

JURISDICTION OF THE PROPOSED NEVADA COURT OF APPEALS

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Robin L. Sweet
Deputy Director
Supreme Court of Nevada
Administrative Office of the Courts
Carson City, Nevada

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By Robin L. Sweet

ABSTRACT

The time is ripe for Nevada to establish an intermediate appellate court (IAC). In dealing with burgeoning caseloads, many innovations have been made over the years to improve case processing in appellate courts and Nevada has implemented all that are applicable. The American Bar Association recommends that once the number of appeals has outpaced all efforts to improve efficiencies, an IAC should be established. Currently, all but 11 states and the District of Columbia have intermediate appellate courts.

Preliminary research for this study indicated that the Justices of the Nevada Supreme Court preferred a deflection model. Five states that use or have used the deflection model recently were selected for a special analysis: Hawaii, Idaho, Iowa, Mississippi, and South Carolina. Clerks of the Court in those states (or their designee) were interviewed.

Backlogs and increasing caseloads were the common reason for creating the IACs in these states. Although all five states initially used the deflection model (filing all cases with the Supreme Court and pushing down some cases to the Court of Appeals), Hawaii has recently changed their process so that cases are filed predominately with the Court of Appeals with a few exceptions based on jurisdiction.

An initial analysis of the caseloads for these states shows that when intermediate appellate courts were created, the overall appellate caseload increased immediately, which implies an improved access to justice. The Nevada Supreme Court has seen steadily

increasing caseloads for more than 20 years; however, following the addition of two Justices in the late 1990s there was a spike. Accordingly, Nevada will likely see a similar increase in caseload if an intermediate appellate court is created.

If an intermediate appellate court is created in Nevada, the recommended jurisdiction for the Supreme Court includes cases of first impression, public importance, constitutional questions, and inconsistency or conflict in decisions between the two appellate courts. In addition, the Supreme Court should hear cases involving the death penalty, termination of parental rights, election issues, and judicial and bar discipline. The Supreme Court should also create a *certiorari* process, which they currently do not have. Currently, the Nevada Supreme Court has mandatory jurisdiction, which means they must consider all cases filed.

The remaining cases should be heard at the Court of Appeals, the new intermediate appellate court, including administrative reviews, most civil and family cases, and all criminal cases except those with a sentence of death or life in prison. The addition of an intermediate appellate court will improve access to justice, the quality of judicial decisions, and timeliness. Delineating the jurisdiction between the appellate court levels while allowing some flexibility and the ability to transfer cases is important also.

INTRODUCTION

The Supreme Court of Nevada is our state's highest court whose primary responsibility is to review and rule on appeals from District Court (our general jurisdiction) cases. The Supreme Court does not conduct any fact-finding trials, but rather determines whether procedural or legal errors were made in the rendering of lower court decisions. As the ultimate appellate court in the state, the Supreme Court hears all filed cases. The Nevada Constitution does not provide for discretionary review of cases in the court of last resort.

The Supreme Court currently has seven Justices who sit in panels of three and *en banc*. At statehood in 1864, the Court was created with three Justices. In 1967, the Court was expanded to five Justices. In 1999, after two failed attempts at creating an intermediate appellate court (IAC), two more Justices were added to the Supreme Court.

The judicial branch is established and its authority defined in Article 6 of the Nevada Constitution. The Supreme Court is the court of last resort and the only appellate court in the state.¹ Nevada does not have an intermediate appellate court. The Supreme Court had 2,238 filings during fiscal year 2008²; the same number of filings as the year before. The Justices disposed of 1,959 cases; a decrease of about 10 percent from the prior year. Criminal appeals make up the majority of the Court's caseload at 46 percent.

¹ Decisions from the Justice and Municipal Courts (limited jurisdiction) are appealed to the District Courts (general jurisdiction) in Nevada; however, the District Courts are considered trial courts and not appellate courts for this discussion.

² Supreme Court of Nevada, *Annual Report of the Nevada Judiciary, Fiscal Year 2008*, Carson City, Nev., 2009, page 22.

Nevada is attempting for the third time to create an IAC. The history of the previous efforts in 1980 and 1992 are outlined in a report to the 2007 Nevada Legislature.³ Both times, the resolutions passed the legislature twice as required but were narrowly defeated by the voters. One modification for this third effort is the inclusion of wording that the Legislature **may** provide for the court of appeals, which will allow the Legislature to create it, for example, when the funding is available if the voters have approved it.

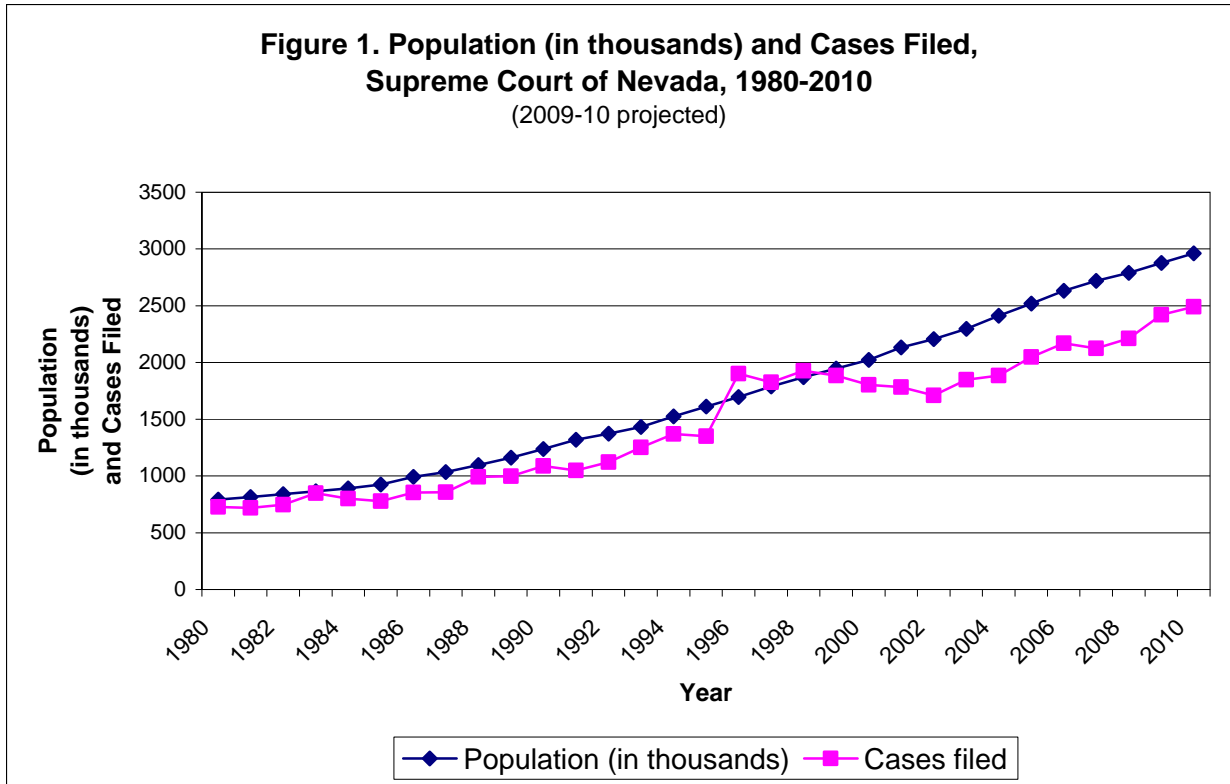
The 2007 report to the Nevada Legislature⁴ also details how the IAC will improve access to justice, quality of the judicial services, and timeliness. In addition, the report suggests that the Supreme Court should determine the new Court of Appeals jurisdiction and offers a few options. Lastly, the report concludes with some estimates of cost for the creation of an IAC.

The chart⁵ below shows the steady increase in the population of Nevada and projected increase during the next couple of years. Also shown are the number of cases filed in the Supreme Court of Nevada. Interesting to note is that from the 1980s through the mid 1990s, the number of cases filed tracks closely with the population (in thousands). Shortly after the turn of the century, the cases filed still track the population somewhat but at a reduced level. In the simplest of interpretations, this change in tracking would indicate a reduced access to justice at the Supreme Court by the citizens of Nevada.

³ Joan E. Neuffer, *Report to the 74th regular session of the Nevada State Legislature, 2007, regarding the creation of the Nevada Court of Appeals*, Supreme Court of Nevada, 2007, 45 p.

⁴ *Ibid.*

⁵ Data for the chart from the State Demographer (http://www.nsbdc.org/what/data_statistics/demographer/) and Nevada Supreme Court (<http://www.nvsupremecourt.us/info/statistics/>) and written communication from the Clerk of the Court.



One other possibility for the increasing caseloads is the opening of the first law school in Nevada—the Boyd School of Law at the University of Nevada, Las Vegas. No direct correlation has been made on the impact of a law school on appellate caseloads; however, the first class graduated from the law school a few years before an increase in civil case filings in the trial courts of Nevada.

The purpose of this report is to make recommendations regarding the jurisdiction of the proposed Nevada Court of Appeals should the legislature and voters agree that one should be created. Additionally, the report will detail some of the background information needed to help the legislature and voters make an informed decision that is also necessary in helping to determine the recommendations for jurisdiction among the two appellate courts. This background information includes some data analysis and results of interviews

with Clerks in other states with defunctive processes about their jurisdictions and how they have changed their processes over the years.

