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APPELLATE DELAY AND COST—AN ANCIENT AND COMMON DISEASE: IS IT INTRACTABLE?

ALVIN B. RUBIN* AND GILBERT GANUCHEAU**

The plagues of delay and cost have ever afflicted all who engage in litigation. Appellate review aggravates both. That the delay and expense incident to an appeal continue to mount with the inexorability of inflation is not news. That courts of appeals are aware of these problems and are trying to solve them may, therefore, seem no more newsworthy, even to members of the legal profession, than an announcement that medical researchers are interested in developing a cure for the common cold. What is worth writing about is that the symptoms of appellate malaise can be alleviated even if the disease cannot be cured. This article traces the therapeutic effort of the United States Court of Appeals for the Fifth Circuit, one of the nation's largest and busiest appellate courts.¹

In 1968, the Fifth Circuit devised a plan to permit the court to keep abreast of its rapidly increasing caseload without resorting to a corresponding increase in judge-power. Refined by a series of changes over the next decade and a half, the plan has allowed the court to decide cases in a median time of eight months from notice of appeal and has increased its output per judgeship by eighty-six percent: the number of cases disposed of on briefs or after oral argument by each three-judge panel increased from 180 in the year before the plan to 334 just two years after its adoption. We here examine the procedure, its successes, and its disadvantages.²

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^{1.} In 1962, the Fifth Circuit had 715 cases and 9 judges. It was then the largest federal court of appeals. During the next 17 years, it continued to be the largest, expanding from 9 to 13 to 15 judges and finally, in 1979, to 26 judges handling nearly 5000 appeals annually. After the circuit was divided, the total appellate case load originating in the six states continued to increase. In 1982, 2715 appeals were filed with the Fifth Circuit and 2556 with the Eleventh. The Fifth now has 14 judges and is the second largest federal appellate court.

All data in this article are for the United States Courts of Appeals. Unless otherwise indicated, they are taken from Management Statistics for United States Courts, published annually by the Administrative Office of the United States Courts.

^{2.} Following the division of the great "old Fifth" Circuit into the "new Fifth" and Eleventh Circuits, both circuits continued to use the same basic plan. The Ninth Circuit has adopted some of these procedures on an experimental basis.

The process of taking an appeal, ending in a final decision by an appellate panel, is not completed in a single step. There is a potential for delay and expense at each stage of the process. Thus, there is no single reason for delay and no single cause of expense: there are many interrelated reasons for both. Remedial efforts, therefore, must seek speed and efficiency at each stage of the appeal.

I. READYING THE CASE FOR DECISION

A. Notice of Appeal Until Briefing

1. Record on Appeal—The appellant begins the process by filing a notice of appeal, but the appellate court cannot even begin work until the district court clerk files the record.³ In most cases, the record includes a transcript. In 1982 the median time for the filing of a notice of appeal to the filing of a record in the United States Courts of Appeals was fifty-one days. The Fifth Circuit's special effort to reduce the time required for this phase began only a year ago, but its effect has been dramatic.

Immediately upon receiving a notice of appeal, the Clerk of Court inserts data concerning it into a computer so that progress of the appeal can be tracked. Thereafter, the Clerk monitors the preparation of the transcript. A weekly printout gives the Clerk information concerning court reporters who have a heavy backlog or who are failing to deliver transcripts. The Clerk has power to penalize excessive delay by reducing the fee the reporter is permitted to charge. The reduction is ten percent if the transcript is not filed within sixty days and twenty percent if it is not filed within ninety days.⁴ One of the judges, working with

^{3.} In the Second Circuit, a Staff Attorney or judge holds a conference with counsel before the transcript is prepared to agree on the issues to be briefed, to set a briefing schedule, and to fix a date for oral argument. Second Circuit Civil Appeals Management Plan ¶ 5(a). A similar procedure is now being used in a few other circuits. This simplifies the issues and reduces the number of motions filed and it also encourages counsel to begin briefs before receiving the record. The fact that counsel in most of the Second Circuit cases have offices fairly close to the court makes such conferences practical. See *infra* note 8 discussing the impracticability of such conferences in the Fifth Circuit.

