cases to determine which would be granted oral argument and which would be decided, instead, on the briefs alone.[50]

Along with restrictions on the frequency and duration of oral argument has come a change in judicial approaches to it. Up until the 1950s, many judges came to oral argument "cold"—knowing little or nothing about a case and not having read the briefs or record before argument.[51] Beginning in the mid-1950s, however, as quickly growing court caseloads led to shorter arguments and more cases decided on the briefs alone, judges altered their approach to oral argument as well.[52] With the assistance of staff, judges began actively to prepare for oral

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> [T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised.

Id.

47. *Id.* at 275.

48. Martineau, *supra* note 1, at 10.

49. FED. R. APP. P. 34(a). For a history of the development of Rule 34(a), including strong opposition by the bar to the curtailment or elimination of oral argument in a significant number of cases, see Joe S. Cecil and Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals*, (F.J.C.), § I.A *available at* 1987 WL 123661. The Arizona Rules of Civil Appellate Procedure allow state courts of appeals to decide cases without oral argument if "the appellate court" makes a determination according to criteria virtually verbatim of the federal rule. Unlike the federal rule, the Arizona rule does not specify how many members of the court must study the record and agree on disposition without argument. ARIZ. R. CIV. APP. P. 18. In the Arizona Court of Appeals, Division Two, decisions on whether to grant oral argument are typically made by a single judge, with heavy reliance on recommendations from court staff. *See infra* notes 90–93 and accompanying text.

50. Cecil & Stienstra, *supra* note 49, at § I.A.

51. MARTINEAU, *supra* note 2, at 210.

52. *Id. See also* ROBERT A. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 32–33 (American Bar Foundation 1976).

> [F]ew courts allow oral arguments to be as lengthy as they were a few years ago, nor do they rely on them to the same extent. Time limitations

argument by reading briefs and drafting questions beforehand.[53] As Professor Martineau explains, these changes significantly altered the role that oral argument would play in modern appellate practice:

> Oral argument was no longer a time for attorneys to introduce the judges to the case with ample time for demonstrating the oratorical arts. Rather, in the limited number of cases in which it was allowed, oral argument gave an opportunity for the judges to clear up questions that had occurred to them in reading the briefs, for the appellant's attorney to emphasize his principal argument, and for the appellee's attorney to make his most telling point in opposition. Appellate attorneys must now rely primarily upon their briefs to define the issues, present their version of the facts, and develop their legal arguments. Oral argument is no longer the central focus of the appellate process but rather just one step in the process through which the appellate court performs its function of error correction or law development.[54]

Given these procedural changes, it bears considering whether courts should adopt other steps—such as advance distribution of draft opinions—to make better use of the limited time allotted to oral argument on appeal.[55]

III. THE PURPOSES OF ORAL ARGUMENT ON APPEAL

To analyze the value of disseminating draft opinions before oral argument, it is useful to review first the purposes of oral argument as described by commentators and practitioners. This perspective will suggest a framework to consider whether disseminating draft opinions furthers or hinders the objectives of oral argument in modern appellate courts. These objectives will be addressed in three subgroups, according to the interests served: interests of the judges involved in a decision, of counsel and litigants, and of the appellate courts as an institution.[56]

> are common. As little as 10–15 minutes may be permitted to each side; 30 minutes is above the average, although permission to use more time is sometimes granted. The once-common arguments of an hour or more per side are now rare.

Id.

53. MARTINEAU, *supra* note 2, at 210–11.

54. *Id.* at 211. One commentator describes the changed nature of modern oral argument this way: "The modern practitioner bears the same relationship to Daniel Webster as an airline pilot bears to Ponce de Leon—the romance is largely gone, the speed has increased incomprehensibly, the margin for error has narrowed to approximately zero—but, all in all, you are still on your own." STEVEN D. MERRYDAY, THE FLA. BAR, FLORIDA APPELLATE PRACTICE HANDBOOK §17.9 (1998).

55. *See* Martineau, *supra* note 1, at 30–32.

56. For a similar division of interests served by oral argument, see Martineau, *supra* note 1, at 11–20. Professor Martineau divides the purposes of oral argument into four groups of interests; because the interests of counsel and litigants substantially overlap, they are grouped together here.

For judges, oral argument presents an opportunity to learn more about a case by hearing the points emphasized by counsel, and by raising questions about the facts, the law, or the parties' positions.[57] Argument is a last chance for judges to overcome misunderstandings about a case.[58] In addition, some judges may find a case easier to understand through the verbal format of argument,[59] and some concepts or ideas may simply be easier to express orally than in the cold context of the written word.[60] Thus, argument helps to clarify the case, to explore the ramifications of a possible outcome, and to assist the judges in reaching a just conclusion.[61] Under modern-day proceedings, many judges view the chance to ask questions of the parties' attorneys to be the primary—if not sole—purpose of granting oral argument.[62] Where the briefs leave no questions, the case is a strong candidate for decision without oral argument.[63]

A secondary benefit to judges is that oral argument keeps them from becoming too isolated in their work.[64] It provides appellate judges with their only opportunity for direct personal contact with litigants and their attorneys.[65] Some judges view the opportunity to "spar intellectually" with appellate attorneys as a highlight of the job.[66] Thus, oral argument may play a role in the retention of judges and the recruitment of qualified candidates to fill the robes of the appellate judiciary,[67] a benefit to the courts as an institution, and to the lawyers and litigants who must place their fate in the hands of appellate judges.

From the perspective of the parties and attorneys whose cases come before the courts of appeal, oral argument is an opportunity to affect the outcome of a case.[68] Advocates at argument can present their case in its best light, according to an integrated theme.[69] Since argument is often followed immediately by a

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57. *Id.* at 13; MEADOR & BERNSTEIN, *supra* note 29, at 83, 117.

58. A.S. Cutler, *Appellate Cases: The Value of Oral Argument*, 44 A.B.A. J. 831, 832 (1958).

59. Martineau, *supra* note 1, at 13.

60. Merritt, *supra* note 31, at 1387–88 ("[F]ifteen minutes worth of questions to counsel familiar with the record can save hours of judicial or law clerk time scouring the record in search of uncertain discrete facts and uncertain fact patterns that emerge clearly only after combining facts in disparate parts of the record.").

61. Martineau, *supra* note 1, at 13.

62. Sasso, *supra* note 3, at 29; MEADOR & BERNSTEIN, *supra* note 29, at 117.

63. *See, e.g.*, FED. R. APP. P. 34(a); ARIZ. R. CIV. APP. P. 18.

64. Martineau, *supra* note 1, at 13.

65. *Id.* This benefit of oral argument may serve not only the judges, but also the cause of justice. George Rossman, *Appellate Court Advocacy: The Importance of Oral Argument*, 45 A.B.A. J. 675, 676 (1959) ("The oral argument can portray the case as a human experience which engulfed the parties but which they could not solve. Thus, the oral argument can help to keep the law human and adapted to the needs of life.").

66. One judge on the Arizona Court of Appeals, Division Two, commented that oral argument "allows us (judges) to get out of our caves here and mix it up with human beings." Interview with Judge Pelander, Arizona Court of Appeals, Division Two, in Tucson, Ariz. (Dec. 13, 2002).

67. Martineau, *supra* note 1, at 13.

68. Cutler, *supra* note 58, at 832.

69. Henry D. Gabriel, *Preparation and Delivery of Oral Argument in Appellate Courts*, 22 AM. J. TRIAL ADVOC. 571, 573 (1999).

conference at which the panel of judges votes its decision, argument is the parties' last chance to win the case.[70] Lawyers use oral argument to answer questions or dispel doubts of the judges on the panel.[71] Some ideas may be easier to convey verbally, and some attorneys may be more persuasive as oral advocates than they are as brief-writers.[72]

Finally, providing oral argument satisfies the American ideal that every person deserves to have his or her "day in court."[73] Oral argument will be the only time that all members of the panel gather publicly to discuss and debate a case, having reviewed the parties' briefs and devoted a period of time to consider the case. Oral argument is thus a forum to reach the ear of every decision-maker on the panel, ensuring the parties a chance to participate in the decision-making process.[74] "It is the advocate's only chance to insinuate himself into the voting conference. A good answer to a hard question may make the difference in the decision."[75] Interaction with judges at argument also may provide an indication of how the court is leaning on the issues, thus enabling parties to better assess the settlement prospects of a case, or to prepare emotionally or otherwise for the likely outcome.[76]

For the appellate courts as an institution, oral argument promotes legitimacy by providing a measure of accountability and visibility to the decision-making process.[77] It has been stated that the judiciary—in possession of neither the power of the purse, nor the power to command armies—depends upon public perceptions for its legitimacy.[78] And "process is critical to law's legitimacy."[79] Put

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70. Martineau, *supra* note 1, at 17.

71. Sasso, *supra* note 3, at 29; Cutler *supra* note 58, at 833 (commenting that questions from the bench "indicate to a trained lawyer doubts in the mind of an individual judge or judges. He would never have had an opportunity to clear up or answer those doubts, if the case had been submitted without argument."); *see also* Gabriel, *supra* note 69, at 573 (arguing that the greatest benefit of oral argument is that it provides counsel with the opportunity "to respond to concerns of the court, concerns that counsel may not have been aware of when drafting the brief").

72. Cutler, *supra* note 58, at 832; Harold R. Medina, *The Oral Argument on Appeal*, 20 A.B.A. J. 139, 140 (1934) ("The judges are human beings and not mere machines. If their sympathy or their interest is aroused, as they should be by a proper oral argument on behalf of the appellant, the effect is bound to be of advantage."); *see also* Rossman, *supra* note 65, at 675 ("The cold print of a brief is directed to the reason and logic of the judge, but an oral argument can touch a sense that is even deeper—the passion for justice.").