LITERATURE REVIEW

Appellate courts serve two main functions – to correct errors made in lower courts and to develop the state law. The success of these functions by the appellate courts improves the manner in which trial courts are able to decide cases by applying the law. This application of law then results in improved confidence in the judicial process.⁶

Appellate courts are expected to render their decisions in a fair, timely, and consistent manner.⁷ When the volume of appeals becomes so great that the court of last resort cannot perform these functions at a satisfactory level, an intermediate appellate court (IAC) should be created.⁸

“For efficient law development, the relatively few lawmaking cases must be decided by the supreme court. IACs, which concentrate on the error-correcting function, are essentially means to add judicial capacity without interfering with the lawmaking function of the top court.”⁹

Additionally, creating or expanding an IAC helps increase the number of decisions even after controlling for other changes in the process such as panels and unpublished opinions.¹⁰ Other benefits of creating an IAC include reducing the number of appeals to

⁶ Roger A. Hanson, *Appellate court performance standards*, National Center for State Courts, Williamsburg, Va., 1995a, page 4.

⁷ *Ibid*, pages vii-viii.

⁸ American Bar Association, *Standards relating to court organization*, ABA, Judicial Administration Division, Standards of Judicial Administration, v. 1, 1990, page 37, section 1.13.

⁹ Thomas B. Marvell, State appellate court responses to caseload growth, *72 Judicature* 5, 1989, page 285.

¹⁰ *Ibid*, page 289.

the court of last resort thereby reducing delay and allowing the citizens more options for appeals.¹¹

In 1982, Justice Joseph R. Weisberger of the Rhode Island Supreme Court published a description of appellate courts that is anecdotally similar to what Nevada faces today (albeit somewhat foreign to our desert environment):¹²

“The appellate structure of our judicial system resembles a great full-rigged ship, some of whose seams have opened below the waterline by the incessant pounding of the seas. The crew has vigorously manned the pumps in order to prevent the vessel from foundering. However, try as they may, with might and main, the crews of appellate judges are able to do no more than maintain a precarious balance between sinking and sailing.”

History of IACs

More than a hundred years ago, most states had only one appellate court and that was their state supreme court.¹³ In 1957, only 13 states had intermediate appellate courts; however, by 1989, that number had risen to 37 permanent IACs throughout the nation and 1 temporary IAC in North Dakota.¹⁴ Currently, all but 11 states and the District of Columbia have IACs.¹⁵ The number of judges in IACs ranges from 3 (in Alaska, Idaho, and North Dakota) to 105 (in California).¹⁶

¹¹ Victor E. Flango and Nora F. Blair, Creating an intermediate appellate court: Does it reduce the caseload of the state’s highest court?, 64 *Judicature* 2, 1980, page 76.

¹² Joseph R. Weisberger, Appellate courts: the challenge of innovation, 31 *Am. U.L. Review*, 1982, page 237.

¹³ David W. Neubauer, *Judicial process – law, courts, & politics in the United States*, Harcourt Brace & Company, 1991, page 78.

¹⁴ Joy A. Chapper and Roger A. Hanson, *Intermediate appellate courts: Improving case processing, final report*, National Center for State Courts, Williamsburg, Va., 1990, page xi.

¹⁵ David B. Rottman and Shauna M. Strickland, *State court organization, 2004*, U.S. Department of Justice Bureau of Justice Statistics, Washington, D.C., USGPO, 2006.

¹⁶ Court Statistics Project, *State Court Caseload Statistics, 2006*, National Center for State Courts, 2007, table 12.

When states started creating intermediate appellate courts, the most common was a Court of Appeals. However, some states also created courts of civil appeals, criminal appeals, and special appeals.¹⁷ This structural change relieved caseloads of courts of last resort predominately by changing the primarily mandatory jurisdiction to discretionary jurisdiction.

Most of the states added IACs to help with the large volume of appeals. The workloads of these courts, as well as many supreme courts today, contain cases that vary substantially in complexity.¹⁸ The states without IACs tend to have primarily mandatory jurisdiction and face an increasing caseload each year as well as a need to sort out routine cases from more complex cases to aid in processing.¹⁹ The continuing high caseload can cause either insufficient attention to cases or time to disposition can increase to “absurd lengths.”²⁰

When Connecticut added their IAC, five areas of policy concern were expressed and should be considered with the evaluation of an IAC in Nevada as well. These concerns were identified as:

“...1) division of workload, 2) the precedent-setting function, 3) double appeals, 4) attractiveness of intermediate court judgeships, and 5) expense. These five are assumed to be equally important ...”²¹

¹⁷ See Note 11 *supra*, pages 78-79.

¹⁸ Roger A. Hanson, *Procedural innovations for appellate courts: A synthesis of two national workshops*: National Center for State Courts, Williamsburg, Va., 1995b, page xx.

¹⁹ Roger A. Hanson, *Jurisdiction, caseload, and timeliness of state Supreme Court*: National Center for State Courts, Williamsburg, Va., 2001, page 5

²⁰ Daniel J. Meador, *Appellate Courts, Staff and process in the crisis of volume*: National Center for State Courts, Appellate Justice Project, 1974, page 187.

²¹ David C. Steelman, Thomas B. Marvell, Samuel D. Conti, James R. James, and Douglas C. Dodge, *Jurisdiction, organization and size of Connecticut's new intermediate appellate court*, National Center for State Courts, North Andover, Mass., 1982, page 27.

The National Center of State Courts staff²² also noted that creating an IAC rarely solves entirely the challenge of a supreme court workload. The current backlog, as well as an assumed increase in filings from offering another venue for justice, will likely mean continued caseload and workload challenges for both appellate courts. It is important to note, however, that these challenges would still be lesser than if an IAC was not created.

Flango and Blair²³ noted that the creation of new courts seems to encourage the filing of new cases. They explained that having a new level of court would encourage more appeals from trial courts, which would result in more appeals to the court of last resort. Further, it is suggested that if the total number of appellate filings increases after creation of the IAC, some citizens must be appealing that otherwise would not have done so,²⁴ thereby improving or at minimum increasing the levels of access to justice.

Improving Case Processing

The volume of appeals is often a problem because the rate of caseload growth is greater than the rate of growth in judicial and staff resources.²⁵ Additionally, some research has shown a connection between the cases resolved per justice and the timeliness of the courts, in that the more cases assigned per justice, the longer it takes to resolve cases.²⁶

²² *Ibid*, page 28.

²³ See Note 9 *supra*, pages 77-78.

²⁴ Means, Florida District Courts of Appeals: *Florida Bar Journal*, v. 33, 1959, page 1209, as cited in Victor E. Flango, and Nora F. Blair, Creating an intermediate appellate court: Does it reduce the caseload of the state's highest court?, 64 *Judicature* 2, 1980, page 78.

²⁵ See Note 5 *supra*, page xx.

²⁶ See Note 17 *supra*, page 67.

Satisfaction with the quality of justice by litigants and attorneys has been found to not be related to system performance, especially for criminal appeals.²⁷ Additionally, processing time for appeals with the Supreme Court often is not reduced if routine cases are sent to IACs and only complex cases stay with the court of last resort.²⁸

At a national symposium on innovations in appellate courts, several strategies for improving case processing were discussed.²⁹ For criminal appeals, they included case management and fast-track procedures; for civil appeals, they included settlement conferences and expedited calendars. Nevada uses all these strategies. Descriptions of these strategies and others Nevada has tried are noted below.

Case management – a procedure that reduces case processing time by setting achievable timeframes for the appeal events that are strictly enforced.³⁰ The Nevada Supreme Court has allowed for this type of process, and documented it in the original creation of the appellate rules in 1973.³¹ This process is often used during election years to expedite the ballot initiatives or election-related issues, for example.

Fast-track procedures – an expedited procedure with limited supplemental statements heard in a conference with justices and staff. If the Court unanimously agrees to a summary affirmation or reversal, the appeal is disposed accordingly. If not

²⁷ Joy A. Chapper, and Roger A. Hanson, *Managing the criminal appeals process*: State Court Journal, National Center for State Courts, v. 12, no. 3, 1988, pages 8-9.

²⁸ See Note 9 *supra*, page 81.

²⁹ See Note 23 *supra*, pages 18-20.

³⁰ See Note 16 *supra*, page 19.

³¹ Nevada Rules of Appellate Procedure, Rule 2.

unanimous, the appeal goes to full briefing.³² Nevada added a fast track process to their rules for criminal cases in 1996 and for child custody in June 2006.³³

Panel hearings – In Nevada, the seven justices are split into two rotating panels of three justices to hear some cases. The Justices sit *en banc* for those appeals when necessary for precedent-setting cases. Some studies have thought that using panels dilutes the law-developing function of the Supreme Court and leads to inconsistencies.³⁴ Further, the American Bar Association recommends that IACs sit in panels of three while the Supreme Court should avoid using panels.³⁵

Settlement conferences – For civil cases, the rules for transcripts and filing briefs are stayed once an appeal is assigned to the settlement conference program. In Nevada, the settlement conference is scheduled within 60 or 90 days depending on case type. If the case cannot be settled, the rules are reinstated. The Nevada Supreme Court added this procedure in 1997.³⁶

The American Bar Association³⁷ has noted also that once the volume of appeals has outpaced all efforts to improve efficiency of operation, steps should be taken to establish an IAC rather than continuing with temporary arrangements.

³² See Note 16 *supra*, page ii.

³³ Nevada Rules of Appellate Procedure, Rules 3C and 3E.

³⁴ Carl F. Bianchi, *An investigation into the problems created by the growing appellate caseload in Idaho*, Idaho Supreme Court Appellate Court Committee, 1977, page 6.