^{4.} Each of the district courts in the circuit has adopted a Court Reporter Management Plan which promises more even distribution of court reporters' work and, therefore, further reduction of the time required to prepare a transcript. These plans were adopted pursuant to a 1982 resolution of the Judicial Conference of the United States, which states:

The Conference recommends that the judicial council require each district court, subject to such exceptions as may be granted by the circuit council, to develop a court reporter management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the court. Each plan is to provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions and delivery schedules. The plan must also provide that supervision

the Clerk, assists in solving delay problems by communicating directly with court reporters who are becoming delinquent and with the judge who tried the case. In instances of serious delinquency the judge may issue an order requiring the reporter to show cause for the delay. If the delay is not satisfactorily explained, he may impose further sanctions. One of the most effective remedies, in extreme cases, has been to order the court reporter to drop all other work, to report to the office of the Clerk every day, and to work only on the late transcripts for eight hours a day until these are completed. Most court reporters, however, have responded willingly to the Clerk's exhortations and this ultimate sanction has been invoked only twice. With the introduction of the Court Reporter Management Plans in January of 1983, the cooperation of the court reporters, and the Clerk's monitoring, the court expects that much of the delay in filing transcripts will be eliminated, with a corresponding decrease in delay.

2. Appendix to the Briefs—Because the full transcript may be lengthy, most circuits require the preparation and printing of an appendix containing selected excerpts from the record for the use of the court in deciding the appeal.⁵ To effect some economy, most attorneys in the past proceeded under paragraph (c) of the rule, deferring the preparation of the appendix until all the briefs had been filed. Each party then knew the portions of the record he had relied on in the brief and could reproduce only those parts. Preparation of the deferred appendix took at least twenty-one days, and the cost of printing the average appendix was \$1,070. Since 1978 the Fifth Circuit has permitted litigants to proceed on the original record if they also file inexpensive photographic copies of a few excerpts from the record.⁶ Today almost all appeals,

be exercised by the clerk of court, district court executive, judge or other person designated by the court; that reporting tasks are to be apportioned equitably at the same site; and that, through scheduling, the use of temporary or contractual services is to be minimized to every extent practicable. The supervisor will implement Judicial Conference policies regarding court reporting services. Each "Court Reporter Management Plan" is to be approved by the judicial council of the circuit and a copy filed with the Adminitrative Office. The Administrative Office will assist the courts in establishing supervised court reporting services and productivity standards.

Thereafter, the Fifth Circuit Judicial Council adopted a similar requirement.

5. Fed. R. App. P. 30 prescribes the procedure for preparing and filing the appendix.
6. This local rule is permitted by Fed. R. App. P. 30(f). 5th Cir. R. 30.1 reads:
Appeals from District courts and the Tax Court shall be on the original record without

Appeals from District courts and the Tax Court shall be on the original record without requirement of the appendix prescribed by FRAP 30. At the time of filing appellant's brief, appellant shall file four copies of the following portions of the district court record, to be bound together, but not in the brief:

The docket sheet;

The judgment or interlocutory order appealed from;

save an occasional administrative review, are taken on the record, saving litigants well over one million dollars in printing costs annually and eliminating both the lawyer costs involved in preparing the appendix and the delay necessary for its preparation.⁷

B. Briefing

Rule 31 of the Federal Rules of Appellate Procedure fixes the time for briefing: forty days for the appellant, thirty days for the appellee, and fourteen days for reply. Denying motions to extend these time limits save for the most exigent reasons and thus holding attorneys closely to these times in most cases has shortened the total briefing delay to ninety-six days,⁸ reducing delays in getting cases to the court for decision

C. Submission to the Court

Because of the heavy schedules of all federal appellate courts, there is a waiting period between the time the case is briefed fully and the time when the court can hear oral argument. This period may be lengthy and it is entirely lost time, because while the case is awaiting judicial action, nothing happens. This interval is the single longest delay in most appellate courts. In some courts, such as the Fifth Circuit, the number of appeals has been so great that it has been impossible to hear oral argument in every case without continually increasing the number of cases awaiting oral argument, the backlog.

