Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California

Thomas E. Hollenhorst
TENTATIVE OPINIONS: AN ANALYSIS OF THEIR BENEFIT IN THE APPELLATE COURT OF CALIFORNIA

Justice Thomas E. Hollenhorst*

This idea is a gimmick and the havoc certain to ensue from public inspection of judicial working papers hitherto not only privileged but sacrosanct can scarcely be imagined.¹

Bernard Witkin

I. INTRODUCTION

For the past four years,² the California Court of Appeal, Fourth Appellate District, Division Two, has provided appellate counsel with drafts of opinions which are mailed approximately one week in advance of oral argument. This concept was born from the frustration of having well prepared, conference "calendar memos" on the bench during oral argument and watching as appellate counsel argued issues which were not germane to the proposed determination of the matter on

* Associate Justice, Fourth District Court of Appeal, Division Two; B.A. 1968, San Jose State University; J.D. 1971, University of California, Hastings College of the Law.

¹ Phillip M. Saeta, Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making, 20 Judges J., Summer 1981, at 20, 20. Bernard Witkin, who Saeta quotes in his article, has "softened" his views on tentative opinions in the last 23 years. During a conversation between the author and this esteemed and beloved giant in the California legal community on November 5, 1994, Mr. Witkin remarked that the idea of tentative opinions is "so bad that it might have some potential!" Interview with Bernard Witkin (Nov. 5, 1994).

² The program officially began in October 1990. The first case assignments to chambers for preparation of tentative opinions preceded the beginning of the program by three months.
appeal. Division Two\(^3\) set about to examine other programs in which tentative opinions are released and to develop our own program. This article chronicles the development of the program and, more importantly, demonstrates the changes which have occurred as a result of the implementation of the Tentative Opinion Program.

The rules that were developed for the program are relatively simple and straightforward.\(^4\) In this respect, this pro-

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3. At the time the program began, the court had only three of its normal complement of five justices. Justice Howard M. Dabney first suggested the use of tentative opinions and the author implemented the idea. Grateful acknowledgment is given to Justices Dabney and F. Douglas McDaniel for their courage to begin such a program and willingness to stick with it while the details were worked out.

4. The tentative opinion rules are:
   (a) [Oral Argument] When the last brief to be filed in an appeal is filed, or when the brief has not been filed and no extension to file it is pending and the period for filing the brief expires, the clerk shall notify the parties to the appeal in writing of the right to request oral argument. Any party to the appeal may file a written request for oral argument on or before ten (10) days after the date of the clerk's notice. The clerk shall set the appeal for hearing and, no later than twenty-five (25) days before the hearing, notify the parties to the appeal of the date, time, and place. Any request for oral argument filed after the ten-day period shall be ineffective, and failure to file a timely request shall be deemed a waiver of the right to oral argument.
   (b) [Tentative opinion; Disputed Issues Memorandum] If any party to the appeal requests oral argument, and if a majority of the justices on the panel for the appeal concur on a tentative opinion, the clerk shall mail the tentative opinion to each party to the appeal no later than ten (10) days before the hearing date. In any appeal where oral argument has been requested and a majority of the justices do not concur on a tentative opinion, the justices will agree on a memorandum describing the issues disputed among the panel members; the clerk shall mail the tentative opinion or disputed issues memorandum with the corresponding cover letter set forth below in paragraph (c) to each party to the appeal no later than ten (10) days before the hearing date.
   (c) [Clerk's letter to accompany tentative opinion or disputed issues memorandum]

   [Majority Panel]
   Enclosed is the tentative opinion of a majority of the panel of three justices hearing the appeal. In this case the court has determined that 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. The court is therefore willing to submit this case without oral argument. Based on the foregoing:
   (1) Waiver of oral argument: Counsel must notify this court if he or she wishes to waive oral argument pursuant to California Rules of Court, rule 22. Failure to do so will be deemed a waiver of oral argument, and the cause will be submitted at that time.
gram differs significantly from the other programs which pro-
vide draft opinions prior to oral argument.

II. BACKGROUND

A. Other Programs Compared

Based upon my research, two other appellate courts use a form of tentative opinions. The Second District of the Arizona Court of Appeal has been using tentative opinions since

(2) Reconfirmation of oral argument: Counsel must reconfirm his or her initial decision requesting oral argument pursuant to California Rules of Court, rule 22.