³⁵ Geoffrey C. Hazard, Jr., Standards of judicial administration: Appellate courts, 62 *American Bar Association Journal*, 1976, page 1015.

³⁶ Nevada Rules of Appellate Procedure, Rule 16.

³⁷ See Note 6 *supra*, page 40.

Considerations When Creating IAC

One lesson noted in the study of Connecticut's creation of an IAC was that owing to the uncertainty of the trends in appellate caseloads, the jurisdiction lines and ability to transfer cases must be flexible to allow adjustment of caseloads by the Supreme Court.³⁸

Another important consideration in the creation of an IAC is to ensure that the Supreme Court is responsible for establishing precedents and ensuring that precedential law is consistent. The work of the Court of Appeals would then be to decide cases within that framework.³⁹

Double appeals, or minimizing them, are another important consideration. Double appeals can increase costs to litigants, delay resolution of the cases, and can be expensive owing to the need for additional judicial resources.⁴⁰ Generally, IACs hear all properly filed appeals and so the decisions by the IAC are final for most cases. The subsequent appeals are then at the discretion of the Supreme Court.⁴¹ The Connecticut study by the National Center for State Courts noted the following:

“Double appeals obviously increase the time required for final decision; they delay resolution of the litigants' dispute and may delay resolution of important legal questions. They also increase litigant expense, and they drain judicial resources through some duplication of effort by the two appellate courts. Hence, the jurisdictional system should be designed to reduce double appeals. Double appeals cannot and ought not be eliminated; however, review by the intermediate appellate court can serve to winnow issues for more incisive consideration by the supreme court.”⁴²

³⁸ See Note 19 *supra*, page 29.

³⁹ See Note 19 *supra*, page 30.

⁴⁰ Thomas B. Marvell, The problem of double appeals: *Appellate Court Administration Review*, 1979, page 23.

⁴¹ See Note 11 *supra*, page 78.

⁴² See Note 19 *supra*, page 30.

Jurisdiction of the court of last resort and the intermediate appellate court is an important area for consideration. In 1971, Wisconsin Chief Justice Harold Hallows⁴³ offered that their IAC should be able to certify a case to the Supreme Court while also allowing the Supreme Court to hear any case of their choosing. Further, he offered that any split decision at the IAC should be allowed an appeal to the Supreme Court. He did go on to suggest that although due process requires a person have one appeal, it does not mean that appeal has to be to the Supreme Court.

In 1980, Florida limited the jurisdiction of the Supreme Court to those trial court cases that imposed the death penalty and those that invalidated statutes or parts of the state constitution. They retained discretionary review of trial court decisions that interpret the state or U.S. Constitutions, decisions affecting state officers, and questions of great importance.⁴⁴ These jurisdictional changes almost eliminated double appeals and subsequently reduced the caseload of the Florida Supreme Court.⁴⁵

In 1990, the American Bar Association recommended that the Supreme Court should hear original proceedings such as writs of *mandamus* or *prohibition* and should have disciplinary authority over the judicial branch and the bar.⁴⁶ They also noted that once an IAC is established, the court of last resort should hear specific cases such as capital murder or important cases such as water rights cases in the West.⁴⁷

⁴³ E. Harold Hallows, The case for an intermediate appellate court: *Wisconsin Bar Bulletin*, April 1971, page 17.

⁴⁴ John M. Scheb and John M. Scheb, II, Making intermediate appellate courts final: assessing jurisdictional changes in Florida's appellate courts: *67 Judicature* 10, 1984, pages 478-479.

⁴⁵ *Ibid*, page 480.

⁴⁶ See Note 6 *supra*, page 39.

⁴⁷ See Note 6 *supra*, page 40.

In the 39 states with IACs, parties may bring an appeal to the intermediate appellate court.⁴⁸ For many criminal cases, the IAC has mandatory jurisdiction to hear the criminal cases. In those states without IACs, the Supreme Court has mandatory jurisdiction to hear the criminal cases, especially death penalty cases. Civil cases are often discretionary for both appellate courts except in some cases with only a court of last resort.

The jurisdiction for IACs is defined by different sources.⁴⁹ In some states, the jurisdiction is defined primarily by statute, in a few states it is defined by constitution, some states it is defined by court rules, and some use a combination of these sources. Although no one way would resolve all issues, clearly, the more flexibility in changing the jurisdiction or adjusting the caseload would maximize the effect creating an intermediate appellate court would have on the workload as well as access to justice for citizens.

METHODS

The methods used for this research involved primarily literature review, data analysis, and oral interviews with Justices of the Nevada Supreme Court and other state appellate Clerks of Court or their recommended staff.

Once the general research topic was determined, the Justices of the Supreme Court of Nevada were interviewed informally to gather their thoughts and ideas regarding the intermediate appellate court and how they thought the cases might be split between the two appellate courts.

⁴⁸ See Note 13 *supra*, p.131.

⁴⁹ Daryl R. Fair, State intermediate appellate courts: An introduction, 24 *The Western Political Quarterly* 3, 1971, page 420.

The common themes from these discussions were that the Justices of the Nevada Supreme Court preferred a push-down or deflective form of case distribution, continuing with one point of filing for cases (one Clerk of Court), a few common themes about some case types (such as death penalty, election related, and cases of first impression) going to the Supreme Court automatically, and developing a *certiorari* process.

Using this information as background, the literature review was started by looking for other states that use this deflective process as well as the other details about the general creation of intermediate appellate courts.

Five states were then selected for additional review and comparison as they seemed to follow the deflective processes similar to those discussed by the Justices. The five states that use (or previously and recently used) the deflective style in their case distribution are Hawaii, Idaho, Iowa, Mississippi, and South Carolina.

Data were gathered for the five states in an attempt to analyze for any trends, especially related to case distribution, or to possibly obtain other information that may be of value during the subsequent research and survey. Most of the data were gathered from the Court Statistics Project of the National Center for State Courts annual reports⁵⁰ with additional information obtained from annual reports of the individual states.

In October 2008, the Clerks of the Courts in those five states were contacted to arrange interviews using the questionnaire developed from the research findings. The original questionnaire is Appendix A. Before using, the questionnaire was reviewed by Nevada Supreme Court Justices and staff as well as a few classmates in the 2010 CEDP

⁵⁰ http://www.ncsconline.org/D_Research/csp/SCCS-pastreports.html accessed August 2008.

class. The answers provided by the Clerks or their designees in the oral interviews are provided in Appendices B-F.

Subsequently, data analysis and survey responses were evaluated to promulgate the findings, conclusions, and recommendations contained in later sections. As mentioned in a couple of areas, the data analysis proved problematic owing to different levels of data detail availability. Only broad, general analysis was completed in most instances owing to these limited comparabilities.

FINDINGS

The following section contains information from the research, data analysis, and surveys of the Clerks of Courts. Specifically, there are discussions about caseloads, time to disposition in Nevada, history and issues related to creating the IAC in selected states, and the summary of responses to the survey questions. The detailed responses to the survey questions are in the appendixes by state near the end of the report.

The initial data analysis provided interesting and valuable information. In three of the five states studied, caseloads increased following the creation of the IAC and most then declined a little before again starting a generally continuing increase. Data for South Carolina show a similar increase, decrease, and increase again for the years after the creation of the IAC; however, the filing data for the year before the IAC was created is not available to determine the probable increase immediately following the creation of the IAC.

Table 1. Change in Caseload Following Creation of Intermediate Appellate Courts in Three States
(comparable data for Idaho and South Carolina not available)

States	Year IAC added	Change in total cases filed with Appellate Courts over previous year			
		Year 1	Year 2	Year 3	Year 4
Hawaii	1980	+23%	-14%	+9%	+34%
Iowa	1977	+35%	+17%	+1%	+10%
Mississippi	1995	+57%	+6%	+3%	-8%

Nevada has had an overall increasing caseload for more than 20 years (see Figure 1). The most recent spike and subsequent leveling around the recent turn of the century when the two justices were added would imply a similar increase in filing of appeals may be expected if an IAC is created in Nevada. The cases filed per justice in recent years in Nevada is almost triple the suggested 100 case dispositions per judge per year⁵¹ [a clearance rate of 100 percent to avoid backlogs would imply 100 case filings per judge per year].