Any other orders or rulings sought to be reviewed; and

Any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the district court.

Such copies shall be reproduced on white paper by any duplicating or copying process capable of producing a clear black image, with a cover sheet bearing the case number and style and captioned "Record Excerpts."

7. For a full review of the effectiveness of the Fifth Circuit's rule dispensing with the appendix, see Ainsworth & Ripple, *The Separate Appendix in Federal Appellate Practice*—*Necessary Tool or Costly Luxury*?, 34 Sw. L.J. 1159 (1981). The late Judge Ainsworth was the author of the court's rule permitting record excerpts.

8. By holding a conference in each case and setting both a date for oral argument and a briefing schedule, the Second Circuit can hear cases in 90 days from the time the record is filed. The Second Circuit, however, disposes of relatively few cases without oral argument and 87% of its cases originate in the New York metropolitan area. Only 24% of the Fifth Circuit's cases come from the New Orleans area, the seat of the court, and the others come from an area that stretches 1160 miles from the eastern boundary of Mississippi to the western boundary of Texas. It is easy and inexpensive for counsel in the Second Circuit to attend conferences. The Second Circuit's program has achieved excellent results, but this part of it does not appear practical for the Fifth. Telephone "conference calls," however, might make a similar program possible although its effectiveness would likely suffer without face-to-face discussion.

The very nature of the oral argument process exacts more time than dispostion of cases without oral argument, not only because of the time required to hear the appeals but also because traditional judicial work habits require more time to reach and to render a decision. Some courts have attempted to change those work habits by limiting the time for oral argument to five or ten minutes for each party and by using brief judgment orders rendered shortly after oral argument.

The judges of the Fifth Circuit did not think these processes adaptable to much of the litigation it handles. Lawyers must travel long distances, at considerable expense, to attend oral argument. It seemed unfair and disproportionately expensive to require or even to permit oral argument if it were to be limited to a few minutes followed by a very brief, almost summary disposition, orally or in a succinct order. To reach a decision that oral argument should be limited in a given case, or to make a pre-hearing study that permits decision at the moment argument is concluded, requires a significant amount of effort. In the same amount of time, a judge or a panel can separate those cases in which oral argument will help the court or will benefit the parties from those in which it will do neither. In addition, if some cases are submitted for decision as soon as the briefs are filed, there is no wait for oral argument.

Accordingly, the court devised a method to separate those cases and dispose of them without argument. This entails the use of Staff Attorneys to assist the court. But decision, at each step, is by a judge, and, if the case is decided without oral argument, by a panel of three judges. The process works this way:

1. Role of the Staff Attorneys⁹—To expedite criminal cases, a Staff Attorney examines the appellant's brief without awaiting the government's brief. If the issues raised in the brief appear likely to require oral argument, the file is returned to the Clerk who immediately schedules the case for prompt oral argument. A judge on that oral argument panel decides, after all briefs are filed, whether the case should remain set for argument or be submitted on briefs. About twenty percent of the criminal cases are thus set for oral argument while still being briefed.

In all other criminal cases, the Staff Attorney waits for the rest of the briefs and the record before taking further steps in the case. Civil

^{9.} The other functions of the Staff Attorney's Office include review of and recommendations on applications for certificates of probable cause, applications for leave to proceed *in forma pauperis*, motions for release on bond or for reduction of bond pending appeal, applications for interlocutory appeal, and motions for appointment or withdrawal of counsel.

cases are not routed through the Staff Attorney's office until the record has been received and briefing has been completed. Because of staffing limitations, the Staff Attorney's office is unable to review all records and, therefore, directs its attention primarily to cases of a type that the judges have learned from experience are not likely to require oral argument. 10 The Staff Attorney who is assigned to work on the case first makes a cursory inspection of the briefs and record to determine the general nature of the issues presented and the length of the record. If, for example, jurisdiction is based on diversity, the Staff Attorney sends the record immediately to the screening panels described below, for the Court has learned that Staff Attorney memoranda are likely to be less helpful in these cases than in others and that judicial attention at the outset is required. If, on the other hand, the petitioner seeks habeas corpus, the issues are likely not to be unique and a Staff Attorney can usually prepare a memorandum that will be helpful to the judicial panel. There is some flexibility in the selection process; if the Staff Attorney's office is busy, cases are not held in that office but are sent immediately to judges even though they involve issues that would ordinarily be reviewed by a Staff Attorney. If the office has the time to do so, it prepares memoranda in cases that would likewise be sent directly to a judicial panel.