(3) Counsel shall advise opposing counsel of his or her decision and so advise the deputy clerk of this court, Mrs. Helen Bradbury, by telephone at (909) 383-4833, not later than 2 p.m. on the Friday prior to the scheduled oral argument.

(4) Should counsel desire that the matter remain on the oral argument calendar, each party shall be limited to 15 minutes of oral argument. Because the panel of justices has read and studied the briefs, discussed the case, and has a tentative opinion before it, you will not be permitted to repeat the arguments set forth in your brief.

(5) No continuance of oral argument will be permitted on the stipulation of the parties without an order of approval by the court. Failure to comply with this notice may result in the imposition of sanctions.

Enclosed is the tentative opinion of a majority of the panel of three justices hearing the appeal. Limit and focus your arguments accordingly. Oral argument for each party will be limited to 15 minutes pursuant to California Rules of Court, rule 22. The tentative opinion is, of course, subject to change in both language and result after oral argument.

[Nonmajority Panel]

Dear Counsel:
Enclosed is a memorandum agreed on by the three justices on the panel hearing the appeal describing the key issues disputed among the panel members. Limit and focus your argument accordingly.

Memorandum from Don Davio to All Court Personnel of the Fourth District Court of Appeal, Division Two (June 14, 1990) (on file with the court).

5. The Los Angeles Superior Court, Appellate Division, has also used tentative opinions since March 1980. Saeta, supra note 1, at 23. The current use of these opinions generally does not involve extensive recitations of facts nor do they include citations to case authority. Id. at 21. Generally, the rulings are limited to the proposed action of the court and several sentences as to why the court intends to rule in a particular way. Cf. id. at 22. Tentative opinions are made available to appellate counsel the afternoon before oral argument. Id. at 23. The Superior Court Appellate Department has appellate jurisdiction over all misdemeanor cases which arise in the municipal courts within the county. Cal. Const., art. VI, § 11.
There, when oral argument has been requested, a notice is sent to the parties that contains the following:

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

The draft does not contain the authoring justice's name. Further, at the top of the document, in bold type face, is the admonition: "Note. This is a draft prepared by only one judge. The court has not conferred on the draft. . . . The draft may be changed entirely after argument." Counsel who have participated in the Arizona program have been contacted and they report three major beneficial effects compared to a traditional system.

First, they feel that oral argument becomes more meaningful when opinions are sent out in advance. They know that at least one judge is familiar with the record and the judges appear better prepared for oral argument. Second, they reported that the system affords counsel an opportunity to correct any misinterpretations of law or fact by the court. Third, they think the procedure helps keep argument, and the process of preparing the final opinion, more focused.

Despite these advantages, there has been criticism that the program leads to one-judge opinions because of the perception that the draft opinion is, in fact, the final opinion.

In response to that criticism, a study was conducted in which the Arizona court reviewed 148 decisions where oral argument was conducted after disclosure of a tentative opinion. The study revealed that these concerns were not well-founded. In eight (five percent) of the 148 cases, there was a change in the outcome of the case after argument. Also, the

7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id. at 5.
13. Id.
court noted that the draft opinion was changed, at least in its content, in forty-six cases (thirty-one percent).\textsuperscript{14}

A second, and considerably different tentative opinion system is used by the New Mexico Court of Appeal. This system differs substantially in scope, format, and purpose, from the California and Arizona programs. The main goals of the New Mexico program are to speed appellate review and reduce the cost of appeal by curtailing the need for full briefing and record preparation.\textsuperscript{15} In New Mexico, the justices rely on memoranda filed by counsel and, in turn, provide tentative decision rulings to which counsel may respond.\textsuperscript{16} In addition, the New Mexico Appellate Court processes its cases in two vastly different ways, either on summary or general calendars.\textsuperscript{17}

The general calendar may best be described as the more traditional calendar where a full record on appeal is prepared, the issues are fully briefed by counsel, and opinions are prepared by three-judge panels. Nonetheless, the record on appeal is a tape recording instead of a typed transcript, and oral argument is rarely held.\textsuperscript{18}