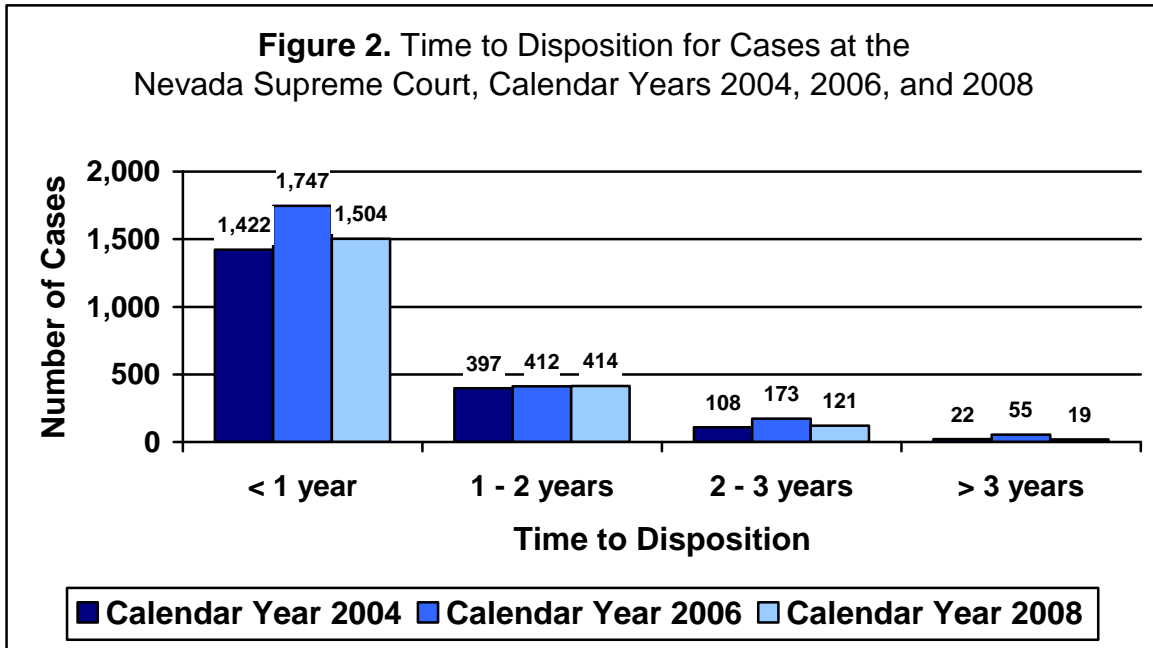
Time to disposition for cases with the Supreme Court is another indicator of challenges facing the court. The American Bar Association has proposed time standards for appellate cases wherein 90 percent of all cases should be resolved within 1 year.⁵² Using information provided by the Nevada Supreme Court Clerk, for calendar years 2004, 2006, and 2008,⁵³ the time to disposition for cases before the Nevada Supreme Court was about 73 percent for all 3 years (see Figure 2). The Court is not meeting the ABA

⁵¹ Paul D. Carrington, Daniel J. Meador, and Maurice Rosenberg, *Justice on Appeal*: St. Paul, Minn., West Publishing Co., 1976, page 143.

⁵² American Bar Association, Standards relating to appellate courts: ABA, Judicial Administration Division, Standards of Judicial Administration, v. 3, 1994, section 3.52.

⁵³ These three years were selected for comparisons because they were all election years and would have all been similarly affected by any election cases filed and disposed during the year.

proposed times standards and, without a significant change, may never meet them considering the continuing growth in population, caseload, and the number of attorneys admitted to practice in Nevada.



Of note in Figure 2 is the changing number of older cases still pending within the Supreme Court. Recently, the Justices have reduced the backlog of older cases; however, the number of cases resolved in the range of 1-2 years seems to hold fairly steady at about 400 cases.

The number of published opinions written by the Supreme Court Justices during these same three years were 101 in 2004, 120 in 2006, and 100 in 2008. The published opinions are but about 5 percent of its decisions. For comparison, the Hawaii Supreme Court was at 17 percent published opinions before their change in processing in 2006 and

is now more than 60 percent (Appendix B). For 2005, the Mississippi Supreme Court was at 37 percent published opinions, Idaho at 22 percent, and South Carolina at 18 percent.⁵⁴

The other states that use defunctive case jurisdiction faced similar issues to Nevada when they created their intermediate appellate courts.

In the 1970s, Idaho faced population growth, increasing numbers of attorneys admitted to practice, due process guarantees for criminal defendants, and increasing legislation.⁵⁵ They noted the cumulative effect of these changes caused a strain on the appellate capabilities of the Idaho Supreme Court. Their Supreme Court, in 1977, appointed a special Appellate Court Committee to examine the problems facing the appellate court. In announcing the Committee, the Chief Justices noted that some cases ready for argument could not be calendared for 6-8 months.

The Iowa General Assembly established a five-member intermediate appellate court in 1976 to ease an overcrowded Supreme Court docket. The Court of Appeals judges maintained supervisory and administrative duties for their own court, which allows them to concentrate on deciding a large volume of cases.⁵⁶

The Mississippi Legislature created their Court of Appeals and it began hearing cases in 1995. The Court of Appeals was created to speed up appeal processing and to reduce the backlog of cases before the Supreme Court.⁵⁷

⁵⁴ See Note 16 *supra*, calculated from data in Tables 11 and 17.

⁵⁵ See Note 32 *supra*, page *i*.

⁵⁶ Iowa Supreme Court Commission on Planning for the 21st Century, *Charting the Future of Iowa's Courts*, Iowa Supreme Court, 1996, p. 18

⁵⁷ "About the Mississippi Court of Appeals" at <http://www.mssc.state.ms.us/aboutcourts/aboutcourts.html> accessed August 2008.

The South Carolina Court of Appeals had its start all the way back in 1790 when their original State Constitution established an appellate body consisting of all associate judges who would meet when the circuit judges term concluded.⁵⁸ That court was known as the “Constitutional Court” and a judge would recuse himself from any case he had heard at the trial court level. This process for appellate review was not efficient to say the least. In 1834, a case was brought before this appellate court that led to its demise—the case put the appellate court in the middle of the controversy pitting the federal government against state sovereignty. The General Assembly abolished the appellate court in their 1835 Legislative session. In 1859, a statute re-established the Court of Appeals. The Civil War resulted in the end of this court largely because it did not have constitutional protection. The judicial system that emerged in South Carolina after the War did not include an intermediate appellate court.

Once again, a backlog of cases in the 1970s would initiate efforts to create an intermediate appellate court for South Carolina. In 1979, the General Assembly passed an act to create the Court of Appeals, which would begin operation July 1, 1980. However, an action was filed before the Supreme Court, which when finalized, found the Court of Appeals valid while also finding that four of the five initial judicial appointees were not able to take office owing to a restriction against legislators creating an office for themselves to fill. If the voters did not ratify the constitutional amendment creating the court by June 30, 1985, the court would cease to exist. In November 1984, the voters ratified the court and on July 1, 1985, it became a constitutional court.

⁵⁸ Jasper M. Cureton, accessed 2008, *Coming of Age: The South Carolina Court of Appeals*, South Carolina Judicial Department History web page <http://www.judicial.state.sc.us/appeals/history.cfm>

The results of the interviews with other states that currently use or have used defective case processing are summarized by question below. The answers provided to the survey questions in the oral interviews are provided in Appendixes B through F.

Question 1. Do you have detailed information about the distribution of case types between the two levels of appellate courts? For example, do you have a breakdown of each case type (such as criminal, civil, and bar matters) handled by each appellate court and how many were filed in each category? Do you track the discretionary appeals? Would you provide the last 10 years of that data?

Jurisdiction is defined by statutes in Idaho, Mississippi, and South Carolina (Appendixes C, E, and F). South Carolina began as a statutory court and would no longer exist if not constitutionally added by the voters (see discussion above). Rules for the Courts of Appeals are usually adopted by the Supreme Courts.

Hawaii initially started their IAC with all cases filed in the Supreme Court; however, in 2006, the statutes were changed to require most appeals to start at the intermediate appeals court (Appendix B). Hawaii staff believes it is better not to start with cases filed in the Supreme Court at all; rather, they make the case that the Justices spend too much of their valuable time on case processing rather than case resolution under this system.

Originally, everything was filed in South Carolina Supreme Court and transferred to their IAC. In 1996, the process was changed to allow appeals to be filed with the IAC (Appendix F). Some state staff believe it is better to start with everything being filed at Supreme Court and transition to the filing with each court rather than start with a new filing process as well as new court at the same time.

The key difference between the two processes (South Carolina and Hawaii) seems to be the level of involvement of the Justices and how far into the process an appeal goes before deciding where it should be heard. This is definitely the difference between the processes in these two states and the processes of the other three states.

The Supreme Courts in several states have court rules describing which cases should be kept or may be transferred. Generally, the appeals that are to be kept in the Supreme Court are (1) issues of first impression; (2) fundamental issues of public importance; (3) constitutional questions as to the validity of a statute, ordinance, or court ruling; and (4) issues of inconsistency or conflict in the decisions between the two appellate courts.

Mississippi Appellate Court Rules further allow that the Supreme Court may assign any case to the Court of Appeals except death penalty, utility rates, annexations, bond issues, election contests, a trial court's ruling that a statute is unconstitutional, attorney discipline, judicial performance, and certified questions from federal courts (Appendix E and Mississippi Court Rules).

Idaho Supreme Court retained jurisdiction over criminal felonies with a sentence of death, life, or that for parole purposes was for life, administrative appeals from Industrial Commission and Public Utilities Commission; general civil appeals, civil zoning and land use appeals, civil tax appeals, and other agency appeals from district court; and bar discipline proceedings. The Court of Appeals would have jurisdiction over the remaining criminal cases, post-conviction relief and *habeas corpus* actions, civil probate and domestic relations, and interlocutory appeals.

In Iowa, IAC developed an expertise in juvenile matters (such as termination of parental rights and child in need of supervision) so more of those appeals go to them (Appendix D). However, they do evaluate each juvenile case. For example, Indian Child Welfare Act cases with Constitution issues would go to the Supreme Court. The IAC rarely publishes opinions, so decisions are more succinct.

The second part of the question related to data was initially responded to by email from the states. However, the data were difficult to obtain in common form. Hawaii was able to provide the data as requested; in fact, they publish it in their annual reports at that detailed level. However, others did not have it available at that level of detail. The data from Mississippi are published as total filings for the Supreme Court and dispositions by the two appellate courts. This became the level at which comparisons were attempted.