After examining the briefs in the cases selected for Staff Attorney review, the Staff Attorney recommends oral argument unless in his judgment the appeal is frivolous, the dispositive issue has been recently decided by the court, or 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.¹¹ In those cases that appear on initial examination to meet one of these criteria for disposition without

^{10.} The Staff Attorney's office reviews all cases of the following types:

^{1.} Direct criminal appeals;

^{2.} Prisoner cases, whether with or without counsel:

^{3.} Section 2255 cases, whether with or without counsel;

^{4.} Civil federal question;

^{5.} Civil cases in which the United States is a party, such as federal Tort Claims Act; cases, bankruptcy, or agency cases (but not tax);

^{6.} Civil rights cases except Title VII;

^{7.} Social Security cases.

^{11.} FED. R. App. P. 34(a) mandates oral argument unless the appeal is frivolous, the dispositive issue or set of issues has been recently authoritatively decided, or the facts and legal arguments are adequately presented in the brief and record and the decisional process would not be significantly aided by oral argument. Cases in which the appeal is frivolous or the decision is controlled by recent authoritative precedent fall into no pattern; they may involve any kind of issue. Obviously cases involving issues that have not been considered by the circuit ordinarily are selected for oral argument. The criterion that turns on adequacy of the briefs winnows out such complex cases as antitrust, institutional law, and RICO from

oral argument, a Staff Attorney reviews the record and briefs and prepares a memorandum outlining the issues and contentions of the parties. The memorandum also includes a recommendation that the case be decided without oral argument. Another Staff Attorney then reviews the memorandum. If he concurs in the recommendation, the Staff Attorney returns the record and briefs to the Clerk with the memorandum. Cases are also decided by screening panels without oral argument if none of the parties requests it.¹²

2. Role of the Judges—Each judge¹³ is assigned to a three-judge screening panel for one year. These panels decide in which cases oral argument should be scheduled and write the opinions for cases decided without oral argument.¹⁴ Because the judges' chambers are geographically separated, they handle much of their work by mail and by frequent telephone conference, in most instances several times daily.

Upon receiving the file from the Staff Attorney's office, the Clerk sends it together with the Staff Attorney's recommendation, the briefs, and record to a judge selected by rotation. The panel of which this initiating judge is a member is the screening panel for that case. If the initiating judge decides that the case merits oral argument, he returns the briefs and record to the Clerk with instructions to docket it. If he decides that the case warrants longer argument than the twenty minutes per side usually allowed, he fixes the amount of additional time. If he thinks that the case should be decided without oral argument, he prepares the disposition. This can be as brief as a "Rule 47.6" affirmance. This cryptic form, however, is now used in only 4.7% of the

such less intricate cases as criminal appeals involving only two or three issues and civil cases involving a limited number of issues, such as Social Security appeals.

^{12. 5}TH CIR. R. 13.6.4 reads:

Request for Oral Argument. Counsel for appellant shall include in appellant's brief (as a preamble thereto) a short statement of the reasons why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee shall likewise include in appellee's brief a statement of why oral argument should or need not be had. The Court will accord these statements due, though not controlling, weight in determining whether oral argument will be heard in the case. See FRAP 34(a) and (f) and Local Rules 15.1 and 18.2.

⁵TH CIR. R. 18.1 reads: "Whenever counsel for all parties indicate pursuant to Rule 13.6.3 that oral argument is not necessary, the case may be submitted to the Court for decision on the briefs."

^{13.} Some judges may be relieved of screening work if they need time to work on oral argument cases.

^{14. 5}TH CIR. R. 4.2 reads: "Oral argument shall be allowed in all cases except those unanimously determined by a three-judge panel of the court to fall in one of the three categories specified by FRAP 34(a)."