73. Cutler, *supra* note 58, at 832.

74. Sasso, *supra* note 3, at 27.

75. Murray Gurfein, *Appellate Advocacy, Modern Style*, LITIG., Winter 1978, at 8.

76. Justice Antonin Scalia has stated he uses oral argument "to give counsel his or her best shot at meeting my major difficulty with that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.'" MERRYDAY, *supra* note 54, at §17.10.

77. Martineau, *supra* note 1, at 11; CARRINGTON, *supra* note 18, at 17.

78. *See, e.g.*, Robert A. Leflar, *Symposium: The Appellate Judiciary—Its Strengths, Its Woes, and Some Suggestions for Reform: The Multi-Judge Decisional*

another way, "it is essential not only that justice be done but that it appear to be done."[80]

Visibility of judges at oral argument reinforces judicial legitimacy.[81] Participation at argument reassures litigants that every judge on a panel has given some attention to the decision to be made.[82] If judges are found to be laboring under a misapprehension of the facts or law in a case, the lawyer at oral argument can correct them. Similarly, if a panel relies too heavily on the work of court staff—or of a single judge assigned to write the opinion—for its understanding of a case, the oral argument provides litigants a chance to present a countervailing view.[83] As Judge Merritt describes it:

> The presence of live human beings in verbal combat engages the attention of judges and makes them think, question, discuss, and reconsider a case as can nothing else, including able briefs and judicial opinions on analogous points. It focuses thought and reflection more than discussion and debate with law clerks in chambers even when the law clerks are better lawyers than the lawyers in the case. It is the right to be heard made concrete, or, in biblical language, the "word made flesh."[84]

In summary, oral argument serves to focus the court on the issues in dispute; to correct misunderstandings of law or fact; to balance the influence of judicial law clerks or judges who draft bench memos or draft decisions; and to reinforce, through visibility of the appellate process, public confidence in the legitimacy of appellate decision-making.

Process, 42 MD. L. REV. 722, 723 (1983) ("The appellate process demands not only sound decisions but public confidence in their soundness.").

79. William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2045 (1994).

80. Martineau, *supra* note 1, at 11.

81. *Id.*

82. CARRINGTON, *supra* note 18, at 17. Because of this function of oral argument, Professor Leflar observes that even judges who view oral argument as "wasted time" nonetheless acknowledge, at least in major cases, its important "public relations" value as one of the few ways to increase the "visibility" of the appellate process. LEFLAR, *supra* note 52, at 31–32.

83. Merritt, *supra* note 31, at 1387 ("Oral argument keeps judges from unreflectively adopting their law clerks' view rather than developing their own view through reflection."); *see also* Cecil & Stienstra, *supra* note 49, at § I.A ("It assures the litigant that his case has been given consideration by those charged with deciding it.").

84. Merritt, *supra* note 31, at 1386–87. Judge Merritt suggests the role of oral argument is such an important check against judges' excessive dependence on law clerks that "lawyers and litigants should fear law clerks without oral argument just as they should fear judges without law clerks. The use of law clerks and oral argument complement each other." *Id.* at 1386.

IV. DRAFT OPINIONS PROCEDURE IN ARIZONA COURT OF APPEALS, DIVISION TWO

Arizona appellate courts have had discretion whether to grant oral argument in criminal appeals since the adoption of the Arizona Rules of Criminal Procedure in 1973.[85] Oral argument was mandatory in civil cases, when requested by either party, until 1992, when argument became discretionary in civil appellate cases also.[86] The change came "to correct an existing inequity, whereby oral argument was mandatory in civil cases but discretionary in criminal cases. The revision was intended to make oral argument more readily available to criminal litigants while reducing unnecessary oral argument in civil cases."[87] To this date, criminal appeals are granted oral argument much less frequently than civil appeals in the Arizona Court of Appeals, Division Two.[88]

Judges of the Division Two court in Tucson, Arizona began drafting opinions for use and reference by judges at oral argument long before the court began in 1982 to disseminate its draft opinions to the parties. Soon after its creation in 1966, the court instituted a practice of assigning all cases to a judge once the case filings are complete, rather than waiting until after oral argument and a decision conference by the judges.[89] When oral argument is requested, the assigned judge has one week to determine whether or not to grant argument, based upon a recommendation by a staff attorney who has reviewed the briefs.[90] In practice, judges typically defer to the staff recommendation.[91] Any member of the panel assigned to a case can decide that oral argument should and will be held in a case.[92] But it is rare for a judge other than the assigned judge to make that determination at this early stage, because only the assigned judge initially will have reviewed the briefs and record.[93]

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85. *See* ARIZ. R. CRIM. P. 31.14; Escher, *supra* note 12, at 3.

86. ARIZ. R. CIV. APP. P. 18. In contrast, parties on appeal in California may insist on oral argument as a matter of right. *See infra* note 135.

87. ARIZ. R. CIV. APP. P. 18 (comment to 1992 amendment).

88. Criminal direct appeals accounted for 38 percent of the cases pending and filed in fiscal year 2002. The Arizona Courts Data Report 2002: General Jurisdiction (Arizona Supreme Court Administrative Office of the Courts), at 53. Yet criminal appeals accounted for just 21.6 percent (8 of 37 cases) of the cases granted oral argument by the court in 2002. Mark Hummels, 2002 Division Two Oral Argument Cases Study (2004) (unpublished database, on file with Author) (hereinafter Author's Database).

89. Escher, *supra*, note 12, at 3.

90. Interview with Judge Brammer, Arizona Court of Appeals, Division Two, in Tucson, Ariz. (Dec. 19, 2002); interview with Judge Pelander, *supra* note 66. The court's internal administrative procedures are not in writing. Interview with Jeffrey P. Handler, Clerk of the Court, Arizona Court of Appeals, Division Two, in Tucson, Ariz. (Jan. 30, 2003).

91. Interview with Judge Druke, Arizona Court of Appeals, Division Two, in Tucson, Ariz. (Nov. 12, 2002); interview with Chief Judge Espinosa, Arizona Court of Appeals, Division Two, in Tucson, Ariz. (Dec. 19, 2002).

92. Interview with Judge Flórez, Arizona Court of Appeals, Division Two, in Tucson, Ariz. (Dec. 16, 2002).

93. Interview with Judge Brammer, *supra* note 90.

When a case is set for oral argument, the assigned judge prepares a draft opinion that is circulated, along with copies of the briefs, to the other judges on the panel approximately one week before oral argument.[94] All judges on the panel then review the draft opinion along with the briefs and, if desired, portions of the record of the case.[95] Judges may informally discuss a case with other members of the panel, especially where the draft opinion causes differences of opinion. But the panel does not typically hold a formal conference before oral argument is heard.[96] Parties to the case receive a notice from the court stating the date and time for argument and informing them:

> A judge usually prepares a rough draft opinion prior to oral argument. The court has not conferred on that draft and it may be changed entirely after oral argument. A copy of the draft will be sent to all counsel, if and when it becomes available, unless any counsel notifies the court that a draft is not desired. In such event, no draft will be sent to any counsel. . . .[97]

Parties must notify the court within 10 days if they do not want the draft disseminated.[98] If neither party exercises that right of refusal, the draft is sent to each attorney about seven to ten days before the date set for oral argument.[99] The draft does not identify its author, and it contains the following caveat printed in bold-face type at the top of the cover sheet: "This is a draft decision prepared by only one judge. The draft may be changed entirely after argument."[100]

Following oral argument, the panel of judges holds a formal conference.[101] If all judges on the panel agree with the wording, result, and reasoning of a draft, then the draft is approved and the judges on the panel must decide whether to issue the ruling as an opinion or an unpublished memorandum decision.[102] Where the judges disagree, or a disputed question of fact or law is

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94. Interview with Judge Pelander, *supra* note 66.

95. Interview with Judge Druke, *supra* note 91.

96. Escher, *supra* note 12, at 4.

97. *Id.*

98. *Id.* Parties rarely invoke their right to refuse distribution of a draft. Such refusals are not made part of the court record, and thus the court does not keep statistics on their frequency. The clerk of the court estimates that a party exercises this right of refusal in perhaps five percent of cases. The right can be of value to a party seeking to settle a case before oral argument without running the risk that an unfavorable draft opinion will give leverage to the opposition. Interview with Jeffrey P. Handler, *supra* note 90.

99. Interview with Jeffrey P. Handler, *supra* note 21. *See also infra* note 255 and accompanying text.

100. The wording of the caveat has changed slightly over the years. The early draft decisions were called "draft opinions" and carried the extra statement that "The court has not conferred on the draft." *See* Escher, *supra* note 12, at 4.