The summary calendar differs greatly from the traditional approach. It was created in 1975 and its use has grown steadily since.\textsuperscript{19} In 1990, sixty-six percent of the court's cases were disposed of using the summary system.\textsuperscript{20}

The decision to place a case on either of the two calendars is made on the basis of a docketing statement filed with the court by counsel.\textsuperscript{21} That statement must contain:

(1) a statement of the nature of the proceeding;
(2) the date of the judgment or order sought to be reviewed, and a statement showing that the appeal was timely filed;

\textsuperscript{14} Id. The survey did not include criminal cases because at the time the study was conducted, requests for oral argument in criminal cases were not routinely granted. Consequently, the survey focused on civil cases.


\textsuperscript{16} Id.

\textsuperscript{17} Id. at 87.

\textsuperscript{18} Id. at 88.

\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} Id.
(3) a concise, accurate statement of the case summarizing all facts material to a consideration of the issues presented;

(4) a statement of the issues presented by the appeal, including a statement of how they arose and how they were preserved in the trial court, but without unnecessary detail. The statement of issues should be short and concise and should not be repetitious. General conclusory statements such as "[t]he judgment of the trial court is not supported by the law or the facts" will not be accepted;

(5) a list of authorities believed to support the contentions of the appellant and any contrary authorities known by appellant. Argument on the law shall not be included, but a short, simple statement of the proposition for which the case or text is cited shall accompany the citation;

(6) a statement specifying whether the entire proceedings were tape recorded, and if not, identifying the portion of the proceedings, other than the record proper, not tape recorded;

(7) a reference to all related or prior appeals. If the reference is to a prior appeal, the appropriate citation should be given; and

(8) where applicable, a copy of the order appointing appellate counsel.22

The average length of a docketing statement is eight to ten double-spaced pages.23 In reviewing the docketing statement, the court also has the "record proper" (or "clerk's transcript") which is forwarded to the appellate court by the clerk of the trial court. The court has no information concerning the testimony or evidence produced during the trial except that which was supplied in the docketing statement.24

All materials submitted are reviewed by staff at the court of appeal. They in turn prepare a calendar notice for the court, with a copy sent to counsel, and recommend calendar assignment either to the summary or general calendar.25 The court generally agrees with the recommendation of the staff. Then, a staff member and single judge, assigned on a rotating basis, will sign the calendar notice sent to counsel signifying assent.26

24. Id.
25. Id.
26. Id.
posed opinions that tentatively decide the merits of the issues raised, usually about 1 1/2 pages in length, and contain no statement of facts since they are sent only to those familiar with the facts.27

The criteria for determining which cases are placed on the summary calendar as opposed to the general calendar are not recorded in the rules, but judges report that there are two considerations. The first is whether the case can be decided without a transcript or tape of the trial.28 Second, the court will not assign a case to the summary calendar where the issue is one of first impression.29 The losing side to the calendar notice has ten days to file a memo in opposition.30 The winning side does not respond which saves time and expense. In criminal cases, where the respondent is usually represented by the attorney general, a significant number of cases involve very little consumption of attorney time, arguably saving public costs. The single judge will consider the arguments raised in the opposition to the calendaring notice and will take one of three courses: (1) place the case on the general calendar; (2) recommend the summary decision by a three-judge panel if the opposition memorandum does not answer the notice; or (3) re-calendar the case for another summary calendar notice, deciding the case on different grounds and thereby beginning the process again.31

The principal benefits of the New Mexico Tentative Opinion Program are threefold. First, the overall decision times are shorter, particularly in criminal cases.32 Second, it significantly reduces the cost of appeals by eliminating the need to produce a record of the proceedings and limiting the briefing to relatively short references to legal authority.33 The respondent, in criminal cases the attorney general, might incur no expense at all. Third, the quality of justice, at least statistically, has not been reduced because there is no difference

27. Id.
28. Id. at 89. The court of course cannot resolve those disputes concerning the content of the record, nor gauge whether error was harmless, without referring to the contents of the record.
29. Id.
30. Id.
31. Id. at 90.
32. See id. at 94.
33. Id.
between the reversal rates. Criticism of the program has come from criminal defense attorneys who believe that they have an inadequate trial record from which to develop error. Further, they think the system implies that some cases deserve very little time, leaving the judges to concentrate resources on the more difficult and time-consuming cases. Likewise, civil practitioners voice concern that the docketing statement does not provide adequate opportunity to present and develop appellate arguments.

