Law Practice, Appellate Practice
Jan. 5, 2021

The score after a score

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EXCEPTIONALLY APPEALING

Happy New Year. This is usually a time for reflection on the past year. But for the terrifyingly tumultuous 2020, why bother? All those old think-pieces playing on the "20/20 vision" schtick seem naïve and ludicrous now. Not only do we not have flying cars, last year more resembled the 14th century than the 21st. So rather than looking back over a memorably unpleasant time, let's adopt the optimism of Sgt. Pepper and cast our glance at "20 years ago today" (more or less), evaluating the score of where things stand appellatewise now after a score of years.

Comparing appellate practice today with its status two decades ago is aided immeasurably by the August 2000, 75-page, Report of the Appellate Process Task Force (dedicated to Bernie Witkin!), commonly called the Strankman Report (because 1st District Administrative Presiding Justice Gary Strankman chaired the project). Chief Justice Ron George created the task force in 1997 to explore how to "efficiently handle rapidly rising caseloads in a timely manner without adding significant new resources to the court." The task force's charge was to suggest changes that would help the Courts of Appeal fulfill their constitutional mandate with greater speed and efficiency without additional expenses and without sacrificing fundamental decision-making values. Numerous justices and appellate practitioners served on the committee and provided ideas over several years. Five recommendations ultimately emerged.

The first idea was to convert the four stand-alone divisions (Division 6 of the 2nd District and the three divisions of the 4th District) into separate districts, and not to create any new divisions. Well, that obviously didn't happen. Those divisions remain stand-alone, and no new districts have been created. To the contrary, a new Division 8 was created in the 2nd District and the total number of justices increased statewide, from 93 to 106.

The task force also explored the idea of an appellate referee, riffing off an "appellate commissioner" procedure used in Washington state, where a single subordinate judicial officer decides an appeal, and the losing party can then request an appeal de novo. Overwhelming negative commentary killed this idea. Other rejected ideas included

implementing the federal appellate practices of intermediate-appellate horizontal stare decisis and convening en banc courts (either within districts or statewide).

Justice Strankman himself later asserted that "there ought to be a court in between the Court of Appeal and the Supreme Court, made up of the six APJs staffed by people from the Supreme Court," to resolve district splits. *See* California Appellate Court Legacy Project, Video Interview Transcript: Justice Gary E. Strankman (Feb. 14, 2007) at p. 24. That innovative structural idea never took hold either.

The second idea was to amend Rule of Court 6.52 (now numbered 10.52) to require the Administrative Presiding Justices Advisory Committee to submit an annual report to the chief justice addressing the workload and backlog of each district and division to help analyze and then equalize caseloads. The proposed amendment never happened. Even so, transfer of cases to equalize work between divisions has been ordered sporadically over the years. And while certain courts may have appreciated the help, it is not clear that this has led to any systemwide improvements to efficiency. Back in 1997-98 (the data set used by the task force), the statewide median was 516 days from notice of appeal to decision for civil appeals. The latest stats have this at 589 days.

The third idea was to require a civil appeals docketing statement shortly after an appeal is docketed. This would allow courts to easily and promptly spot jurisdictional problems, facilitate early coordination of related appeals, and assist in data gathering. This idea was adopted, and the Civil Case Information Statement is an ordinary part of appellate practice today (although many forms are bounced for failing to include a copy of the order or judgment being appealed -- a requirement somewhat lost in the fine print on the form). Presumably the stated goals for this form have been met, benefitting the courts, and not meaningfully burdening appellants. Indeed, the 6th District recently enacted a new Local Rule 4 (effective Dec. 28, 2020) to require additional attachments to the CCIS form to help the court quickly pinpoint jurisdictional flaws. The latest stats show the 6th District has the slowest median civil appeals time in the state (at 830 days), but the 3rd is close behind (at 829 days, and the 3rd has the longest 90th percentile time at 1,522 days).

The fourth idea was to adopt a rule to encourage the use of abbreviated "memorandum" opinions "when an appeal or an issue within an appeal raises no substantial points of law or fact." Witkin had been pushing this idea decades earlier. *See* B.E. Witkin, Manual on Appellate Court Opinions, pp. 238-268 (1977). Memorandum opinions already were encouraged by Section 6 (now 8.1) of the Standards of Judicial Administration (adopted in 1970), but courts were not using them. The task force believed that reiterating the standard as a rule might help make memorandum opinions more common.

As discussed in this column's May 2019 installment ("Abbreviated Justice"), despite the task force's recommendation, no statewide rule was ever adopted. Indeed, no rule governs the form of opinions at all. A phantom "rule 8.260" (titled "Opinion") exists, but it has no text and is simply "reserved" for possible future content. However, the 1st District

adopted Local Rule 19 in August 2019 to encourage the use of memorandum opinions, and there appears to have been a tiny uptick in their use in Division 1 of the 1st, as well as in the 5th District. So the task force's suggestion has partially came to fruition, at least in the form of a local rule in one district.

The fifth recommendation was to amend Code of Civil Procedure Section 906 to expand the topics subject to mandatory new trial motions (or else suffer waiver on appeal). Thus, in addition to the existing law requiring that claims of jury misconduct or excessive or inadequate damages be raised in a new trial motion, the report recommended that "to be cognizable on appeal" a new trial motion must be brought to preserve issues of accident or surprise that ordinary prudence would not have prevented, and newly discovered evidence not discoverable with reasonable diligence. Section 906, however, was never amended to make this change. It seems doubtful that such a statutory amendment would have done much to reduce the crisis of appellate volume anyway.

The task force's efforts were an excellent exercise in examining the existing appellate process and creatively proposing improvements. Some good came from all that hard work. But significant change is hard, especially against a moving target. Even given 20 years, if the Strankman Report is the measuring stick, it is not at all apparent that much "progress" has been made in the processing of civil appeals. Twenty years ago, the most backlogged courts were the 4th and 5th Districts. A Temporary Law Clerks Program added additional research attorneys and secretaries to address the backlogs. Today, the 4th District divisions are faster than the statewide median, but that figure itself is now about a hundred days slower than it was. And while those districts are no longer slowest (instead, it's now the 3rd and 6th), it's hard to see how replacing certain backlogged courts with different severely backlogged courts -- and an overall slower system -- counts as an improvement.

On the more positive side, the most meaningful changes in appellate practice over the past two decades include the entire redrafting and reorganization of the Rules of Court; the creation of numerous Judicial Council and local forms to aid with simple procedural filings; the use of internet docketing systems, resources, and email notification; the momentous advent of universal appellate e-filing (via the TrueFiling system); and -- courtesy of COVID-19 -- the widespread pivot to remote oral arguments. Many of these transformative advances took years of planning to implement. Yet the pace of change is increasing noticeably. Technology has made a big difference. Behind the scenes, the courts' software was upgraded with the Appellate Court Case Management System. And on the public-facing side, online video arguments and opinions with color photos make for nice presentations. *E.g.*, *11 Lagunita, LLC v. Cal. Coastal Comm'n*, G058436 (2020) (color photos of residential seawalls); *In re Edgerrin*, 271 Cal. Rptr. 3d 610, 618 (2020) (color photo from police body camera).

The pandemic proved that when push comes to shove, the appellate system can adapt effectively and nearly instantaneously. Despite tragic hardships and 2020-trauma, the past

year ushered in some beneficial changes to our appellate world. The futuristic notion that all one needs is a laptop and Wi-Fi to singlehandedly handle every single aspect of an appeal is our new reality, and it is exceptionally appealing.