The number of justices and cases filed in each of these five states and Nevada for 2006 is provided in Table 2. While the case types and discretion related to filings affects the workload in each court, the comparison of justices and cases filed clearly indicates Nevada is overdue for an IAC on the basis of caseload and numbers of justices.

South Carolina has added IAC judges after creation, a total of nine now sit in panels (Appendix F). Iowa has nine justices in the court of appeals that sit in panels of three (Appendix D). The Iowa Supreme Court subsequently dropped from nine Justices to seven.

Table 2. Number of Justices and Cases Filed in Selected Appellate Courts for 2006.

States	Justices in Court of Last Resort	Justices in Intermediate Appellate Court	2006 Total Cases Filed*
Hawaii	5	6	1,062
Idaho	5	3**	1,357
Iowa	7	9	2,012
Mississippi	9	10	2,051
South Carolina***	5	9	3,054
Nevada	7	NA	2,185

* Court Statistics Project, 2007, *State Court Caseload Statistics, 2006*: National Center for State Courts, available online at http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

** Idaho has received permission to add two more justices to their Court of Appeals, one in January 2009 and another in the future.

*** South Carolina has a bill before the 2009 Legislature to increase the number of Justices.

Question 2. What were the reasons behind creating your IAC? *Caseloads*? IF UNKNOWN, ask if they could recommend someone to speak with who is familiar with the IAC creation?

Backlog and caseload are the primary reasons that these five states created their intermediate appellate courts (Appendixes B-E). Additionally, Hawaii noted the backlogs, in addition to the rulemaking, original proceedings, and related efforts, had limited their ability to have oral arguments.

Mississippi noted their backlog was worsening and they needed to add another court or more Justices. South Carolina noted that much of the backlog included cases the Supreme Court did not need to handle; they should do policy making and let the Court of Appeals do the error correction.

Question 3. How was the initial caseload for the IAC provided? Transfer cases in or just start with the effective date of the court or something else?

Different methods were used when the states created their intermediate appellate courts. In Hawaii, the Constitutional Convention created the Court of Appeals as well as the statutes defining their “pour over” system (Appendix B). The Idaho Supreme Court transferred 206 backlog cases on the first day for the Court of Appeals and 235 more throughout the first year (Appendix C).⁵⁹ In Iowa, a Supreme Court order routed cases with a recommended screening statement to determine which appellate court received the case (Appendix D).

Mississippi started reviewing cases the summer before the new appellate court began and actually started assigning cases about 90 days before the January start of the new court. Mississippi did not give the new Court of Appeals stale cases from the Supreme Court (Appendix E).

Question 4. During the creation of the IAC, what challenges were faced?

In Hawaii, the original challenge was in deciding whether to add Justices to the Supreme Court or create the intermediate appellate court. They chose the latter (Appendix B). Idaho had few challenges and initially realized great success with the IAC (Appendix C). In Mississippi, the challenges were few; they explained that making sure to give the Court of Appeals the independence and respect of a separate court has made the process better (Appendix E).

⁵⁹ Task Force on Idaho’s Court of Appeals, *Right and Justice... Without Delay (Report of the Task Force on Idaho’s Court of Appeals: The Next Quarter Century and Beyond)*, Idaho Supreme Court, 2007, 39 p.

Question 5. If your state were creating a new IAC today, how would you do things differently?

In Hawaii, a Justice was assigned to review appeals and assign cases to the Supreme Court or Court of Appeals (Appendix B). The work in this assignment process did not help with the resolution or disposition of cases (and was a major reason behind their recent changes). In Iowa, they realized guilty pleas were not going to the Supreme Court; however, they did not recognize this until budget cuts forced an analysis and subsequent change recently. Mississippi was unsure that they needed to have started with so many Justices at the IAC (Appendix E).

Question 6. With your state's method of filing and distributing appeals for the two levels of appellate courts, are there any particular challenges we should be aware of?

In Hawaii, the original process placed the burden on the Supreme Court for all the procedural work on a case. Staff and justices read briefs for determination of the distribution for the case instead of working toward resolution of the case (Appendix B). The Supreme Court maintained much initial control over which cases were eventually deflected.

In Idaho, they have one Justice, who is not the Chief Justice but who is assigned by the Chief, to review all the cases to determine which ones the Supreme Court will hear (Appendix C).

Iowa staff also mentioned the analyzing of briefs noting that the Supreme Court looks for issues of first impression in the two-page (or less) document prepared for determination of which of the two appellate courts should hear the case (Appendix D). A panel of two sitting Justices and one retired Justice decide which cases stay with the

Supreme Court and which go to the Court of Appeals. Another recent challenge has been with the cases with guilty pleas. Budget cuts forced an analysis of cases and they realized that none of the guilty plea cases were going to the Supreme Court. They are currently analyzing how many guilty pleas go to full briefing.

In South Carolina, the change in adding the separate Clerk's Office was good for the appellate court; however, it was also a good thing that it was not done right away (Appendix F). They believe it was easier to do later rather than making too many changes all at once.

Question 7. Are there any particular processes that should be considered?

Hawaii strongly recommended that their current, revised process be considered (Appendix B). The revised process is that all cases now go to the Court of Appeals and the attorneys can file a motion to transfer to the Supreme Court. Specific cases, such as those of public importance, state constitutionality, and life without parole (they have no death penalty) can be transferred to the Supreme Court. Currently, they have five or six transfers per year and proportionally fewer applications for *certiorari*. In making this change, the Court of Appeals expanded their number of staff attorneys also, including transferring two from the Supreme Court.

In Idaho, most criminal cases go to the Court of Appeals except death penalty cases, which are automatically assigned to the Supreme Court (Appendix C).

The recommendation from Iowa was to be sure to keep the screening statement short (Appendix D). In fact, they recently modified their screening statement to follow the Idaho model. Previously, their screening statement was more like a bench memo and was

too much preliminary work at the start of the case that did not help move the case toward resolution. With the revision, it is just enough information to decide whether to keep the case or deflect it to the Court of Appeals.

In Mississippi, some of the case determination is outlined in statutes (Appendix E). All workers' compensation cases go to the Court of Appeals as do most of the noncapital criminal cases. Central Staff review the remainder of cases to determine whether the cases go the Supreme Court or Court of Appeals. The two Central Staffs also use the short memo on issues and size of record in recommending which appellate court should hear the case. The screening judge rotates monthly reviewing the memos.

Of note, South Carolina found they were quickly overcrowded for records (Appendix F). They have started scanning everything now but still have a lot of paperwork.

Question 8. Do cases go from the IAC to the Supreme Court through a *certiorari* process?

In Hawaii, cases can go through *certiorari* process, but seldom do (Appendix B). In Iowa, some original cases can be granted *certiorari*; the most common is to request transfer of jurisdiction or ask for further review (Appendix D). In Mississippi, they do have a *certiorari* process and the Supreme Court Central Staff handle them (Appendix E).

In Idaho, they do not have a *certiorari* process between the two appellate courts; litigants can file a petition for review, which is then granted or denied. If granted, the briefing process starts (Appendix C).

Question 9. Are there any changes you would like to see made within your current case distribution/jurisdictions and processes?

Hawaii recently made substantive changes to their process (Appendix B), which changed from a defunctive process with everything filed at the Supreme Court to one where everything is filed at the IAC. The Court of Appeals likes the new system with the shared filing clerk. The filing process stayed the same, just the process behind the scenes changed in determining in which appellate court the cases start.

The current process in Idaho works pretty well (Appendix C). They continue to look for ways to improve the speed of the process—improve the start to finish for each case.

One challenge remaining in Iowa involves the physical moving of paper (Appendix D). The Chief Judge of the Court of Appeals sets specific dates for the cases to be physically transferred. The transfer is dependent on full briefs. The Clerk waits until about 20 cases are ready to transfer and does them all at once. Setting a specific date may be helpful in organizing the transfer; however, from the outside looking in, the waiting seems to add an unnecessary delay to the process.

Mississippi rules allow that one Supreme Court Justice can vote to retain a case and it is retained (Appendix E). The process is that the screening list is shared with all the justices; if any one Justice requests any one case stay in the Supreme Court, it does. One consideration might be that they need a majority vote to keep a case.

South Carolina would like to have the flexibility to distribute the cases as needed on the basis of increased or decreased caseloads (Appendix F).

Other challenges mentioned by these five states appellate courts include records storage, clerk location, and ensuring that screening statement is concise and not a lengthy bench memo too early in process (Appendixes B-F).

Question 10. Do you track case filing statistics such as pending, new filings, disposition, ending pending for each year? Would you be willing to send it to me? Question 10a. IF NO, Would you be willing to send the five years before and after creating the IAC?

As noted earlier, all the states keep some level of statistics. However, because they are kept in so many different ways, few comparisons and analysis could be completed on the data provided by the separate states.

The National Center for State Courts has observed this problem over the long term and just recently come out with a guide to appellate court statistics. Future research efforts of this type should benefit greatly from those states who apply this guide to their statistical data collection and reporting efforts.

Question 11. HI specific – What were some of the reasons for your recent change in jurisdiction for the IAC? **SC specific** – Do you have mandatory and granted discretionary filing data available for 1982 and 1983?

In Hawaii, the main reason for the recent change in process was the burden on the Supreme Court (Appendix B). The briefing process was lengthy before even deciding which appellate court would hear the case and then the process would start over. Only 17 percent of the cases were published before the change and 61 percent of the cases are being published now; not that so many more cases are being published, but that the caseload is reduced so it is a greater number of the total cases.

South Carolina did not have the filing data available for 1982 and 1983, which were the years before the intermediate appellate court was created.