B. Inefficiencies in the Processing of Appellate Cases

California has a unique appellate court because of both the age of the system and the size of the state. While California has a unified system for purposes of operations and the rules which guide the processing of cases, the six districts, geographically located in population centers around the state, employ different procedures in processing appeals. Collectively, however, the court is hampered by rather antiquated rules which, given the tremendous actual and projected increase in appellate volume, significantly detract from the court's ability to process cases in a timely and efficient manner.

First, the appellate courts, including the supreme court, must dispose of cases by written opinion. This requirement slows the process of resolving cases and adds little to the resolution of mundane, easily resolved issues on appeal. More importantly, the requirement that full opinions be written in all cases is simply inefficient. Since the late 1960's, there has been a growing movement in the appellate courts to dif-

34. Id. at 93.
35. Id. at 94.
36. Id.
37. The Courts of Appeal in the State of California were created by a 1879 amendment to the California Constitution. CAL. CONST. art. VI, § 3.
40. The requirement that decisions be delivered in opinion form simply exacerbates the crisis of volume in California. In 1993, justices on the California Court of Appeal participated in decisions on over 375 cases including authored and panel cases. J. Clark Kelso, A Report on the California Appellate System, 45 HASTINGS L.J., 433, 441 (1994). This number far exceeds the recommended number from Professors Carrington, Meador and Rosenberg which is 100. Id.
ferentiate cases based upon complexity. This screening process determines the way the cases are handled and the nature of the opinion that is generated. In Michigan, the appellate court created a central staff that processed the non-complex cases and prepared drafts of opinions for the court. In California, the staff actually participates in the screening process, culling simpler cases for routine disposition. In the initial attempts to deal with volume by screening out simpler cases, a principal component of the process was summary or short dispositions. If the appellate courts in California are going to keep pace with their rising caseloads, the state must consider amending the State Constitution to permit decisions by less than a full opinion.

A second and equally important issue concerns the right to oral argument. The right to oral argument is not specifically delineated in the California Constitution but has been established by case law which holds, "the right to oral argument in matters on the calendar in open sessions of the court has always been accorded." Since the 1970's, there has been a growing movement in the appellate courts to limit this right. The principal reason for this movement is, of course, grounded upon expediency in the handling of increased case volume. The time-savings sought is not from the bench time, but in the bottleneck which occurs in getting cases scheduled on busy oral argument calendars. Moreover, there are a large number of cases in which only the briefing is necessary to dispose of the case. In most of the federal circuits, over half of the appellate cases are resolved without oral argument. In state courts, the percentage of cases that are orally

43. DANIEL J. MEADOR & JORDANA S. BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES, 80 (1994). Our court, like many intermediate appellate courts in the United States, has relied upon staff screening to identify those cases which contain one or two issues where the law is settled and the case lends itself to shorter opinions. However, shorter opinions have never been construed to be summary dispositions with only a short statement of the court's decision. While our "routine disposition" cases are generally shorter in length than the longer opinions where the issues are more substantial, the resultant opinions generally exceed six pages.
44. Metropolitan Water Dist. v. Adams, 122 P.2d 257, 260 (Cal. 1942); see also Moles v. Regents of the Univ. of Cal., 654 P.2d 740, 742 (Cal. 1982).
46. Id. at 30.
argued in the intermediate appellate courts is higher, although in some states fewer than half of the cases are orally argued.\textsuperscript{47} These issues contributed to the decision in the Fourth District, Second Division, to implement a Tentative Opinion Program in order to make oral argument, which is compulsory, more effective.\textsuperscript{48}