^{15.} A Rule 47.6 case is disposed of by an opinion reading in its entirety: "Affirmed. See Local Rule 47.6." The rule states:

cases, usually ones in which the only issues are factual and in which the opinion of the district judge adequately considers all of them.

The initiating judge must prepare his opinion within thirty days or schedule the case for oral argument. After the judge has prepared a proposed opinion, he forwards it with the entire case file to the second member of his panel. That judge then reads the Staff Attorney's memorandum, the briefs, and the record. He may concur in the opinion and send it to the third judge on the panel; he may, without explanation, send the case to the oral argument calendar; or he may discuss changes in the draft opinion with the initiating judge. If they do not agree on the full text of the opinion, the case is sent to the oral argument calendar. The court's local rules and policies require that, unless all counsel waive oral argument, every decision reached without argument not only must be unanimous but also must reflect consensus on the reasons for decision, and, therefore, must be without dissenting or concurring opinions, although the opinion may be per curiam or signed, published or unpublished.

If both the initiating and second judge agree on the opinion, the case goes to the third judge who reviews it in the same manner as the second judge. These reviews are accompanied by frequent telephone conversations and reflect, therefore, a collegial effort, not merely a paperwork review.

The court's Local Rules require appellant to include in his brief a short statement of the reasons why oral argument would be helpful or a statement that appellant waives oral argument. The appellee is also required to state why the court should or should not hear oral argument. This affords counsel desiring an opportunity a chance to make a succinct exposition of the importance or complexity of the case or some other reason for its being heard orally. In an increasing number

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AF-FIRMED. See Local Rule 47.6." or "ENFORCED. See Local Rule 47.6."

See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970) [applying the rule and explaining to litigants and Bar the reason for its implementation—the ever increasing case load].

16. 5th Cir. R. 13.6.4.

of cases, both counsel waive oral argument. If neither party requests oral argument, the case may be decided without the unanimity required for summary disposition, and the opinion may be accompanied by a concurrence or a dissent.¹⁷ In the fourteen years that this basic procedure has been in effect, about fifty percent of the cases submitted to the court fully briefed have been decided without oral argument.¹⁸

3. Effects of the Summary Calendar—Although data on all cases handled in this manner have not been compiled, decisions in criminal cases submitted without oral argument are now rendered in slightly more than two months after the filing of the last brief. The actual time during the current court year is seventy-one days.

For the entire docket, civil and criminal, disposition without oral argument now requires a median period of 8.7 months from filing of the notice of appeal, compared with 13.7 months for oral argument cases. The national median for all cases is 10.5 months. If the time required for filing the complete record, including the transcript and the briefs, is eliminated, the comparison is more dramatic: 105 days for

17. 5TH CIR. Internal Operating Procedures 4(g). 18.

		Class o	f Cases			
Fiscal	Not Argued		Argued		Total	
<u>Year</u>	No.	<u>%</u>	No.	<u>%</u>	No.	<u>%</u>
1969	218	32.7	449	67.3	667	100
1970	452	38.1	735	61.9	1187	100
1971	652	45.7	776	54.3	1428	100
1972*	1050	59.1	727	40.9	1777	100
1973*	1068	57.0	805	43.0	1873	100
1974	1028	54.9	846	45.1	1874	100
1975	1039	51.2	992	48.8	2031	100
1976	1126	53.4	981	46.6	2107	100
1977	1068	51.2	1017	48.8	2085	100
1978	993	49.4	1015	50.6	2008	100
1979	1004	46.9	1138	53.1	2142	100
1980	997	49.2	1029	50.8	2026	100
1981	677	54.9	556	45.1	1233	100
1982	719	51.2	686	48.8	1405	100
Total	12,091	50.7	11,752	49.3	23,843	100
* The de	to for 1072	72		*hat ====		TL.

^{*} The data for 1972-73 reflect an experiment that proved unsatisfactory. The Court designated "standing panels" of three judges to work together for a year. Cases were assigned to panels in rotation. If a panel did not dispose of a case without oral argument, it heard oral argument on that case. The various panels differed widely in the percentage of cases decided without oral argument, and some were hearing oral argument in less than 30% of the cases. The experiment therefore was abandoned.

decisions without oral argument compared to 204 days for oral argument cases.