101. *Id.*

102. *Id.* The court must issue its decision as a published opinion

> when a majority of the judges acting determine that it: 1) establishes, alters, modifies or clarifies a rule of law, or 2) calls attention to a rule of law which appears to have been generally overlooked, or 3) criticizes existing law, or 4) involves a legal or factual issue of unique interest or substantial public importance, or 5) if the disposition of a matter is

raised by the oral argument, the draft ruling is sent back for additional research and writing.[103] Depending on the eventual decision of the judges on the panel, the draft ruling may become a majority opinion, or a dissent, or may be discarded altogether.[104] When the panel fails to reach an agreement following its conference, a revised draft ruling will later be circulated among the members of the panel, with changes from the original indicated.[105] The case is placed on the panel's weekly discussion calendar and, if the draft is approved, the judges on the panel then decide whether to issue the decision as a formal opinion.[106]

The above procedure is typical, but is not followed rigidly in all cases.[107] In practice, the Division Two judges have been somewhat flexible in adapting their procedure to the demands of a specific case.[108] For instance, the court may decide upon further review of a case that oral argument is warranted after all, and thus schedule a hearing in a case where argument was initially denied, or where neither party requested oral argument.[109] Such reconsideration is most common in cases where a judge believes that publication of the decision is likely.[110] Sometimes, because of time constraints or difficulty analyzing a case, the authoring judge does not have a draft ready for release in advance, and oral argument proceeds without a disseminated draft.[111] Alternatively, argument may be postponed to a later date to allow completion of the draft before the date of argument.[112] In rare cases, where the assigned judge is having difficulty determining how the draft should be written, a panel will hold a conference on the case before the drafting of the opinion.[113] Such a draft will reflect the opinion of a majority of the panel,[114] but that fact is not revealed to the parties upon distribution of the draft.[115] Even more rarely, an authoring judge struggling with a case may write two different draft opinions, with different outcomes.[116] The second draft may be made available

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> accompanied by separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

ARIZ. R. CIV. APP. P. 28.

103. Escher, *supra* note 12, at 4.

104. Interview with Jeffrey P. Handler, *supra* note 21.

105. Escher, *supra* note 12, at 4.

106. *Id.*

107. Interview with Judge Pelander, *supra* note 66.

108. *Id.*

109. *Id.*

110. *Id.*

111. Interview with Judge Druke, *supra* note 91; interview with Judge Brammer, *supra* note 90.

112. Interview with Judge Flórez, *supra* note 92; interview with Judge Brammer, *supra* note 90.

113. Interview with Judge Druke, *supra* note 91. In the California Court of Appeal, Fourth Appellate District, Division Two, judicial panels originally met to confer before voting on draft tentative opinions, but the judges now circulate draft opinions for a tentative vote by other members of the panel without a conference before sending the tentative opinion to the parties. *See infra* notes 143–45 and accompanying text.

114. Interview with Judge Druke, *supra* note 91.

115. *Id.*

116. Interview with Judge Pelander, *supra* note 66.

shortly before argument is to commence, or it may be mailed out simultaneously with the alternative draft.[117] In other unusual instances, the court has sent litigants questions that it wishes to have addressed at oral argument, or has requested supplemental briefs from the parties on particular issues.[118]

Five years after the Arizona Court of Appeals, Division Two, implemented its draft dissemination experiment, the court's Vice Chief Staff Attorney Patricia Escher conducted an informal survey of attorneys and judges regarding the effects of the draft procedure.[119] Her research found a consensus that the issuance of draft rulings before argument: 1) made oral argument more useful for both counsel and the court by ensuring that judges were better prepared for argument and by focusing the attention of judges and advocates on the significant issues in the case;[120] 2) gave counsel an opportunity to clarify perceived errors of fact or law in the draft, at a time when the court was viewed to be more responsive to such suggestions than it would be during a motion for reconsideration after a decision;[121] and 3) served to keep the judges and their staff "on track" with their caseload by establishing an "artificial deadline" for draft rulings before argument, and by enabling panels of judges to move quickly to a final opinion or memorandum immediately following oral argument.[122] Escher describes a final "incidental benefit" as the occasional willingness of parties to waive oral argument and settle a case after having seen the draft.[123]

The 1987 survey found the primary criticism of issuing draft opinions before argument to be a concern that the process "destroys the collegiality of the court and results in a one-judge decision."[124] Another observed drawback was the potential that the judge charged with drafting an opinion would tend to be

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117. *Id.*

118. Interview with Chief Judge Espinosa, *supra* note 91.

119. Escher, *supra* note 12. Escher is now a judge of the Superior Court of Arizona, Pima County.

120. *Id.* at 4.

121. *Id.*

122. *Id.* at 4–5.

123. *Id.* at 5.

124. *Id.* The term "collegiality" generally refers to the ideal of judges on a court or panel reaching a decision through a collaborative exchange in which the views of every judge contribute to the court's final understanding of the issues and resolution of the case. *See, e.g.*, Frank M. Coffin, *The Anatomy of Judicial Collegiality*, reprinted in DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 550–52 (The Michie Company 1994). Critics of courts that assign draft opinions to a judge before the judges have conferred on the case contend that such a process can inhibit collegiality by fostering excessive reliance on information provided by the assigned judge, who will have developed a proprietary interest in the draft opinion. *See, e.g.*, Robert S. Thompson & John B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1, 65–66. Pre-conference drafting can also create excessive reliance on the court's law clerks or research attorneys. *See infra* note 228. Judge Escher states that Division Two judges did not show a tendency to rely on the work of the assigned author of an opinion, and were not reluctant to express opposing views. Escher, *supra* note 12, at 5.

defensive of the draft and thus reluctant to respond to criticisms of the draft from oral argument.[125]

A study conducted in conjunction with the 1987 survey, however, concluded that this criticism was unwarranted. The study analyzed the court's decisions for 148 civil cases where oral argument was held in 1986.[126] Of those cases analyzed, the draft opinions' result was changed after argument in eight cases (five percent).[127] The draft opinion was modified, without changing the ultimate result, in forty-six cases, or thirty-one percent of those analyzed.[128] In eighty-seven cases (fifty-eight percent of those analyzed), no change was made from draft ruling to final decision.[129] Finally, six appeals were dismissed after the parties received the draft opinion, and one additional oral argument was vacated, though the appeal was not dismissed.[130] Escher's study concluded that "the view that oral argument will have no effect on the ultimate decision is unfounded."[131]

V. A CALIFORNIA COURT OF APPEALS DIVISION EMBRACES TENTATIVE OPINIONS

In 1990, justices of the California Court of Appeals, Fourth Appellate District, Division Two, adopted a "tentative opinions program" to provide parties with a draft opinion before oral argument.[132] The experiment came at a time when the court was in transition. Its number had just been cut from five to three, by death and retirement, and the remaining justices were the three "most likely to get into trouble," according to Justice Hollenhorst, one of the three.[133]

The idea to distribute tentative rulings before argument came up, says Justice Hollenhorst, where many of the court's decisions were made—at the drinking fountain.[134] The justices had just walked out of an oral argument that all

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125. Escher, *supra* note 12, at 5.

126. The number represents an incomplete sample of the court's oral argument cases for 1986 because the six judges on the court keep individual files; of the six, one judge had recently retired, and his files were not available, and another judge did not retain draft rulings after the court's final decision was filed. The study thus focused on the decisions written in civil cases by the remaining four justices. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* It may often be difficult to determine whether oral argument actually *caused* changes to draft decisions, since the draft decision reflects the opinion of only one judge on the panel. *See supra* notes 96, 97, and accompanying text. For the findings of two more recent studies comparing disseminated draft decisions to post-argument outcomes in Arizona and California, see *infra*, Part VII.

132. Hollenhorst, *supra* note 10, at 14.

133. *Id.*

134. Telephone Interview with Justice Hollenhorst, California Court of Appeal, Fourth Appellate District, Division Two (Jan. 31, 2003).

agreed was a complete waste of time.[135] One of the justices mentioned the California trial courts' use of tentative rulings, which had dramatically reduced the number of oral arguments held in state law and motion courts.[136] The justices agreed to explore the idea of issuing tentative rulings, and Justice Hollenhorst began researching existing tentative opinion programs.[137] He found only two in use at the intermediate state appellate court level: an expedited appeals process in New Mexico,[138] and the draft opinions program at the Division Two court in Tucson, Arizona.[139] The California Division Two court, which sits in Riverside, copied elements of the draft procedures being used by the California trial courts and by Division Two of the Arizona Court of Appeals, and initiated its own tentative opinion program.[140]

Justice Hollenhorst explains that the California court adopted its dissemination program because the justices were frustrated at "having well prepared, conference 'calendar memos' on the bench during oral argument and watching as appellate counsel argued issues which were not germane to the proposed determination of the matter on appeal."[141] The justices sought a way to make oral argument more effective and meaningful, and tentative opinions promised a potential opportunity.[142]

Initially, judicial panels of the California court met to confer and take a preliminary vote on each tentative opinion prior to its distribution to the parties.[143] After a change in 1998, panels of the court now circulate the tentative opinions to other members of the panel for concurrence or dissent, without conference, before sending out the tentative opinions.[144] Thus, the draft is still subject to a preliminary vote by the panel, but without conference.[145] The court adopted the procedural change in 1998 to speed up its distribution of tentative opinions.[146] Generally, tentative opinions are now mailed out, with an oral argument waiver notice, about one to two months before the oral argument is scheduled.[147] Where a majority of judges cannot concur on a tentative opinion, the judges agree on a memorandum

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135. *Id.* In California courts, parties are granted oral argument as a matter of right in criminal and civil cases on appeal, regardless of whether the court believes argument will be useful. Moles v. Regents of the Univ. of Calif., 654 P.2d 740, 742 (1982).

136. Telephone Interview with Justice Hollenhorst, *supra* note 134. For more information on the California superior court program, see Saeta, *supra* note 14.

137. Telephone Interview with Justice Hollenhorst, *supra* note 134.

138. *See* Marvel, *supra* note 26.

139. Telephone Interview with Justice Hollenhorst, *supra* note 134.

140. *Id.*

141. Hollenhorst, *supra* note 10, at 1.

142. *Id.* at 14.

143. *Id.*

144. Telephone Interview with Don Davio, Managing Attorney, California Court of Appeal, Fourth Appellate District, Division Two (Mar. 23, 2004).