C. Oral Argument With Value

While there has been a steady retreat from oral argument as a matter of right in the appellate court,\textsuperscript{49} the concept of oral argument as important in the resolution of appellate cases has remained vital. Against the increasing pressure to curtail or eliminate oral argument in an effort to deal with burgeoning caseloads, the American Bar Association passed a resolution which underscored counsel's view of the value of oral argument.\textsuperscript{50} As Professor Meador suggests,

\begin{quote}
[d]eep within the Anglo-American legal psyche, mixed in with notions about the opportunity to be heard and the concept of due process, is the idea that a litigant and his lawyer should be able to face their judges and communicate directly to them. Nothing else affords the same assurance that the judges in fact have been confronted with the theories and arguments of the parties and have put their minds to the case. The acceptability and the integrity of the judicial process may be heavily affected by such assurance, and only the visible, orally presented appellate proceeding can provide it.\textsuperscript{51}
\end{quote}

\textsuperscript{47} See Meador & Bernstein, \textit{supra} note 43, at 82-84. For an even grimmer description of the value of oral argument in many cases in the appellate court, see Kelso, \textit{supra} note 40, at 464.


\textsuperscript{50} See \textit{id.} at 736 n.18. The resolution reads as follows: \textit{Be It Resolved,} That the American Bar Association express its opposition in an appropriate manner to the rules of certain United States Circuit Courts of Appeals which drastically curtail or entirely eliminate oral argument in a substantial proportion of non-frivolous appeals and, \textit{a fortiori}, to the disposition of cases prior to the filing of briefs.


\textsuperscript{51} Meador, \textit{supra} note 49, at 736-37.
Thus, two extreme positions exist between the courts and litigants. The realities are that there are simply too many cases for each to receive the same level of treatment. The courts must look for ways to make the appellate system more efficient. Curtailing oral argument has traditionally been one method of increasing efficiency in the appellate system. However, curtailing oral argument has created tension within the bar. The traditional notion that all are entitled to their day in court, to appear personally before the court and persuade the court through oral advocacy, has become an expectation in our system of justice. Resorting to briefs alone to resolve legal issues is not consistent with traditional expectations. As Professor Meador stated,

[t]his tension between expedience necessary to survival, on the one hand, and the ideal process, on the other, yield[s] a fresh insight: a central difficulty with the traditional American appellate process, in the context of high volume, is its redundancy in requiring both written and oral submissions. Each is a form of communication from the lawyers to the judges. At least in some cases, it seems entirely unnecessary for both forms of communication to be employed.\textsuperscript{52}

If we are to assume that oral argument will continue to have a role in appellate decision making,\textsuperscript{53} it behooves the court to provide a forum where counsel may have a meaningful dialogue with the court, and provide the court with the ability to receive argument which is both helpful and germane in the resolution of its cases. Against this backdrop of competing concerns — the need for counsel to effectively communicate, and the court's need to quickly process its case load — the Tentative Opinion Program of the Fourth District, Division Two, was developed.

\footnote{52. Id. at 737.}

\footnote{53. The “tradition” of oral argument in appellate proceedings, as applied in this country, is of dubious parentage. While no one seriously challenges Professor Meador's conclusion that oral argument has been viewed as a part of our traditional right of due process, the right to present both oral argument and a written brief under our ancestral English system did not have a corollary. The traditional role of the Barristers in the English system was to act as an oral advocate for a party in trial. The same system of oral advocacy carried over into the appellate court which featured no briefs and very little written material other than trial court record and recorded case law. The proceedings were entirely oral with the court rendering an oral opinion at the end of argument. Martineau, supra note 45, at 7.}
D. Early Discussion of Tentative Opinions in California

The earliest discussions concerning the use of tentative opinions in the appellate court occurred in 1975. In a bar journal article, Justice Thompson of the California Court of Appeal suggested the release of draft opinions prior to oral argument. He also suggested releasing the tentative decision draft sufficiently early before oral argument to allow counsel to respond to the draft in writing and, if necessary, orally. He also urged that the use of tentative opinions would reduce the number of dispositive issues in the case, these being limited by the response of counsel after the tentative decision is released. In theory, counsel will challenge only those issues where room for dispute remains after considering the court's proposed ruling. By conceding issues that are beyond dispute, the court and counsel have more time to devote to those issues which are truly open to argument.