CONCLUSIONS & RECOMMENDATIONS

Most of the states throughout our nation have some type of intermediate appellate court—only 10 states and the District of Columbia do not. Many decades ago, most of these states had caseloads and in some cases backlogs that were less than Nevada has today.

CONCLUSION ONE: NEVADA HAS INCORPORATED ALL KNOWN AND APPLICABLE CHANGES TO IMPROVE CASE PROCESSING.

The Nevada Supreme Court has followed many states in population and caseload growth and benefited from the many different technology, process, and procedure changes that have allowed it to continue providing access to justice in spite of the phenomenal population and related caseload growth. However, Nevada has clearly outgrown and outpaced any other advances known to appellate courts other than the creation of the IAC to help maintain or improve the access to justice for its citizens.

CONCLUSION TWO: THE CASELOAD IN NEVADA WILL CONTINUE AT LEAST AT CURRENT LEVELS, AND MOST LIKELY INCREASE, FOR ALL TRIAL COURTS AND, SUBSEQUENTLY, THE SUPREME COURT.

Although the population of Nevada is not increasing at the same pace as previous years, it is still increasing; judges are still being added at the trial court levels; and caseloads at trial court levels generally are still increasing. The citizens of Nevada deserve their day in court and their right to a timely appeal. As the cases are appealed, errors are

corrected and the rule of law is further defined, which allows the trial courts (and IAC if created) to better apply the rule of law.

The creation of the IAC will not resolve all issues plaguing the Nevada judiciary. The new appellate court will, however, improve the access to justice by Nevada citizens, which is at the heart of our democratic system.

RECOMMENDATION ONE: THE NEVADA JUDICIAL BRANCH SHOULD CONTINUE EFFORTS TO HAVE AN INTERMEDIATE COURT OF APPEALS CREATED.

The Nevada Judicial Branch has tried three times during the last three decades to create the court of appeals. Even with the current tough economic times for the state and nation, it is still important to move forward with the Constitutional amendment to ensure when the state comes out of this fiscal downturn, the Legislature can create the Court of Appeals without beginning the constitutional amendment process again.

A review of the comparison of caseload and population growth (see Figure 1) shows an apparent decrease in access to justice by the citizens of Nevada around the turn of the 21st century that appears to continue today. Creation of an intermediate appellate court will help improve access and should help improve timeliness.

CONCLUSION THREE: WHILE SOME JURISDICTIONS FOR THE APPELLATE COURTS MAY BE DEFINED BY STATUTE, THE MAJORITY SHOULD BE DECIDED BY COURT RULE TO ALLOW GREATER FLEXIBILITY IN FUTURE CHANGES AS NEEDED.

Some legislatures may wish to require some specific jurisdiction be defined for the Supreme Court, especially as part of the creation of an intermediate appellate court. The

Nevada Legislature may find they too want to ensure certain cases go to the Supreme Court; they will undoubtedly be lobbied by constituents who think their cases are most important and deserve special consideration by the Supreme Court; however, the Legislature should allow the Supreme Court some flexibility to make changes and adjustments over time as caseloads and issues become more or less prominent. This could be done through Supreme Court rules, for example.

Also important to note, is that although a right to appeal is important, under no circumstances should it be seen that a right to appeal is only an appeal to the Supreme Court. Appeals to the District Court or the intermediate appellate court are still appeals.

Lastly, an important element in the flexibility of jurisdiction is the flexibility in case assignment. During an election year, for example, many writs are filed related to the election and must be heard and decided promptly by the Supreme Court. The IAC could still be handling their regular error-correcting caseload instead of having it put off for a few more months as now has to be done at the Supreme Court.

RECOMMENDATION TWO: A FEW SPECIFIC CASE TYPES SHOULD BE ALLOWED DIRECT APPEAL TO THE SUPREME COURT WHILE MOST OTHERS SHOULD BE DEFLECTED TO THE COURT OF APPEALS. THE SUPREME COURT SHOULD THEN CREATE A PETITION PROCESS FOR WRIT OF *CERTIORARI* FROM IAC.

As with many other Supreme Courts in states with two or more appellate courts, some case types should be maintained at the court of last resort. They are (1) issues of first impression; (2) fundamental issues of public importance; (3) constitutional questions as to the validity of a statute, ordinance, or court ruling; and (4) issues of inconsistency or

conflict in the decisions between the two appellate courts. These are common to all the other deflector system appellate processes in state judiciaries.

In addition to these broadly defined jurisdictions, the Nevada Supreme Court should hear cases involving death penalty, termination of parental rights, tax and bond issues, election or ballot issues, judicial discipline or performance, attorney discipline, and certified questions from federal courts. The Nevada Supreme Court should create a petition process for writ of *certiorari* to allow discretionary review of cases previously decided by the Court of Appeals.

The Nevada Court of Appeals, the new intermediate appellate court if created, should hear the cases that are currently fast tracked (such as all criminal cases except those with a sentence of death or life in prison, and those brought by proper person and child custody cases without proper person appellants). The IAC should hear most civil cases, including many of the family cases regarding child custody or marriage dissolution. The Court of Appeals should also hear judicial or administrative review cases such as worker's compensation and reinstatement of driver license administrative decisions.

The table below shows the possible estimated distribution of the cases for the last 5 years using the case filings for the Nevada Supreme Court. The values are estimated from the breakdown of case types provided by the Nevada Clerk of the Court and rounded to resist any implication of exactness. Until the cases actually start being distributed between the two appellate courts, there is no way of knowing how the caseload will actually fall.

Table 3. Estimated Distribution of Appellate Cases Between the Supreme Court and Proposed Court of Appeals of Nevada for Filings in Fiscal Years 2004-08.

Court	Fiscal Year 2004	Fiscal Year 2005	Fiscal Year 2006	Fiscal Year 2007	Fiscal Year 2008
Supreme Court	700	900	1,000	800	900
Proposed Court of Appeals	1,100	1,100	1,100	1,300	1,300

Should the cases be distributed between the two appellate courts similarly to that noted above, the seven Justices of the Supreme Court would have a caseload that should allow for the recommended 100 dispositions per judge per year. The Justices should be able to provide thoughtful resolution to these cases further defining the rule of law for the judicial branch as well as the citizens.

Another unknown for the Supreme Court caseload will be the writs of *certiorari* for cases heard at the Court of Appeals. Most of the other defunctive states noted that their *certiorari* or requests for review were minimal. However, in a new process it is safe to assume at least initially these numbers may be a little high and then settle into some lower number for most years.

What is truly unknown about this caseload is whether the initial three Justices in the proposed Court of Appeals could truly handle the remaining cases without continuing a backlog. Careful consideration will need to be made and the disposition and processing monitored for the first few years after an IAC is created. Although initially as the Justices learn the process dispositions may be impacted, once they have worked out any issues,

they will be able to process many of these fast track type cases. The total amount of cases they are capable of processing may take a few years to determine. Additional Justices may be needed in a few years after creation depending on many of these factors.

Of course, having this additional venue to seek justice will increase the number of cases filed just as the Nevada Supreme Court saw with the addition of two Justices in the late 1990s and as other states have seen when they added another court jurisdiction. The amount of this increase, and which of the two appellate courts might receive the larger part of it, is too difficult to quantify.

In conclusion, the Nevada judiciary, as well as the citizens of Nevada, needs an intermediate appellate court. The recommended jurisdiction for that court includes case types common to deflected appellate court systems as well as a few others. Defining the jurisdiction through statutes as well as court rules should provide enough flexibility to the entire judicial branch to maximize its resources and adjust to the potential changes in caseloads.

The Nevada Supreme Court must also be careful to define and follow a process that reduces judicial involvement in the initial review for case distribution. Using the proposed jurisdiction for case distribution will approximate a caseload for the Supreme Court that is near that recommended by the American Bar Association for the current number of justices; the larger number of cases for the new Court of Appeals judges would mainly involve error-correction cases and should be manageable. However, it should be noted that the caseload of the new IAC could become as overwhelming for them as it is now for the Supreme Court if the use of staff attorneys and other time and efficiency processes are not continued or if too many cases are deflected for the number of justices.

One significant finding in the research was the caseloads often increase in the years following the creation of the IAC and Nevada can expect to experience that increase as well. Future years may see the need for additional justices and staff to support the caseload.

APPENDIX A: SURVEY FOR FIVE STATES

1. Do you have detailed information about the distribution of case types between the two levels of appellate courts? For example, do you have a breakdown of each case type (such as criminal, civil, and bar matters) handled by each appellate court and how many were filed in each category? Do you track the discretionary appeals? Would you provide the last 10 years of that data?
2. What were the reasons behind creating your IAC?
Caseloads? IF UNKNOWN, ask if they could recommend someone to speak with who is familiar with the IAC creation?
3. How was the initial caseload for the IAC provided?
Transfer cases in or just start with the effective date of the court or something else?
4. During the creation of the IAC, what challenges were faced?
5. If your state were creating a new IAC today, how would you do things differently?
6. With your state's method of filing and distributing appeals for the two levels of appellate courts, are there any particular challenges we should be aware of?
7. Are there any particular processes that should be considered?
8. Do cases go from the IAC to the Supreme Court through a *certiorari* process?
9. Are there any changes you would like to see made within your current case distribution/jurisdictions and processes?
10. Do you track case filing statistics such as pending, new filings, disposition, ending pending for each year? Would you be willing to send it to me?
 - a. IF NO, Would you be willing to send the five years before and after creating the IAC?
11. **HI specific** – What were some of the reasons for your recent change in jurisdiction for the IAC?
SC specific – Do you have mandatory and granted discretionary filing data available for 1982 and 1983?
12. Would you like to receive a copy of the final report?