145. *Id.* In the Arizona court, because the panel neither confers nor takes a preliminary vote on the draft decision before the draft is disseminated, a draft ruling may end up representing a pre-argument minority opinion of the panel.

146. Telephone Interview with Don Davio, *supra* note 144.

147. *Id.*

describing the issues disputed among members of the panel; this memorandum is provided to the parties, prior to oral argument, instead of a tentative opinion.[148]

The decision to take a preliminary vote before distribution of the tentative opinion came from a "concern . . . that counsel might be better off if they knew where they stood with the entire panel when making their argument."[149] Because the drafts have received a vote by the panel, the California court refers to its draft rulings as "tentative opinions"—rather than as "draft opinions" or "draft decisions," the terms used to describe disseminated drafts of the Arizona Division Two court, where the draft decisions have not been subjected to a vote by the panel before distribution to counsel.[150]

The tentative opinions program in the California court quickly showed effects on the court's oral argument calendar. Although the court saw a strong initial surge in the number of cases in which oral argument was requested,[151] the actual number of oral arguments heard by the court declined.[152] This paradox came from parties deciding to waive oral argument after reading the tentative opinion—either because they were satisfied with the court's decision, or because they felt they had no reasonable chance to overcome the court's logic and reasoning.[153] Appellate counsel reported that receiving tentative opinions helped the attorneys evaluate the likely benefit—weighed against the cost to the client—of continuing the appeal through oral argument.[154] Among other considerations, the tentative opinions helped attorneys better evaluate whether to waive oral argument in view of potential malpractice concerns.[155]

Where oral argument was not waived, the court observed that the arguments were more focused and more effective.[156] As a result, the amount of time consumed by oral argument dropped by at least fifty percent.[157] Attorneys

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148. Hollenhorst, *supra* note 10, at 2 n.4.

149. *Id.* at 14.

150. *See supra* note 21.

151. In California, oral argument is granted in all cases, when requested, as a matter of right. *See supra* note 135; Hollenhorst, *supra* note 10, at 9. Upon implementation of the tentative opinion procedure in 1990, the court's requests for oral argument jumped from a rate of about thirty-eight percent in criminal cases and seventy-eight percent in civil cases to a new rate of seventy percent for criminal cases, and eighty-two percent in civil cases. The court's initial surge in requests for oral argument may have stemmed in part from curiosity about tentative opinions, which are offered only for those cases where oral argument is requested. Hollenhorst, *supra* note 10, at 18. The California Supreme Court declared this year that an oral argument waiver notice that the California Division Two court had been sending to counsel along with its tentative opinions presented a risk of improperly discouraging litigants from exercising their right to present oral argument before the court. *See infra* notes 176–80 and accompanying text.

152. Hollenhorst, *supra* note 10, at 18.

153. *Id.*

154. *Id.* at 19. ("[C]ounsel felt that once the tentative decision was received, the decision to proceed with oral argument became easier, and could be discussed with clients in light of the cost savings that accompany waiver of oral argument.").

155. *Id.*

156. *Id.* at 22.

157. *Id.* at 19.

generally came into oral argument well-prepared to discuss the cases upon which the court was relying for its tentative opinion.[158] In addition, attorneys were less likely to argue the "kitchen sink" approach to appeals: raise every conceivable, perhaps flimsy, ground upon which the court might rule. "After receipt of the tentative decision, counsel generally do not contest the court's intended opinion on each issue raised, but tend to focus on only one or two issues still open to argument. Thus, the remaining non-essential issues involve no extra time consumption in oral argument."[159]

Other benefits noted from the issuance of tentative rulings included: 1) making oral argument more useful to attorneys and judges;[160] 2) helping counsel plan their strategy for oral argument;[161] 3) reducing to almost zero the number of petitions for rehearing received by the court;[162] 4) providing the court with useful arguments and feedback concerning whether an opinion merits publication;[163] 5) affording counsel an opportunity to correct "misstatements or misunderstandings in the draft";[164] and 6) improving the court's "calendar management" by lowering the frequency and time of oral arguments, and by speeding the time for the court's release of the final draft.[165]

Drawbacks of the program were noted to be: 1) an increase of costs for printing, postage, and electronic cite-checking, caused by the fact that opinions are issued twice;[166] 2) increased workload for secretarial and clerical staff;[167] 3) the occasional need for a continuance of a case because the tentative opinion has not been completed in time;[168] 4) "super-editor" lawyers whose nitpicking arguments about a draft—including suggestions of punctuation, style, and grammar—detract time and attention from the legal issues upon which the time of oral argument should be focused;[169] 5) the danger that attorneys will rely too heavily on a tentative opinion and claim afterward, when a final opinion departs from the tentative draft, that they were misled by the tentative opinion;[170] 6) the disappointment to the court that a minority of counsel does not adequately use the

158. *Id.*
159. *Id.* at 19–20.
160. *Id.* at 17.
161. *Id.*
162. Justice Hollenhorst explains that "[t]he losing party in the tentative decision tends to treat oral argument as an oral petition for rehearing. . . . If further review is requested, the party generally requests a petition for review by the California Supreme Court." *Id.* at 22.
163. *Id.* at 23.
164. *Id.* Because of this check against errors, the court needs fewer modifications to opinions to correct mistakes after the opinion has been filed. *Id.* at 23–24.
165. *Id.* at 24–25.
166. *Id.* at 21.
167. *Id.* at 26.
168. *Id.*
169. *Id.* at 25. Justice Hollenhorst observes that these "super-editor" attorneys appear during oral argument "just enough to be annoying." *Id.*
170. *Id.* at 27. ("[C]are must be taken not to suggest that the winner has been so identified for purposes of the final draft so as not to mislead counsel into abandoning their role as an advocate for the tentative position the court has taken.").

tentative opinion in the preparation and presentation of oral argument, such that "oral argument returns to the original unenlightened, uninspired approach so frequently seen today";[171] and 7) the perception by critics of the process that issuing a tentative opinion causes the court to become locked into a position.[172]

This last criticism—the alleged locked-in phenomenon—is a principal reason given by other courts in deciding not to issue draft opinions.[173] Justice Hollenhorst argues the critics have it backwards. Putting the draft before the parties and attorneys at argument makes a court more—not less—receptive to changing its pre-argument position.[174] As Justice Hollenhorst explains: "You can't stand there as somebody is taking the opinion apart, and rightly so, and then send out the same opinion. If the criticism is valid, it forces us to address it."[175]

This year, the California Supreme Court issued an opinion addressing for the first time whether the Division Two court's tentative opinion program violates the right of litigants to oral argument on appeal in California.[176] The court found that distributing tentative opinions was permissible, but that the Division Two court's oral argument waiver notice letter accompanying its tentative opinions had "the potential to improperly discourage the exercise of the right to present oral argument on appeal."[177] The waiver notices, providing that parties must renew their demand for oral argument or be deemed to have waived the right, stated that the court of appeal "has determined that . . . oral argument *will not aid* the decision-making process, and . . . the tentative opinion *should be filed* as the final opinion without oral argument. . . ."[178] The California Supreme Court also raised

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171. *Id.* at 28.

172. *Id.*

173. *Id.*

174. *Id.* at 29–30.

175. Telephone Interview with Justice Hollenhorst, *supra* note 134. Hollenhorst has explained that oral argument is more persuasive, because better aimed, after receipt of a tentative decision:

> [T]he argument that the release of tentative opinions locks the court into a position is simply not true. In fact, the release of tentative opinions probably has the opposite effect, because the court has exposed its tentative opinion ruling to the parties for them to knowledgeably argue as opposed to requiring them to argue blindly. The fact that counsel have the draft before oral argument gives them at least some chance to change the court's view of the case because counsel have the ability to focus on the issues which have tentatively decided the case.

Hollenhorst, *supra* note 10, at 30

176. People v. Pena, 9 Cal. Rptr. 3d. 107 (2004).

177. *Id.* at 117.

178. *Id.* (emphasis in opinion). The court has since adopted a new waiver notice form that is more inviting to oral argument, and that emphasizes:

> The court is not unalterably bound by the tentative opinion and is willing to amend or discard the tentative opinion if counsel's arguments persuade the court that the tentative opinion is incorrect in any way. *However, at present, in this case the court believes that the record and briefs thoroughly present the facts and legal arguments such that the court is prepared to rule as set forth in the tentative opinion without oral argument*.

concern with the waiver notice's stern warnings that "[c]ounsel may not repeat arguments made in counsel's briefs," and that "[s]anctions may be imposed for noncompliance with this notice."[179] Taken together, stated the California Supreme Court, the two warnings might be interpreted to threaten a party with sanctions for insisting on oral argument, since parties are prohibited by the rules of appellate procedure from raising any issues *not* addressed in the party's briefs.[180]

Yet, despite its concern with the court's waiver notice form, the state high court spoke approvingly of the tentative opinions program: "We applaud innovations, such as the tentative opinion program adopted by the Court of Appeal here, that are initiated to maintain the quality and integrity of the judicial process in spite of [courts' increasing caseloads and financial constraints]."[181] The California Supreme Court found that distributing tentative opinions before argument "does not in itself improperly interfere with the right to present oral argument on appeal."[182]

> So long as the appellate court's decision is truly tentative, that is, so long as the court is willing to discard the writing if counsel's arguments persuade the court that its tentative views were incorrect, the drafting and dissemination of a written tentative opinion alone does not itself infringe upon the right to present oral argument on appeal.[183]

VI. JUDGES' PERSPECTIVES ON DRAFT OPINIONS IN THE ARIZONA COURT OF APPEALS

Judges[184] on Division Two of the Arizona Court of Appeals also believe strongly in the benefits of issuing draft opinions before oral argument.[185] The judges say draft opinions improve the quality and efficiency of oral argument,[186]

Oral Argument Waiver Notice, California Court of Appeal, Fourth Appellate District, Division Two (dated March 4, 2004) (on file with Author) (emphasis in original). As under its previous waiver notice form, the court provides parties just twelve days to re-request oral argument, or be deemed to have waived the right to oral argument. *Id.*

179. *Pena*, 9 Cal. Rptr. 3d. at 118. The court's new waiver notice now states, without any threat of sanctions, that "[c]ounsel should respond to the tentative opinion and avoid unreasonable repetition of arguments raised in counsel's briefs . . . No supplemental briefing will be accepted because counsel may raise those issues during oral argument. Counsel should refrain from raising new issues not briefed [citing *Pena*]." Oral Argument Waiver Notice, *supra* note 178.