Thompson's proposal was not well received. "When the subject of precalendar circulation of tentative opinions is raised at meetings of appellate judges, it is as welcomed as a porcupine at a dog show. There is loud noise, but no one wants to get close to the intruder." Four reasons have been advanced for not wishing to participate in the distribution of tentative opinions: (1) fear that the use of tentative opinions will cause delays in the production of cases; (2) the court's position in the tentative decision may become intractable after its release; (3) the vaguely articulated fear that the public would become aware of the court's dependence on staff in the preparation of opinions; and (4) fear of criticism of a draft opinion by panel members during precalendar conference. Division Two, the first and only court which has followed up on Justice Thompson's suggestion regarding the release of conferenced draft opinions before oral argument, views the above fears as groundless. Nonetheless, unforeseen problems do arise under this system which were not envisioned in the

55. Id.
56. Id. at 517.
57. Id. at 518.
58. Id.
59. Id.
60. Id. at 518-19.
discussion stages of tentative opinions. These problems will be discussed in detail within this article.

The advantages of such a system are relatively clear. It is important to recognize that the preparation of a draft opinion prior to oral argument is not unusual in the appellate court. In part, because of the "ninety-day" rule, appellate courts have prepared drafts of opinions prior to oral argument that can later be fine-tuned and released well within the ninety-day limit after submission at oral argument. A second reason for the use of tentative opinions has been espoused. It has been argued that, because of the increased reliance on staff during the preparation of cases, the draft opinion prepared by staff, rather than the arguments of counsel, may persuade the court. Ordinarily, counsel does not have the opportunity to read or comment on an unreleased staff recommendation or draft opinion. This has led to the fear that the real decision maker is actually someone other than the accountable court official. The use of tentative opinions overcomes this concern to some extent. At the very least, under a tentative decision system, counsel are afforded an opportunity to comment on recommendations of staff.

A second argument that has been offered in favor of tentative opinions is that the visibility of the draft opinion increases judicial vigilance. A judge who simply releases the work of staff without judicial scrutiny may suffer embarrassment when counsel comments upon the draft during argument or in supplemental briefing. An ancillary benefit is also achieved in that misconceptions concerning the facts or mis-statements of law are identifiable before the opinion is filed.

61. "A judge of a court of record may not receive the salary of a judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." CAL. CONST. art. VI, § 19.

62. Kelso, supra note 40, at 464. The author's personal interviews with appellate judges across the United States suggest that the practice of front-loading is common. While most states do not have the equivalent of the ninety-day rule, judges have reported that the practice of preparing draft opinions prior to oral argument greatly assists the court in focusing on the issues in preparation for oral argument. These courts are referred to as "hot" courts, ones which have conferenced on the case before oral argument and have prepared draft opinions.

63. This argument is flawed for an obvious reason. Except in jurisdictions where judicial officers serve for "life" terms, they must stand in contested elections or retention elections. A judge who consistently follows erroneous advice from staff may suffer electoral consequences.
because counsel has the opportunity to comment on these misstatements during oral argument. 64

III. THE SYSTEM AT THE FOURTH DISTRICT, SECOND DIVISION

A. Implementation

With little more than the history cited above to support implementation of tentative opinions, in the spring of 1990 the California Court of Appeal, Fourth District, Division Two decided to try the process as an experiment. The reasons for starting such a program were stated earlier, and part of the consideration was that since oral argument is a compulsory part of the appellate system, both court and counsel should participate meaningfully in the process. 65

The Tentative Opinion Program in Division Two of the Arizona Court of Appeals was the role model for our Tentative Opinion Program. However, we did not simply copy the rules for that program and use them as our own. There were two reasons for this. First, at the time of the implementation of our program, the rules that supported the Arizona Tentative Opinion Program were based on appellate rules considerably different than our own. 66 Second, we were concerned that providing counsel with an unconferenced draft opinion might mislead counsel into believing that the majority of the court concurred in the draft. Stated differently, our concern was that counsel might be better off if they knew where they stood with the entire panel when making their argument. We thus chose to provide tentative opinions that were generated by the entire panel.

In addition, knowing whether all three of the panel members concurred in the draft of the opinion was deemed to be of some help to counsel in deciding whether to continue with their request for oral argument after receipt of the tentative decision and to further refine strategy for oral argument

66. In Arizona, an appellant in a criminal proceeding is not entitled, as a matter of right, to oral argument. Ariz. R. Crim. P. 31.14. At the time our program began, oral argument was mandatory in civil cases in Arizona assuming a timely request was made. Ariz. Civ. App. P. R. 18 (West 1988). Last year, this rule was changed to provide oral argument at the discretion of the court. See id. (West Supp. 1994).
should counsel wish to pursue oral argument. In sum, this court decided that a tailored approach to tentative opinions would better fit our needs rather than a wholesale adoption of the Arizona system.