APPENDIX B: SURVEY RESPONSES FROM HAWAII

1. Do you have detailed information about the distribution of case types between the two levels of appellate courts? For example, do you have a breakdown of each case type (such as criminal, civil, and bar matters) handled by each appellate court and how many were filed in each category? Do you track the discretionary appeals? Would you provide the last 10 years of that data?
 - a. *1980-2006 we had the push down or “pour over” model. Data provided from annual reports.*

2. What were the reasons behind creating your IAC?
Caseloads? IF UNKNOWN, ask if they could recommend someone to speak with who is familiar with the IAC creation?
 - a. *Backlog of appeals. The burden of the Supreme Court with all procedural work for the case plus rulemaking plus original proceedings.*

3. How was the initial caseload for the IAC provided?
Transfer cases in or just start with the effective date of the court or something else?
 - a. *A Constitutional Convention created the Court of Appeals by statute. The statutes created a system, cases “pour over.” The Court of Appeals was developed in 1980. We do not have historical information about how the initial caseload was created for the Hawaii Intermediate Court of Appeals when it began operations. It appears from the historical data that at least some portion of the Supreme Court’s backlog of appeals was transferred to the Intermediate Court of Appeals.*

4. During the creation of the IAC, what challenges were faced?
 - a. *The original Constitutional Convention had two proposals. One was to expand the Supreme Court from 5 to 7 members; the other creation of the Court of Appeals. The Constitutional Convention chose the latter. Since the creation of the Court of Appeals with three judges, the legislature has expanded the court to six judges and work in random panel assignments. All six meet once a week to discuss all cases each panel is considering.*

Another challenge was whether the ICA should be a true court of appeals or an appendage of the Supreme Court. Once the decision was made to create an intermediate court of appeals, the primary challenge was whether to create a court of appeals to which appeals were directly taken or to make the court one that operated as a mere appendage of the supreme court, by having “overflow” appeals assigned to it.

5. If your state were creating a new IAC today, how would you do things differently?

- a. *An assignment Justice is given the task to review appeals and assign cases either to IAC or Supreme Court. The work for assignment does not help with resolution or disposition of cases.*

After more than 25 years of experience with a “pour over” appellate system, Hawaii had the opportunity to recreate the ICA in 2006 and did so by changing the jurisdictional statutes so that all appeals now are filed directly with the ICA. In short, Hawaii adopted the federal model for appellate courts.

6. With your state’s method of filing and distributing appeals for the two levels of appellate courts, are there any particular challenges we should be aware of?

- a. *Originally, the “pour over” system placed all the procedural burdens of processing cases on the Supreme Court; staff and justices were reading briefs for distribution instead of for resolution. This allowed the Supreme Court to maintain a lot of control over the appeals that would get deflected, but it mired the justices in procedural minutiae, including 2,500 or so motions filed each year between the notice of appeal and completion of briefing.*

A “pour over” system requires a considerable amount of wholly unproductive procedural work as staff and justices must spend time researching and writing about whether a case should be assigned to the ICA or the Supreme Court, rather than researching and writing about the issues raised by the parties.

Any change in a process that people are accustomed to will result in a lot of opposition. In 2004, a statutory amendment was passed to change this process. The change was opposed by the bar, prosecutors, and others. The legislative compromise was to allow the Judiciary’s proposal that is more like the federal system to sunset in 2010, unless the judiciary can convince the legislature the new system is a success. The Hawaii Judiciary must present results in a report to legislature in 2010.

7. Are there any particular processes that should be considered?

- a. *Hawaii’s revised process is that all appeals go to the ICA and parties may file a motion for a transfer in limited circumstances. The circumstances under which transfer is allowed should be considered carefully to avoid burdening the Supreme Court. Currently, we have 5-6 transfers per year.*

Consider whether any classes of appeals should go directly from the trial court or agency to the Supreme Court. Cases of public importance, state constitutionality, and life without parole (we have no death penalty) can be transferred to Supreme Court; cases of first impression are discretionary.

Consider the standards for an application for a writ of certiorari. After the entry of the ICA's judgment on appeal, Hawaii Supreme Court review may be sought by application for a writ of certiorari. In FY07, cert applications were filed from approximately 26% of the ICA's judgments. That figure dropped to 23% in FY08.

We added staff attorneys at the Court of Appeals. They have two law clerks per justice and five staff attorneys, two of which came from the Supreme Court. In our experience, trained, permanent central staff attorneys are more productive than law clerks, especially with regard to procedural matters. Hawaii found the "pour over" system to be wasteful of scarce judicial and attorney resources.

Justices should think about what type of cases will come to the Supreme Court because everyone will lobby the legislature to be first in line. Our Legislature has the authority to determine jurisdiction of each appellate court and the number of judges on the ICA.

We would be happy to discuss our process with anyone.

8. Do cases go from the IAC to the Supreme Court through a *certiorari* process?
 - a. *They can (see above).*

9. Are there any changes you would like to see made within your current case distribution/jurisdictions and processes?
 - a. *They do not wish to return to the "pour over" system. Although somewhat apprehensive at first, the Court of Appeals appears to like the new system. Hawaii has retained and will likely keep the unitary filing clerk and filing process. The Hawaii Judiciary will likely ask that some types of appeals be directly appealable to the Supreme Court.*

10. Do you track case filing statistics such as pending, new filings, disposition, ending pending for each year? Would you be willing to send it to me?
 - a. *Yes. Data sent from annual reports.*

- a. IF NO, Would you be willing to send the five years before and after creating the IAC?

11. **HI specific** – What were some of the reasons for your recent change in jurisdiction for the IAC?

- a. *The burden on the Supreme Court. The amount of time spent on procedural matters related to briefing and assignment impaired the Supreme Court's ability to deal with rule making, attorney and judicial discipline, and other matters within their authority. In short, the justices were mired in procedural minutiae, so much so that oral argument had been severely curtailed for many years and publication was minimal. 17% of cases were published before the change; 61% cases are published now, in part because of fewer number of total cases.*

SC specific – Do you have mandatory and granted discretionary filing data available for 1982 and 1983?

12. Would you like to receive a copy of the final report?

- a. *Yes, send a copy of the final report.*

APPENDIX C: SURVEY RESPONSES FROM IDAHO

1. Do you have detailed information about the distribution of case types between the two levels of appellate courts? For example, do you have a breakdown of each case type (such as criminal, civil, and bar matters) handled by each appellate court and how many were filed in each category? Do you track the discretionary appeals? Would you provide the last 10 years of that data?

- a. *Will send a recent report⁶⁰ to the Idaho Legislature with some data contained therein.*

From report, p. 6, The Idaho Court of Appeals was established by statute (Idaho Code sections 1-2401 through 1-2411) in 1980 and the court received funding to begin operation in January 1982.

2. What were the reasons behind creating your IAC?
Caseloads? IF UNKNOWN, ask if they could recommend someone to speak with who is familiar with the IAC creation?

- a. *Caseloads.*

3. How was the initial caseload for the IAC provided?
Transfer cases in or just start with the effective date of the court or something else?

- a. *From report, p. 6, The court was assigned 206 of the backlogged cases on the first day of operation and 235 more during the first year. Those and subsequently assigned cases were resolved at a rate that resulted in just 21 cases pending by the end of 1985. The delay in deciding all cases in Idaho's appellate system was cut by more than 10 months.*

All cases go to the Supreme Court. One Justice reviews all cases to determine whether to assign to Supreme Court or Court of Appeals.

4. During the creation of the IAC, what challenges were faced?

- a. *Recently completed a task force report on history and will send.*

From the report, p. 6, 10-11, 38-39, The creation was a success and resulted in initial reduction in appellate caseload. However, by the mid-1990s, the assignments to the Court of Appeals was approximately 300 new cases each year increasing to 500 new cases a year at the turn of the century. The cases at the Supreme Court were similarly increasing. Of

⁶⁰ See Note 58 *supra*.

note, during the history of the Supreme Court, the Court has had one practitioner, one district judge, and one present or former magistrate, providing a balance within the bench and bar in the representation on the court.

5. If your state were creating a new IAC today, how would you do things differently?
6. With your state's method of filing and distributing appeals for the two levels of appellate courts, are there any particular challenges we should be aware of?
 - a. *One Justice, not the Chief Justice, but assigned by the Chief, reviews all cases and determines which court will hear which cases.*
7. Are there any particular processes that should be considered?
 - a. *Most criminal cases go to the Court of Appeals; death penalty cases are automatically assigned to Supreme Court. A couple of case types, like workers compensation go to Supreme Court, but those were largely part of the politic process getting the IAC approved.*
8. Do cases go from the IAC to the Supreme Court through a *certiorari* process?
 - a. *Idaho does not have a certiorari process. They can file a petition for review, which is then granted or denied. If granted, the briefing process starts.*
9. Are there any changes you would like to see made within your current case distribution/jurisdictions and processes?
 - a. *The current process works pretty well. Just need to continue to look for opportunities to increase the speed of the process – improve the start to finish.*
10. Do you track case filing statistics such as pending, new filings, disposition, ending pending for each year? Would you be willing to send it to me?
 - a. IF NO, Would you be willing to send the five years before and after creating the IAC?
11. **HI specific** – What were some of the reasons for your recent change in jurisdiction for the IAC?
SC specific – Do you have mandatory and granted discretionary filing data available for 1982 and 1983?