180. *Pena*, 9 Cal. Rptr. 3d. at 118.

181. *Id.* at 119.

182. *Id.* at 114.

183. *Id.* at 115 (citation and quotation marks omitted).

184. This section reports findings from interviews with five of the six judges on the Arizona Court of Appeals, Division Two, in fall 2002. Judge Howard declined to be interviewed.

185. Interviews with Judges Druke, Brammer, Espinosa, Flórez, and Pelander, *supra* notes 91, 92, 66 [hereinafter collectively Interviews with Division Two Judges].

186. All five judges listed the focusing of oral arguments as a principal benefit of the draft opinions program. Interviews with Division Two judges, *supra* note 185.

and the quality of judicial opinions revised after oral argument.[187] The Division Two judges strongly reject the criticisms that the issuance of draft opinions causes the court's opinion to be "frozen" or overly-reliant on the work of the authoring judge.[188]

The court follows a similar drafting approach for opinions in cases where oral argument is not granted.[189] In those cases, a single judge or clerk[190] authors a draft opinion for a conference of the panel where the draft is debated and a vote is taken on whether to accept, reject, or modify the draft.[191] Thus, the judges are accustomed to having draft opinions picked apart, debated, sent back for re-writes or rejected altogether by other members of the panel.[192] According to Judge Pelander, "There is no reluctance or reservation at all to saying, 'I just don't agree with this.' If a judge has to go back to the drawing board and start from square one, there's no reluctance in saying that."[193] At oral argument, the judges invite attorneys to point out flaws in the draft opinions. They describe the drafts as "targets" at which the parties are encouraged to take careful aim.[194]

A. Draft Opinions Make Evident the Facts a Court is Relying Upon

On appeal, the facts dictate the law.[195] The Honorable John H. Davis noted:

> [I]t cannot be too often emphasized that in an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself. . . . The court wants above all

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187. This opinion was expressed by both appellate lawyers and judges in Tucson. *See id.*; *see also, e.g.*, interview with Mick Rusing, attorney, in Tucson, Ariz. (Jan. 10, 2003); interview with Richard Brown, attorney, in Tucson, Ariz. (Jan. 9, 2003). Improvement of judicial opinions flows from the ability of attorneys at oral argument to question the court's reasoning, correct misstatements of law or fact, and explore the ramifications of a proposed decision in ways that would not be possible were the draft opinions not disseminated.

188. Interviews with Division Two Judges, *supra* note 185.

189. Interview with Judge Brammer, *supra* note 90.

190. *See infra* note 199.

191. Interview with Judge Pelander, *supra* note 66.

192. *Id.*

193. *Id.*

194. *Id.* ("The attorney [against whom the draft is written], they'll come in hopefully with some ammunition to shoot at the draft."); Interview with Judge Flórez, *supra* note 92 ("Nobody feels compelled to maintain the draft. We put it up there to be shot down, to see if we're right."). Justice Hollenhorst, of the California court, describes the dissemination of tentative opinions as placing a well-lighted target before attorneys to take "rifle shots" at during oral argument; in contrast, where the tentative opinions are not provided beforehand, oral argument is like placing the target in a dark room, such that attorneys end up shooting shotgun blasts in all directions, hoping to hit the unseen target. Interview with Justice Hollenhorst, *supra* note 134.

195. Cutler, *supra* note 58, at 833 ("Much may be said of the value of the citation of precedents and the argument of legal formulae and principles. We reiterate that in our humble opinion most cases are decided on the facts."); *see also* Jackson, *supra* note 2, at 803 ("It may sound paradoxical, but most contentions of law are won or lost on the facts.").

> things to learn what are the facts which give rise to the call upon its energies; for in many, probably in most, cases when the facts are clear there is no great trouble about the law. *Ex Facto oritur jus*,[196] and no court ever forgets it.[197]

The writing of a draft opinion assists the court by sorting out the facts of the case before it.[198] The drafting process forces the author[199] to set forth a neutral presentation of the facts in a way that is not present in the briefs of the adversaries.[200] The draft is then used by the other judges on the panel, and by the parties and appellate counsel, to prepare for oral argument. All sides thus come to oral argument with a common statement of facts before them. An error or dispute of fact can be raised immediately to the court.[201] Some judges—commonly the author of the draft before the court—begin oral argument by asking counsel what, if anything, they dispute about the draft opinion.[202] At argument, parties with a copy of the draft opinion in their hands have an opportunity to dissuade the court from an improper understanding of the facts that might otherwise never become apparent. Advocates can even bring in visual aids to highlight mistakes in the draft.[203]

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196. "Ex Facto Jus Oritur. The law arises out of the fact. . . . A rule of law continues in abstraction and theory, until an act is done on which it can attach and assume as it were a body and shape." BLACK'S LAW DICTIONARY, REVISED FOURTH EDITION 660 (4th ed. 1968).

197. Davis, *supra* note 7, at 896.

198. Interview with Chief Judge Espinosa, *supra* note 91.

199. The Division Two Court of Appeals in Tucson has six judges, nine law clerks and six staff attorneys, all of whom draft opinions and decisions. Initial drafts for most criminal cases are written by staff attorneys; however, those criminal cases granted oral argument are assigned to a judge's chambers for drafting by the judge and/or the judge's clerks. Interview with Jeffrey P. Handler, *supra* note 90.

200. Interview with Chief Judge Espinosa, *supra* note 91.

> The author is required to render a very accurate presentation of the facts, procedural background, and pertinent parts of the record. We can change the results and the analysis, but we want to make sure we've got the facts right, and this does so before oral argument in a way you don't get from the briefs and record.

Id.

201. By reading the court's statement of facts in the draft, attorneys gain the opportunity to comment at argument on factual mistakes or disputable assertions of which they would otherwise never be aware. In this way, the issuance of draft decisions is analogous to procedures allowing parties to comment on draft reports, and object to findings of fact, proposed by special masters in non-jury cases. *See, e.g.*, FED R. CIV. P. 53(e)(2), (5).

202. Interview with Judge Pelander, *supra* note 66.

203. One Tucson attorney described an oral argument where he brought in poster boards contrasting the draft opinion language with the language from an insurance contract at issue, to highlight a mistake of fact in the draft opinion. The end result was a reversal of the draft opinion and a favorable outcome for the attorney's client. Interview with John Baade, attorney, in Tucson, Ariz. (Jan. 7, 2003).

B. Drafts Elevate and Focus Analysis at Oral Argument

Judges on the Arizona Court of Appeals, Division Two, say a principal benefit of disseminating draft opinions is the focus the drafts bring to oral argument.[204] The focus comes two ways: 1) by narrowing the scope of argument through the draft's indication of the issues, arguments, and cases that appeal to the draft's author, and 2) by allowing for a focused critique of the draft's analysis, made possible by the analytical jump-start the draft provides.

The first observation—the draft's benefit in narrowing the scope of oral argument—has been noted previously,[205] and will not be explained in detail here. It should be pointed out, however, that this narrowing of scope benefits both the court and the advocate. For the court, it allows more time to explore in greater detail a few key issues, and to avoid time-wasting discussion of extraneous matters. For the advocate, effectiveness at oral argument often depends on a lawyer's ability to focus clearly on the one or two strongest arguments.[206] If an advocate is unsure what to emphasize at argument, the draft opinion may provide the answer. This is not to suggest that advocates will, or should, blindly follow the draft opinion's lead as to which issues are most important. If the attorney at argument thinks it more valuable to raise an issue or argument entirely overlooked or minimized by the draft, the attorney can take that approach instead. In any event, the lawyer's decision is made from an informed perspective, aided by the draft's indication as to what the authoring judge, at a minimum,[207] has chosen to emphasize in the draft opinion.

The second focusing effect of draft opinions comes from the analytical benefit of committing thoughts to writing, and then exposing that writing to critique. It has often been observed that the process of writing forces the author to critically evaluate ideas and arguments, viewed through the facts of a case; to discard those preliminary ideas that just will not "write";[208] and to expose the flaws in a position by spelling out the argument and reviewing the holes of logic and reasoning that emerge.[209] Professor Robert Leflar has emphasized that the process of writing forces better-reasoned opinions:

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204. Interviews with Division Two Judges, *supra* note 185.

205. See *supra* notes 120, 159, and accompanying text.

206. *See, e.g.*, STATE BAR OF ARIZ., *supra* note 3, at § 2.5.1.3 ("The appellate lawyer should go for the jugular vein. . . . For an argument of 20 or even 30 minutes, only two or three significant points can be made effectively.").

207. One judge points out that the judges on Division Two have worked together closely for years, and thus have a strong sense of how the other judges on a panel are likely to approach a particular subject. Thus, while the draft opinion is typically not the result of conferring between the judges, the authoring judge will often write the draft in a way that takes into account, perhaps subconsciously, the likely perspectives of the other judges on a panel. Interview with Chief Judge Espinosa, *supra* note 91.