Cases scheduled for argument once waited twenty-one months. As a result both of increase in the number of judges and the use of the system described, the wait until argument is now six months, and in the 1982-83 court year, as in the prior year, all fully briefed cases awaiting oral argument will be scheduled before the end of the current year.

In the fifty percent of Fifth Circuit cases decided without oral argument, the overall time required for final decision is one-third less than the time required for oral argument cases. Moreover, if all cases were set for oral argument, the delay in hearing cases could be several years and the time for completing decisions would be seriously lengthened—justice delayed. Thus, by taking for decision on the briefs some cases that do not warrant oral argument, the delay in hearing *all* cases has been held to a minimum.

Many judges find that deciding the relatively less difficult cases in this fashion enables them to make more efficient use of their time. They can fit a record review into an early morning or late afternoon interval, or take the record excerpts and briefs home for evening study. The decision to schedule oral argument can be quickly reached. If the case is to be decided without oral argument, more detailed study of the briefs and record and preparation, or review, of a draft opinion can be accomplished on a completely flexible schedule in which none of the panel must leave his chambers or adjust his conference time to the scheduling of his colleagues.

4. Advantages to the Litigants—The expense to litigants in cases decided without oral argument is reduced substantially. The time counsel spends preparing for oral argument, travelling to and from the place of hearing, and conducting oral argument is eliminated. There are no travel expenses or hotel bills. Although the total cost of these expenses varies depending on the nature of the case and the distance counsel must travel, we can make an estimate. Let us suppose that counsel's office is in Houston, Texas, and the case is to be heard in New Orleans, Louisiana. Let us also assume that counsel would spend four hours preparing for oral argument, including supplemental research. Let us also assume that counsel would arrive for hearing the evening before it is scheduled, to avoid possible travel delays and to be certain of a good night's sleep:

30

60

\$1615

Counsel's time:	
Preparation	4 hours
Travel to airport and awaiting	
departure	1.5 hours
Travel to hotel	1 hour
Awaiting argument, last minute	
preparation and argument	4 hours
Travel to airport and awaiting	
departure	_1.5 hours
	12 hours
[Out-of-office time 1½ days.	
This does not include secretarial time making	
reservations, etc.]	
12 hours at \$100 per hour	\$1200
Airline tickets—round trip	225
Hotel bill	100

If there are two counsel, then the cost of oral argument is \$3230. As the number of counsel increases, obviously the cost increases. In addition, attorneys' fees and costs have been reduced in all cases by eliminating the work required for designation and printing of an appendix.

Taxi fares to and from airports

Meals

5. Disadvantages—There are, however, significant disadvantages to disposition without oral argument. The most important is that counsel is deprived of the opportunity to face the decisionmakers and to attempt to persuade them. The opportunity for oral argument is traditional but more than the elimination of custom is involved. Oral argument gives the suitors and their counsel a higher degree of assurance that they have had a fair opportunity to present their case and to put the issues before the judges who will make the decision. The give-and-take of questioning helps to minimize the suspicion that the judge did not understand the case or that he delegated the decision to a clerk.

The value of oral argument is, however, usually overstated. It helps the court write a better opinion for it affords an opportunity to ask questions about the issue and the record and to explore matters not adequately presented in the briefs. In some cases, oral argument will alter the panel's perception of the case, and it is not uncommon when the judges begin their discussion in chambers for one or more judges to begin by saying, "That argument changed my mind about the result." We have no records concerning how frequently this occurs, nor have we heard of any judge who keeps such a score sheet, but Judge Rubin

estimates that this happens in about ten percent of the oral argument cases. In some cases, however, even after the judges tentatively vote on a decision, more careful study of the briefs and review of the record or appendix convinces them that they should reach a different result. It is, therefore, difficult to state with assurance that the judges would not change their tentative conclusions even without oral argument. Doubtless in some relatively small number of cases, oral argument alone does alter the result that would be reached without it. This occurs relatively infrequently, even in cases selected for argument, and it is doubtful that, of the cases decided by our summary process, oral argument would alter the result in any but a statistically insignificant number. The degree of unanimity required, concerning both result and rationale, as well as the opportunity for correction by application for rehearing, appear to eliminate the likelihood that a different final result would be obtained had argument been heard.