Once the rules were in place, setting the system up was no easy task. Unlike trial courts, where calendars change day to day, the appellate court does not easily absorb calendar changes. Our tentative opinion system proposed conferencing on cases before the release of the decisions. We originally provided tentative opinions 10 days prior to oral argument, hence it was necessary to assign cases earlier because the preparation time in chambers was shortened by the need to have cases ready for distribution to other panel members early in the month as opposed to the third or fourth week. In addition, after calendar conference and before release of the tentative opinion, some modification frequently occurred and the opinion needed to be cite-checked. The net result was that we decided to begin the first month of oral argument using tentative opinions in only half of the cases to allow staff to catch up with any non-tentative opinion cases.

Cases were assigned one month earlier than normal because of the loss of about three weeks of preparation time before the cases had originally been due. After the first month of using the tentative opinions, the entire calendar was assigned on the basis of the extra month of preparation time.

67. The court does not advise counsel of the numerical breakdown of votes on a tentative opinion. Counsel who practice regularly in our court, and now counsel who read this footnote, know that they can determine whether the panel is unanimous by simply looking at the cover letter which accompanies the tentative opinion. A cover letter which invites oral argument or points to a specific issue for counsel to address has at least one vote in doubt. A cover letter which accompanies a tentative decision which advises counsel to address a specific issue in the tentative decision and states there is no majority supporting the tentative decision means the author did not get a second vote supporting the tentative decision during calendar conference. The idea of sending out tentative opinions with no majority is a recent phenomenon. We found that sending out no tentative decision but asking counsel to address certain issues was much less satisfactory than sending out a tentative decision with advice to counsel that the tentative decision only has one vote. It is believed that showing counsel the problem in the context of the facts and surrounding issues makes oral argument much more productive in aiding the court in resolving the dispute.

68. Our court has never treated cases differently as far as preparation is concerned irrespective of whether oral argument has been requested or waived. Generally, more time pressures exist where cases have a pre-oral argument due date. However, cases are prepared on roughly the same time schedule.
time. Chambers and staff reported no significant changes in the actual preparation of draft opinions although there seemed to be increased discussion among the panel members about individual cases prior to oral argument. Our court had not traditionally conferenced on cases before the preparation of a draft opinion. While this process is still typical, there was more discussion among the judges concerning resolution of cases in which drafts were being processed but had not yet been completed. The reason for this is the simple fact that there is not enough time to rewrite a draft for mailing after a calendar conference. This creates a sense of urgency to get agreement among panel members as the case is being prepared. Panel members typically work at least two months ahead on review of briefs for cases where they are a non-authoring judge. The meetings of these panels before drafting the opinions had been ad hoc, but the use of tentative opinions clearly changed the operating procedure of the court concerning conferencing. It was at least one year into the program before there was a case where at least two judges could not agree on the tentative opinion. Because front-loaded courts generally receive and work on cases long before due dates, the release of tentative opinions before oral argument presents little deviation from the normal work flow in the court. The only adjustment necessary is providing enough advance preparation time on cases. This extra time is needed to conference, cite-check, and mail the tentative decision so that counsel will receive it with enough time to consider its contents.

69. In some courts, panels thoroughly discuss cases before the draft is written. Because there has been a consensus concerning how the case should be approached, calendar conferences before oral argument generally do not involve first-time position taking on the draft of the opinion.