208. *See, e.g.*, Hollenhorst, *supra* note 10, at 30; interview with Judge Druke, *supra* note 91. Chief Justice Rehnquist notes that decision conferences of the U.S. Supreme Court often end with the understanding that "some things will have to be worked out in the writing." REHNQUIST, *supra* note 43, at 257.

209. *See, e.g.*, Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

> [T]he necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law's bearing upon them. Snap judgments and lazy preferences for armchair theorizing as against library research . . . are somewhat minimized. The checking of holdings in cases cited, the setting down of reasons in a context of comparison with competing reasons, the answering of arguments seriously urged, the announcement of a conclusion that purportedly follows from the analysis set out in the opinion, are antidotes to casualness and carelessness in decision. They compel thought. It is even necessary that the thought have some of the quality of rigorousness in it.[210]

Another commentator has noted:

> Where a judge need write no opinion, his judgment may be faulty. Forced to reason his way step by step and set down these steps in black and white, he is compelled to put salt on the tail of his reasoning to keep it from fluttering away . . . [U.S. Supreme Court Justice Oliver Wendell] Holmes said the difficulty is with the writing rather than the thinking. I am sure he meant that for the conscientious man the writing tests the thinking.[211]

Allowing parties to review the draft opinions before oral argument takes the analytical value of writing the draft one step further. Now, the arguments and conclusions of the authoring judge can be scrutinized by not only the judge's peers on the panel, but also by the advocates and the parties—the ones most likely to be the best informed about the case. With time to think through the logic and implications of the draft opinion, and time to back up their arguments with additional research, attorneys are able to provide more thoughtful and thorough responses to issues addressed by the draft. "Realistically, one should not expect the average attorney to respond effectively to unanticipated questions, relying solely on memory, without an opportunity to reflect on either the question or the

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> In sixteen years I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.

Id. Martineau also has emphasized the error-correcting function of the writing process:

> Fallacy of reasoning, misreading of the facts, or a misuse of precedent are far more likely to become apparent when all of the factors of a decision are set out in writing. Thus, the written opinion is essential to both the writing judge and to the other members of the court.

Martineau, *supra* note 1, at 27

210. Robert Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 810 (1961).

211. Moses Lasky, *Observing Appellate Opinions From Below the Bench*, 49 CAL. L. REV. 831, 838 (1961), *quoted in* CONNIE E. BOLDEN, APPELLATE OPINION PREPARATION: A SELECTIVE BIBLIOGRAPHY AND SURVEY 4 (The National Judicial College 1978).

response."[212] In addition, the non-authoring judges on the panel are often able to approach argument at a higher level of analysis after having read the draft opinion,[213] so long as the non-authoring judges adequately prepare for argument themselves.[214] Thus, the preparation and dissemination of draft opinions, like oral argument itself, brings focus to questions not resolved by a study of the briefs, and helps the court to explore intelligently the ramifications of a particular course of action.

C. Criticisms of Disseminating Draft Opinions

Judges on the Arizona Court of Appeals, Division Two, are also familiar with criticisms of disseminating draft opinions. The criticisms come frequently from appellate judges of other courts,[215] though rarely, if ever, from the attorneys who practice before the court.[216] The Division Two judges firmly reject the most commonly heard criticisms, that draft opinions cause the court to become locked into a position, or excessively reliant on a single authoring judge.[217]

To understand better these criticisms—and the Division Two judges' uniform rejection of their premise—it is useful to view separately two aspects of the draft decision process: 1) the actual writing of the pre-argument draft opinion, and 2) the dissemination of that decision prior to oral argument. Roughly half of state appellate courts create some form of draft decision before oral argument.[218] The criticism that draft opinions reduce judicial open-mindedness applies equally to any court that assigns draft decisions to be written prior to oral argument.[219] Judges who write pre-argument opinions necessarily make pre-argument judgments.[220] Disseminating the draft makes its existence apparent to the parties, but does not cause the court to freeze its position.[221] Instead, it has the opposite

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212. Martineau, *supra* note 1, at 24.
213. Interview with Chief Judge Espinosa, *supra* note 91.
214. *See* LEFLAR, *supra* note 52, at 37.
215. Interview with Judge Flórez, *supra* note 92.
216. *Id.*; Interview with Judge Brammer, *supra* note 90.
217. Interviews with Division Two Judges, *supra* note 185.
218. *See infra* note 283.
219. Indeed, the criticism logically extends also to the drafting of preliminary decisions before the judges' decision conference. *See, e.g.*, REHNQUIST, *supra* note 43, at 258 ("There is also a very human tendency to become more firmly committed to a view that is put in writing than one that is simply expressed orally, and therefore the possibility of adjustment and adaptation might be lessened by this approach."). *But see* People v. Pena, 9 Cal. Rptr. 3d 107, 114–15 (2004) ("We find nothing objectionable in the court's studying the merits of a motion in advance of the hearing and reaching a tentative conclusion as to how the motion should be resolved. . . . Nor do we see anything improper in the court's having reduced its tentative ruling to writing.") (citation omitted).
220. *See infra* note 227, 240, and accompanying text.
221. A counterargument might be made that publicizing a draft opinion will make judges more defensive of their draft analysis. Yet providing the opportunity for advocates to study and prepare a response to drafts makes it more difficult for a judge interested in "saving face" to ignore valid criticisms. Additionally, the fact that the draft represents the initial opinion of only one judge means that two members of the panel have no personal investment in defending the draft.

effect: Disseminating the draft before argument can serve to mitigate the risk that a court or panel will cling defensively to a decision made before oral argument.[222] In a similar manner, as explained below, opening the draft to criticism by parties' counsel at argument also lessens the risk that a decision will rely too heavily on the thoughts of a single judge who writes the draft.

Appellate court decisions are meant to be a collaborative process involving all members of a court or panel.[223] The American Bar Association's published standards for appellate courts states: "An appeal is intended to subject a decision of a lower court to collective and deliberative review. An appellate court's internal procedures for deciding an appeal should therefore ensure that the parties' contentions are carefully considered by all the judges participating in the decision."[224]

The ABA standard's commentary adds:

> The authority of an appellate court and its enjoyment of public confidence depend chiefly on the fairness with which it is perceived to act and the persuasiveness of its decisions in terms of law and justice. Fairness and persuasiveness in appellate adjudication require that the parties have adequate opportunity to present their contentions, that they have confidence that their contentions have been considered, that all the judges responsible for a decision have participated in reaching it, and that the court's decision rests on well-reasoned grounds.[225]
>
> Draft decisions written by a judge before conferencing with other members of the panel obviously will not reflect the considered opinions of the entire panel.[226] Whether the final decision in such a case is the product of collegiality will thus depend on the extent to which the non-authoring judges prepare for and contribute to the discussion of the draft at oral argument and/or the decision conference. This risk of one-judge decision making is an inherent danger in any front-loaded court that assigns the drafting of an opinion prior to the judges' decision-making conference.[227]

Providing the parties with the draft opinion before argument, however, serves to mitigate the danger of one-judge or no-judge[228] decisions. If non-

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222. *See supra* notes 173–75 and accompanying text.

223. ABA STANDARDS RELATING TO APPELLATE COURTS [hereinafter ABA STANDARDS] §3.30 (1977).

224. *Id.*

225. *Id. See also supra* note 124 and accompanying text.

226. In fact, a key motivation for front-loading the decision-making process in this way is the gain in efficiency caused by eliminating the redundant preliminary preparation of each case by multiple judges.

227. The danger is the perception, perhaps justified, that the non-authoring judges will defer to the authoring judge, since that judge has devoted the most time and the most thorough study and thought to the case.

228. The term "no judge opinions" refers to appellate court opinions drafted by court staff or law clerks, a phenomenon decried by some as an improper delegation of the judicial thought process.

authoring judges tend to defer to the authoring judge or law clerk—the one who has given the most time and careful study to the case—then the advocates at oral argument have an opportunity to point out where the author of the draft decision went astray.[229] In comparison with the non-authoring judges, the advocate with a stake in the outcome and a superior familiarity with the record can be expected to pursue more vigorously any errors of fact, law or logic in the disseminated draft. By exposing its draft decision to criticism at oral argument, the court reduces the danger that flawed reasoning or errors of law or fact will prevail simply because the non-authoring judges have not given the case sufficient study.[230]

Disseminating draft opinions, in a similar way, may shake a court from becoming permanently committed to a position expressed by the draft opinion. The criticism of judgments—tentative or otherwise—reached before oral argument is that judges should keep a fully open mind about a case before having heard the arguments.[231] This view has sometimes been carried to the extreme of judges questioning whether it was proper to even review the briefs or record before the parties had presented their case at argument.[232] But intentional blindness has lost its following; today it's widely accepted that a court gains more than it loses by a more thorough preparation for oral argument.[233] "A judge who has not prepared at all for oral argument might be more 'open-minded,' but it would be the open-mindedness of ignorance, not of impartiality."[234]

Commentary to the American Bar Association Standards Relating to Appellate Courts describes the considerations at issue:

> Some appellate judges believe that they should not "prejudice" their minds by reading the briefs and record before hearing oral argument. A judge should of course approach oral argument with an open mind. But a judge who is not well acquainted with a case before it is argued is unable to benefit fully from the argument or to use it to explore questions that may emerge. Moreover, if the bench is unprepared, counsel are required to use much of their limited time

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> Where the career research attorney working for an individual judge prepares a precalendar tentative opinion, the document may circulate with minimum judicial input if the judge has become too dependent upon his research attorney. In either situation, the less-than-dedicated panel which would produce a one judge opinion without staff may produce a no judge opinion with it.