Some commentators have stated that a conference among the judges is a necessary safeguard when a court dispenses with oral argument. The fact that our judges' chambers are widely separated geographically has made such a practice impracticable. But the judges frequently confer by telephone. Based on experience, the court has not considered the absence of a conference in every case a deficiency. Almost all of the cases decided without oral argument provoke so little difference that a face-to-face conference would likely be very short and the remarks cryptic.

During Judge Rubin's service on the Court of Appeals, he has participated in the decision of approximately 1600 cases, about half of which were decided without oral argument. His personal opinion based on twenty years experience as a lawyer, over eleven years on the trial bench, and over four years on the appellate court, is that the results reached in cases decided without oral argument do not differ from those that would be rendered after oral argument. In the summary process, the judges exert the same measure of care as they do when cases are argued orally. They also feel the same degree of assurance in the result. The legal process demands of judges only probity, fairness, neutrality, care and, it is hoped, some measure of intelligence and legal

^{19.} P. Carrington, D. Meador, & M. Rosenberg, Justice on Appeal 29-30 (1976); Meador, Appellate Case Management and Decisional Processes, 61 Va. L. Rev. 255, 275-76 (1975). These commentators suggest that briefs be distributed simultaneously to the members of the screening panel. After a conference at which the case and its disposition are discussed, the senior judge would assign the opinion. Some discussion of per curiam versus signed and publish versus non-publish would occur. Professor Meador suggests that a staff memorandum or a signed opinion may compensate for the lack of argument. Meador, supra, at 276.

ability. Infallibility is neither expected nor achievable whatever the method of submission.

II. ORAL ARGUMENT

Because no case is scheduled for oral argument unless a judge has decided that argument will be helpful, there is no reduction in the standard time allowed—twenty minutes for each side. After oral argument of all cases set for the day, the panels confer and the presiding judge assigns the responsibility for preparing the opinion.

Another wait then occurs while the court is preparing an opinion. The Fifth Circuit's Internal Operating Procedures call for all opinions to be prepared within ninety days. The court is not yet disposing of all cases within that time but, in the average case, the court takes only some two months from oral argument to filing of the opinion.²⁰ The court is, however, attempting to shorten this interval.

Professor Meador suggests the possibility that appeals could be expedited and costs reduced by eliminating briefs and ruling entirely on oral argument.²¹ This suggestion does not take sufficient account of the variety and complexity of both the legal and factual issues presented by federal appellate cases. The legal issues considered by federal courts of appeal are incredibly diverse, and sometimes neglected or inadequately treated in briefs. When a case turns on factual issues, the facts are usually so complex that they cannot be adequately presented in a relatively limited time. Habeas corpus cases involve the issues most frequently repeated. Yet these cases entail serious constitutional issues and may require the review of state court or earlier federal court records. Submitting federal cases to decision on oral argument alone, particularly if followed by fairly rapid summary decision, appears to be a path only to quick injustice.

The Fifth Circuit method is not advanced as either paragon or paradigm. It was devised to meet the needs of a court so inundated that it literally could not hear oral argument in every case and to serve the requirements of counsel and litigants from a vast geographic area in a manner that would be at once just and economical. With the leadership of a succession of able Chief Judges, Elbert E. Tuttle, John R. Brown, J.P. Coleman, John C. Godbold, and Charles Clark, the plan is constantly reexamined, a lawyer's advisory committee is regularly con-

^{20.} The Administrative Office data show the elapsed time as 1.9 months in criminal cases and 2.0 months in civil cases.

^{21.} See Meador, Toward Orality and Visibility in the Appellate Process, 42 Md. L. Rev. 732, passim (1983).

sulted, and improvements are made. At present it appears to be assisting in reducing both the delay and the cost of appeal. The treatment has not yet cured the disease but its progress has been retarded and the symptoms are abating.