12. Would you like to receive a copy of the final report?

a. Yes.

APPENDIX D: SURVEY RESPONSES FROM IOWA

1. Do you have detailed information about the distribution of case types between the two levels of appellate courts? For example, do you have a breakdown of each case type (such as criminal, civil, and bar matters) handled by each appellate court and how many were filed in each category? Do you track the discretionary appeals? Would you provide the last 10 years of that data?

- a. *Deflective court. All appeals are filed with the Supreme Court and pushed down. The IAC has developed expertise in juvenile matters. All guilty pleas to IAC, post conviction to IAC unless unusual Constitutional issue; child custody and dissolution to IAC.*

Send email request for all stats.

2. What were the reasons behind creating your IAC?
Caseloads? IF UNKNOWN, ask if they could recommend someone to speak with who is familiar with the IAC creation?

- a. *Unsure.*

3. How was the initial caseload for the IAC provided?
Transfer cases in or just start with the effective date of the court or something else?

- a. *A Supreme Court order in 1988 routed cases. Started by recommending Supreme Court or Court of Appeals screening statement for each case.*

4. During the creation of the IAC, what challenges were faced?

5. If your state were creating a new IAC today, how would you do things differently?

- a. *Analysis and budget cuts forced us to realize the recent changes because no guilty pleas were going up. We are looking now for how many guilty pleas (life sentences) actually go to full briefing. The court of appeals is a reviewer of facts not analyzer of law.*

6. With your state's method of filing and distributing appeals for the two levels of appellate courts, are there any particular challenges we should be aware of?

- a. *Analyze briefs to look for issues of first impression, issue or trouble, less than two pages why Supreme Court should take case; panel of two sitting and one retired justice decide which to hear.*

Guilty pleas and juvenile cases are a recent change to the original order. Start by recommending Supreme Court or Court of Appeals through a screening statement for each case. Analysis and budget cuts made them re-evaluate and realize these changes because no guilty pleas were going up. Currently analyzing to see how many guilty pleas actually go to full briefing.

7. Are there any particular processes that should be considered?
 - a. *Keep the screening statement short. We recently modified and suggest review of the Idaho version. The IAC judges developed some expertise through the work. Attorneys take notes during panel decisions about what to take so they can learn from decisions. Previously, the screening statement was like a bench memo and that is not what should be done at the start. Currently, it is just enough information to decide to keep the case or deflect it to the IAC.*

8. Do cases go from the IAC to the Supreme Court through a *certiorari* process?
 - a. *Request further review; certiorari for some original cases but not many. Transfers jurisdiction temporarily most common is to ask for further review because of errors.*

9. Are there any changes you would like to see made within your current case distribution/jurisdictions and processes?
 - a. *The physical moving of paper. The Chief Judge of the Court of Appeals set transfer dates when cases are actually transferred. The actual transfer is dependent on full briefs. Clerk waits until about 20 cases are ready to transfer and does it then. A set date may helpful but may delay cases unnecessarily.*

National Center for State Courts worked with us to evaluate and recommend new processes and systems. They recommended two or three attorneys should be dedicated to doing case statements. The small number of attorneys has kept us from doing this. May be able to split the responsibilities as well as spending 3-4 days a month doing case statements.

10. Do you track case filing statistics such as pending, new filings, disposition, ending pending for each year? Would you be willing to send it to me?
 - a. IF NO, Would you be willing to send the five years before and after creating the IAC?

11. **HI specific** – What were some of the reasons for your recent change in jurisdiction for the IAC?

SC specific – Do you have mandatory and granted discretionary filing data available for 1982 and 1983?

12. Would you like to receive a copy of the final report?

a. Yes, send final report.

APPENDIX E: SURVEY RESPONSES FROM MISSISSIPPI

1. Do you have detailed information about the distribution of case types between the two levels of appellate courts? For example, do you have a breakdown of each case type (such as criminal, civil, and bar matters) handled by each appellate court and how many were filed in each category? Do you track the discretionary appeals? Would you provide the last 10 years of that data?
 - a. *Early in 1990s we went to Iowa and started with their model owing to the economics and level of caseload.
Check annual reports on web.*

2. What were the reasons behind creating your IAC?
Caseloads? IF UNKNOWN, ask if they could recommend someone to speak with who is familiar with the IAC creation?
 - a. *Backlog was getting worse. We needed to increase the size (already 9 justices) or do something else. We tried magistrates, but that did not work well.*

3. How was the initial caseload for the IAC provided?
Transfer cases in or just start with the effective date of the court or something else?
 - a. *Started the summer before the January start of the court looking at cases to be assigned and actually started assigning about 90 days before. Did not go back and give stale cases of Supreme Court. The new court also needed some organization time.*

4. During the creation of the IAC, what challenges were faced?
 - a. *Actually worked well. Some issues on giving them the independence and respect f a separate court while avoiding them being the “servants” of the Supreme Court.

*Rules of the Court of Appeals are adopted by the Supreme Court.**

5. If your state were creating a new IAC today, how would you do things differently?
 - a. *The 10 judge IAC may not be necessary to start with.*

6. With your state's method of filing and distributing appeals for the two levels of appellate courts, are there any particular challenges we should be aware of?
 - a. *No. The 2007 annual report explains jurisdiction between appellate courts.*

7. Are there any particular processes that should be considered?
 - a. *Clear set of cases defined by statute to be retained at the Supreme Court. All workers compensation cases go to Court of Appeals. 89% of noncapital cases go to IAC. Central Staff review remainder for whether the cases go to the Supreme Court or Court of Appeals. They prepare 1-1.5 page memo on issues, size of record, and recommend which court. First impression cases to the Supreme Court. Screening judge rotates monthly to review memos. Rarely, the Court of Appeals might find one that should be at Supreme Court. Two separate central staffs (one at Supreme Court and one for IAC).*

8. Do cases go from the IAC to the Supreme Court through a *certiorari* process?
 - a. *Supreme Court central staff handle the certs.*

9. Are there any changes you would like to see made within your current case distribution/jurisdictions and processes?
 - a. *The screening before reply brief has been helpful to keep things moving. One Supreme Court Justice can vote to retain and it is retained; maybe this retention should require a majority. This is done as the screening list is shared with all justices and any one can request any case stay.*

10. Do you track case filing statistics such as pending, new filings, disposition, ending pending for each year? Would you be willing to send it to me?
 - a. *IF NO, Would you be willing to send the five years before and after creating the IAC?*

11. **HI specific** – What were some of the reasons for your recent change in jurisdiction for the IAC?
SC specific – Do you have mandatory and granted discretionary filing data available for 1982 and 1983?

12. Would you like to receive a copy of the final report?
 - a. *Yes, send a copy.*

APPENDIX F: SURVEY RESPONSES FROM SOUTH CAROLINA

1. Do you have detailed information about the distribution of case types between the two levels of appellate courts? For example, do you have a breakdown of each case type (such as criminal, civil, and bar matters) handled by each appellate court and how many were filed in each category? Do you track the discretionary appeals? Would you provide the last 10 years of that data?

- a. *Statutes on IAC jurisdiction are in Title 14-7-200. All appeals from circuit courts go to IAC except death penalty, elections, setting utility rates, and timely authority. Email data questions.*

2. What were the reasons behind creating your IAC?
Caseloads? IF UNKNOWN, ask if they could recommend someone to speak with who is familiar with the IAC creation?

- a. *Big backlog at Supreme Court; 2-3 years behind. A lot of the cases, they did not need to handle. Supreme Court should do policy making, not nuts and bolts. IAC for error correcting was more advisable. Supreme Court moved to certiorari. It has been 25 years and still working on some issues.*

Originally began as a statutory court and would go out of existence if not constitutionally added.

3. How was the initial caseload for the IAC provided?
Transfer cases in or just start with the effective date of the court or something else?

- a. *Organizationally, the Court of Appeals met with the federal circuit judges to discuss organization. Originally, six judges heard cases in panels; now nine judges.*

Everything is filed in the Supreme Court and certain cases transferred to IAC. In 1996, that changed and appeals were filed in IAC at start.

4. During the creation of the IAC, what challenges were faced?
5. If your state were creating a new IAC today, how would you do things differently?

- a. *Not much.*

6. With your state's method of filing and distributing appeals for the two levels of appellate courts, are there any particular challenges we should be aware of?
 - a. *The change made in 1996 to open a new filing office was good that it was not done right away. With all the other changes in the court – it was easier to do later rather than making too many changes all at once.*

7. Are there any particular processes that should be considered?
 - a. *Quickly overcrowded for records. They are scanning everything now but still have the papers. Expensive to rent outside storage.*

Clerks Office is now divided into two floors, but otherwise things go well.

8. Do cases go from the IAC to the Supreme Court through a *certiorari* process?

9. Are there any changes you would like to see made within your current case distribution/jurisdictions and processes?
 - a. *Need the flexibility of distributing cases to allow for increases and decreases in caseload.*

10. Do you track case filing statistics such as pending, new filings, disposition, ending pending for each year? Would you be willing to send it to me?
 - a. IF NO, Would you be willing to send the five years before and after creating the IAC?

11. **HI specific** – What were some of the reasons for your recent change in jurisdiction for the IAC?
SC specific – Do you have mandatory and granted discretionary filing data available for 1982 and 1983?
 - a. *No.*

12. Would you like to receive a copy of the final report?
 - b. *Yes, send a copy.*

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