Thompson, *supra* note 13, at 515

229. *See supra*, note 194 and accompanying text. *See also* Hollenhorst, *supra* note 10, at 13–14.

230. For a similar argument urging dissemination of staff case reports and recommendations as a check on the growing power of the appellate "shadow court" of court research attorneys and recent law school graduates ("beginners in the law") serving as law clerks, see Paul M. Hamburger, *Improving Appellate Justice by Sending Prehearing Reports to Counsel*, 65 MICH. B.J. 1016, 1018–20 (1986).

231. *See* ABA STANDARDS, *supra* note 223, at Commentary to §3.34. *See also supra* note 51 and accompanying text.

232. *See* ABA STANDARDS, *supra* note 223, at Commentary to §3.34.

233. *See id.*

234. REHNQUIST, *supra* note 43, at 244.

> to state the basic facts and issues presented and are in practical effect denied opportunity to direct argument to matters that may be important or troublesome to the court. The view that an open mind must be an empty mind, so to speak, thus results not in greater fairness to the parties but rather in impairment of their right to be heard.[235]

By granting oral argument on a discretionary basis, a court acknowledges that argument, when granted, is likely to assist the court's decision.[236] Yet judges who enter argument with a draft opinion—whether disseminated to the parties or not—have already reached a tentative conclusion about a case.[237] Thus, front-loaded courts subject themselves to the criticism that the court has "made up its mind" prematurely before having heard oral argument.[238] The criticism has more force under the California Division Two tentative opinion procedure, where a majority of the panel has voted to endorse the outcome expressed in the tentative opinion before argument.[239] In the Arizona Court of Appeals, Division Two, the draft is presented as the initial opinion of only one judge; the other members of the panel have not committed to the draft opinion.[240]

Again, it is important to distinguish the effects of pre-argument opinion drafting from the effects of distributing those drafts to the parties before oral argument. The danger of prejudgment is a facet of pre-calendar drafting, not dissemination.[241] Dissemination merely makes evident the existence of the draft.[242] The Arizona Court of Appeals, Division Two, used draft opinions internally for years before it began providing the drafts to the parties in advance of oral argument.[243] Indeed, the court's decision to first experiment with disseminating drafts came about upon the suggestions of appellate lawyers, to whom the presence of the drafts at oral argument had become evident.[244]

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235. ABA STANDARDS, supra note 223, at Commentary to § 3.34.

236. *See supra* notes 49, 63, and accompanying text.

237. *See* Hollenhorst, *supra* note 10, at 29–30.

238. *See* Thompson & Oakley, *supra* note 124, at 65 ("If a court has reached a conclusion, even one that is labeled 'tentative,' oral argument involves a process by which minds must be changed rather than open minds persuaded."). The California Supreme Court, however, has rejected the suggestion that pre-argument drafting of a tentative decision undermines the effectiveness of oral argument:

> Based on this court's own practice and experience we know that tentative written determinations prepared prior to argument are both helpful to the court in collecting and organizing its thoughts, and not infrequently altered or even reversed after argument and further reflection. The suggestion that a defendant receives a 'less meaningful' hearing when the court prepares a tentative opinion is simply untenable.

People v. Brown, 862 P.2d 710, 722 (Cal. 1993) (citation omitted).

239. *See supra* notes 143–45 and accompanying text.

240. *See* Escher, *supra* note 12, at 4.

241. *See* Hollenhorst, *supra* note 10, at 30.

242. *Id.*

243. *See* Escher, *supra* note 12, at 3.

244. One Tucson attorney recalls that before the days of dissemination, "You'd go down there to argue and they'd all be holding something, reading it to you, so it was

Judges on the Arizona Division Two court also reject the suggestion that distributing drafts before oral argument causes the court to become defensive of a preliminary position.[245] Instead, they argue, dissemination forces the court to examine a draft after attack by attorneys with the knowledge of the case—and the incentive—to best expose any flaws in the draft.[246] Placing the draft opinion "face up" on the table promotes accountability by making it harder for judges to remain intransigent in the face of persuasive arguments.[247] Thus, dissemination of draft opinions may expose the extent to which a court has "made up its mind" before argument, but the dissemination itself should have a tendency to thaw—not freeze—a judge's pre-argument opinions.[248]

While rejecting these two common criticisms of disseminating draft decisions, judges of the Division Two court in Tucson do acknowledge other drawbacks of the procedure. One concern is the short timeframe provided for writing draft decisions.[249] Since cases typically are set for argument approximately one month from the time the record on appeal is complete with the court, the draft decisions must be ready to distribute within a matter of just a few weeks.[250] Thus, the draft decisions may be artificially forced to rise to the top of a judge's pile of pending cases.[251] Additionally, judges may be rushed into writing a draft decision that is less well-crafted than it would be if the authoring judge had more time to consider the issues, conduct further research, and fine-tune the draft.[252] The court's self-imposed deadline for preparing drafts and scheduling oral argument may thus bring about the ironic result that the authoring judge has the least amount of time to prepare draft opinions in those cases where the issues are most complicated, most important to the public, or most likely to result in publication.[253] Although the process of exposing the draft to criticism at oral argument—and the subsequent opportunity to edit and re-write—may overcome any initial shortcomings in the draft,[254] the possibility of providing a second-best draft may undermine somewhat the draft's asserted value in raising the level of analysis and debate at oral argument.

The compressed time schedule also has implications for appellate lawyers and their clients. Several lawyers commented that the receipt of draft opinions just

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obvious they had a draft." Interview with D. Burr Udall, attorney, in Tucson, Ariz. (Jan. 7, 2003). Retired Division Two Judge Larry Howard, who led the court's draft dissemination experiment, says he was motivated by a suggestion from (now former Supreme Court Chief Justice) Stanley Feldman, then an appellate attorney, who argued it was only fair to provide the parties with drafts, since attorneys already knew that the members of the court were using them. Interview with Judge Howard, retired Judge, Arizona Court of Appeals, Division Two, in Tucson, Ariz. (November 20, 2002).

245. Interviews with Division Two Judges, *supra* note 185.
246. *Id.*
247. *See supra* note 175 and accompanying text.
248. *Id.*
249. Interview with Judge Flórez, *supra* note 92.
250. *Id.*
251. *Id.*
252. Interview with Judge Brammer, *supra* note 90.
253. *See supra* notes 49, 63, 102, 110 and accompanying text.
254. Interview with Judge Brammer, *supra* note 90.

a few days before oral argument often provides too little time to re-open settlement negotiations after receipt of the draft but before argument.[255] Receipt of draft opinions with just days—or sometimes just minutes—to consider them before oral argument also reduces the opportunity for counsel to pursue further research or other preparation in response to the draft.[256] The time constraints did not appear to be a major concern among members of the court,[257] perhaps because the court's procedures allow the flexibility to reschedule oral argument when a draft opinion is not yet ready.[258]

VII. CHANGES TO DRAFT OR TENTATIVE OPINIONS FOLLOWING ORAL ARGUMENT

Part IV of this Note described the findings of a study conducted in Tucson five years after the Arizona court began its draft dissemination experiment. The study compared draft to final rulings to find what percentage of decisions were modified or overturned following oral argument.[259] This section supplements that data with a comparison of draft to final decisions from the court's 2002 oral argument calendar. This section then discusses a more elaborate study conducted by the California Court of Appeal, Fourth Appellate District, Division Two, suggesting that distribution of tentative opinions to the parties before oral argument leads to more frequent changes of the court's first-draft opinion.

A. Changes to Draft Decisions by the Arizona Court of Appeals, Division Two

The comparison of 1986 draft to final decisions from the Arizona Court of Appeals, Division Two, found that the draft opinions' proposed result changed in five percent of the 148 civil cases studied.[260] The decision was modified without changing the result in thirty-one percent of cases.[261] In fifty-eight percent of the cases analyzed, no change was made from draft to final decision.[262] In six cases, the parties dismissed the appeal after receiving a draft opinion.[263]

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255. Interview with D. Burr Udall, *supra* note 244; telephone interview with Susan Freeman, attorney in Phoenix (Jan. 10, 2003); interview with Mick Rusing, *supra* note 187.

256. Interview with Mick Rusing, *supra* note 187 ("We get the opinions too late in the game. More than once, they've been handed to me minutes before argument."). The data suggest most litigants get a bit more advance notice. Of twenty-nine cases with data available from the court's 2002 oral argument calendar, the court disseminated its draft decision on average 8.5 days before oral argument. However, in seven of the twenty-nine cases, the court distributed its draft less than two full days before oral argument. Author's Database, *supra* note 88. Since 2003, the court has sent its draft decisions to counsel via e-mail.

257. Only two judges mentioned the timing of the program as a concern. Interview with Judge Flórez, *supra* note 92; interview with Judge Brammer, *supra* note 90.

258. See *supra* notes 111–112 and accompanying text.

259. *See supra* notes 126–31 and accompanying text.

260. *See supra* note 126–27 and accompanying text.

261. *See supra* note 128 and accompanying text.

262. *See supra* note 129 and accompanying text.

263. *See supra* note 130 and accompanying text.

Sixteen years later, in 2002, the court's oral argument calendar was far smaller. The court granted oral argument in just thirty-seven cases—less than four percent of the 1,023 cases filed in 2002.[264] Of the thirty-seven cases calendared for oral argument, nine were criminal appeals.[265] The court distributed draft decisions in thirty-four of the thirty-seven cases.[266] This author compared the draft to final decisions for these thirty-four cases[267] and found the following results: The court changed the draft decision's outcome in four (11.7%) of the thirty-four cases.[268] Three of the four cases with draft outcomes "overturned" were criminal appeals.[269] Every one of the thirty-four decisions analyzed was changed in some way from draft to final version, either in response to oral argument[270] or the panel's decision conference, or simply because the process of writing, editing, and rewriting resulted in the clarification, focus, or elaboration of previous drafts. In cases where the draft decision outcome was not reversed after oral argument, at least nine decisions (twenty-six percent of the thirty-four cases) were modified substantially from draft to final decision.[271]

B. The California Study: Dissemination Makes a Difference

In a study designed to test what difference dissemination makes, the California Court of Appeal, Fourth Appellate District, Division Two teamed up with another division of the California Court of Appeal to compare the frequency of changes to tentative opinions after argument. For a period of eight months,[272]

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264. Author's Database, *supra* note 88; The Arizona Courts Data Report 2002, *supra note* 88, at 53. As a point of comparison, the court in 1986 scheduled oral argument in more than 148 civil cases alone. See *supra* note 126 and accompanying text.

265. *See* Author's Database, *supra* note 88.

266. *Id.* In one case, the court heard oral argument on an expedited appeal without a draft. In a second case, oral argument was cancelled at the request of the parties before any draft was distributed. In a third case, the court held oral argument without a draft decision, apparently because the draft was not ready for distribution. *Id.*

267. The Author was unable to locate a copy of one of the draft opinions. For that case, appellate attorneys on both sides of the case agreed that the outcome did not change from the draft to the final decision. *Id.*

268. *Id.*

269. *Id.* One of the reversed criminal cases suggests reasons why criminal appeals might be more likely to change in outcome from draft to final decision. The case turned on the highly subjective and fact-specific inquiry of whether the taint of an illegal arrest had been purged by the time a criminal confession was made. Another of the court's criminal cases was overturned between draft and final decisions in response to new controlling precedent from the U.S. Supreme Court on a question of federal constitutional law. *Id.*

270. *Id.* In at least seventeen of the thirty-four decisions that followed a pre-argument distributed draft, the court's final decision addresses contentions made at oral argument. *Id.*

271. *Id.* Whether to consider a draft substantially modified involved a case-by-case, somewhat subjective determination made on the basis of either the extent of rewriting (changing more than one-third of the draft decision), or, in some cases, the extent to which the court changed its legal reasoning or articulation of its decision. *Id.*

272. The study period lasted from the fall of 1993 to the spring of 1994. Hollenhorst, *supra* note 10, at 33, n. 111.

both courts kept data of cases where oral argument was requested.[273] The comparison court was chosen for the study because it was heavily front-loaded, similar to Division Two.[274] The comparison court also drafted preliminary opinions following a panel conference discussion, but before oral argument; however, it did not disseminate its draft rulings to the parties before argument.[275] Both the tentative opinion court and the comparison court then tracked the changes made to the court's opinions as they progressed from draft to final decisions.[276]

During the eight-month study, the comparison court drafted 122 tentative opinions, distributed none, and changed the final disposition of a case from draft to final decision only once (0.82% of cases).[277] Hollenhorst's court drafted and distributed 192 tentative opinions.[278] Remarkably, seventy-eight of the 192 cases (40%) resulted in a waiver of oral argument after distribution of the tentative opinion.[279] Of the 114 cases where oral argument was held following distribution of the tentative opinion, the court changed the final disposition in four cases (3.5% of cases argued).[280] The comparison court also was found to have substantially rewritten fewer opinions than Hollenhorst's court (three opinions vs. nine).[281] Hollenhorst concluded from the comparison that "there were clearly more changes to tentative opinions where counsel had an opportunity to comment on the court's initial determination."[282]

VIII. CONCLUSION

Disseminating draft opinions before appellate oral argument furthers the purposes of oral argument, a litigant's last chance to persuade judges, clear the fog of misunderstanding, and explore ramifications of possible decisions. The disseminated drafts provide counsel the chance to see—with time to prepare a thoughtful response—any errors of fact, flaws of logic, or problematic implications of a proposed decision. Exposing the draft puts erroneous assumptions on the table, where they can be quickly and efficiently dispelled. Thus, distributing the draft to the parties, like oral argument itself, acts as a check on a court's undue reliance on the work of the authoring judge or court staff attorney.[283] If oral

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273. *Id.* at 32.
274. *Id.*
275. *Id.* at 32–33.
276. *Id.* at 33.
277. *Id.* at 34.
278. *Id.*
279. *Id.* The high incidence of waiver may have been partly caused by the court arguably discouraging oral argument. *See supra* notes 176–80 and accompanying text.
280. Hollenhorst, *supra* note 10, at 34.
281. *Id.*
282. *Id.* at 35.
283. *See* CARRINGTON, *supra* note 18, at 52–53 (encouraging experiments in providing counsel with advance copies of staff-drafted opinions as a safeguard against staff errors or misconceptions, and to dispel concerns about undue staff influence, and noting that a similar practice has been shown to be useful in administrative tribunals). Others have made similar recommendations:

> The common practice in which precalendar preparation of non-central staff cases is delegated to one judge of the panel whose memorandum

argument today is viewed as an invitation to the parties to participate in the first phase of the judicial conference, then it makes sense to allow the parties to work off the same "script" as the judges whom they seek to persuade.

Also noteworthy in an era of pressing appellate caseloads, disseminating draft opinions increases the efficiency of oral argument. By allowing the advocates and judges to enter the argument all "on the same page," the draft brings quick focus to key disputed questions of law, fact, or policy. In addition, the draft analysis jump-starts the analytical argument by getting everyone "up to speed" on the court's proposed reasoning and analysis before the argument starts. Finally, disseminating draft opinions, like oral argument, provides a measure of judicial accountability and visibility. By inviting criticism of its "work product," the court demonstrates greater transparency. The suspicion that judges have their "minds made up" before oral argument is put to the test when parties can compare the draft decisions to final opinions.

Criticisms of the draft-dissemination programs miss their mark. The concern that a court has "made up its mind" before argument is properly aimed at the procedure of "front-loading" courts: assigning the drafting of an initial opinion before oral argument. It is this front-loaded decision-making, not dissemination itself, which threatens to freeze a court into a preconceived opinion. Sending draft opinions to the parties before argument serves to thaw, not freeze, the court's initial impressions of a case. Opening the draft to comment by advocates—the individuals most knowledgeable about the case, most motivated to seek flaws in a draft opinion—provides a check on the power of a single authoring judge, and makes it less likely for a court to remain stubbornly unmoved in the face of persuasive arguments.

Despite the strong praise for disseminating draft opinions from the California and Arizona state intermediate appellate courts where the practice is followed, the innovation remains unlikely to gain a broad following. Indeed, most appellate courts would be unable to adopt a draft dissemination program without a significant overhaul of their internal procedures.[284] In addition, it may take an unusual group of appellate judges to invite public scrutiny of the court's working drafts—a form of judicial "work product" that has long been viewed as entitled to utmost confidentiality. As scholars of precedent and *stare decisis*, appellate judges

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> educates the others poses dangers of defective information and other bureaucratic pressures that should be avoided. We suggest that, where possible, each judge prepare herself individually to be an effective participant in oral argument and conference. Where this is not possible, judges would do well to consider the circulation to counsel prior to argument of the one judge precalendar product in the same fashion we claim central staff product should be distributed.

Thompson & Oakley, *supra* note 124, at 72.

284. None of the federal appellate courts, and only about half of state intermediate appellate courts are front-loaded, such that some form of draft opinion is created before oral argument. For many of those front-loaded courts, the pre-argument drafts are just rough sketches or brief outlines of an opinion, probably not viewed as suitable for dissemination. Interview with Justice Hollenhorst, *supra* note 134.

also might not be the best candidates to embrace new, controversial changes to long-standing traditions and procedures.[285]

Finally, courts might be reluctant to adopt a draft dissemination procedure because the benefits of such a procedure are difficult to measure, while the drawbacks are more easily quantified. Courts can easily track such efficiency measures as the size of case backlogs, average case processing times, and related statistics. In contrast, the "quality" of justice dispensed by a court is not subject to quantification or record-keeping.[286] Because many of the benefits of disseminating draft opinions cannot be easily measured, skeptics may dismiss them as merely anecdotal, conjectural, or subjective. Meanwhile, the disruptive transition to a draft-dissemination procedure, and the added burden of the procedure itself, would likely impair a court's efficiency in objectively quantifiable ways.

Nonetheless, the experience with draft opinions in California and Arizona suggests that the dissemination programs are worth replicating in appellate courts elsewhere. Exposing the pre-argument judicial "work product" to criticism and debate fosters a spirit of judicial candor that is warmly welcomed by appellate attorneys and their clients. Dissemination furthers the objectives of oral argument in modern appellate procedure. Though not subject to easy measurement, it is the *quality* of justice on appeal that is an appellate court's true "bottom line." Inviting criticism of draft opinions gives judges a better chance of "getting it right."

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285. *Id.* Many appellate courts' sole exposure to pre-argument dissemination comes by accident, in cases where a clerical error fails to note that oral argument has been requested, and drafts are sent out before the parties correct the error and request argument. In such cases, the parties enter argument with the benefit of the "draft," but are unlikely to view the proceeding in a positive light. *Id.*

286. *See* Marvell, *supra* note 5, at 93 ("Most questions about the impact of the summary calendar on the quality of appellate justice cannot be addressed with statistical analysis, and here we rely on the opinions of the judges and lawyers.").