70. The reason for this is twofold. First, there is an incentive to give counsel a clear message as to what the court is thinking about issues raised on appeal. If the court and counsel are to receive anything meaningful from the release of tentative opinions during oral argument, the contents of the tentative decision ought to reflect the thinking of at least a majority of the panel. If it does not represent a majority, counsel can be lulled into a false sense of security concerning the court's intended position. The second reason that almost all cases have a majority of panel members supporting the tentative decision has been the flexibility of the author and panelists in making changes before the tentative decision is released.
B. Initial Results

The initial results of the experiment were quite encouraging. What we had sought to accomplish — making oral argument more useful to the court and counsel — was clearly occurring. Counsel were questioned concerning the tentative opinion after oral argument to determine their impressions. The uniform response from counsel was supportive. In both civil and criminal matters, counsel almost always reported great benefit in planning their strategy for oral argument and deciding which issues to concede and which to pursue.71

When the program was first conceived, the court needed to identify which cases would receive a tentative opinion. Because the motivating concern was to improve the quality of oral argument by making it more meaningful, a decision was made to provide tentative opinions only in those cases where oral argument was requested.72 While it took some time before counsel understood what a tentative opinion was, it was almost immediately clear that they had an interest in receiving one. The requests for oral argument began to rise almost immediately as did the number of cases actually ar-

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71. Efforts to obtain the views of counsel concerning the Tentative Opinion Program were done by direct contact after oral argument. Counsel were advised before oral argument that after their argument was completed, the court would solicit their thoughts concerning the use of tentative opinions. Counsel were specifically asked whether the program helped in the preparation for oral argument and whether oral argument was more effective for them with the draft in hand. This was done for about six months after the beginning of the program on all cases, both criminal and civil. The response was overwhelmingly positive. The only negative reply we received was from one counsel on a civil case who reported he found it difficult to overcome the psychological trauma of being identified as the losing party in the tentative decision. He stated that it affected his preparation for and presentation of oral argument. Several years later, we received a letter from counsel in a criminal case which expressed concern that the issuance of tentative opinions causes the court to be "locked into a position." This issue will be discussed further. These are the only two negative comments which the court has received in the four years of this program.

72. After the final brief has been filed in the matter and the case is ready for calendaring, the clerk sends out a letter to counsel advising them of their option of electing or waiving oral argument. Cal. R. Ct. 22.5. A cover letter is also sent to counsel with the notice which provides that should counsel elect oral argument, a tentative opinion will be sent prior to oral argument. Counsel are also advised at that time that the tentative opinion will be conferenced prior to its release with a majority of the court agreeing on the reasoning and disposition set forth in the tentative opinion.
In the months preceding the start of tentative opinions, about thirty-eight percent of criminal cases and seventy-eight percent of civil cases requested oral argument. After tentative opinions began, those numbers rose dramatically to seventy percent for oral argument in criminal cases, and eighty-two percent in civil cases. Initially, the court felt that the increase was an aberration because of the uniqueness of the program. The judges and administrative staff conjectured that the increase was, at least in part, due to curiosity about tentative opinions. This theory was driven in part by the high fallout rate between requests for oral argument initially to obtain a tentative opinion and subsequent submissions on the tentative decision with oral argument being waived. Thus, while the initial requests for oral argument rose, causing the preparation and mailing of many more tentative opinions, the actual number of cases where oral argument was heard by the court declined.

Reducing the number of cases argued orally has fiscal significance aside from the benefit of allowing the court more time to prepare other cases. In California, criminal appeals are handled on a contract basis by a supervisory group of lawyers who oversee the briefing of cases and their assignment to other contracted lawyers within each of our six appellate districts. Reimbursement is made from public funds for brief preparation, travel costs and time expended during oral argument. The reduction in oral argument saves travel expenses.

73. The number of cases which actually went to oral argument did not approach the percentage of increase in requests for oral argument. Many cases waived oral argument after the tentative opinion was received. This created some initial havoc with the court calendar because the number of parties requesting oral argument increased significantly. However, frequently these parties would waive oral argument shortly before the calendar was called. This sometimes created a hardship on the panel members. On a few occasions, the morning session of oral argument actually went through the lunch period and carried over into the time allotted for the next panel of judges to convene on a different calendar.

74. The requests for oral argument vary from month to month. The percentage of requests for the twelve months preceding the beginning of the program are included in further discussion.

75. These percentages have been tracked over the four years since the inception of tentative opinions and are presented and discussed further.

76. On some of the early oral argument calendars after tentative opinions were first introduced, the rate of waivers of oral argument sometimes approached seventy-five percent of the cases.
including lodging and car rentals and saves counsel's fees for time expended.

Similarly, cost savings were realized in civil appeals. Counsel reported that the receipt of tentative opinions, the contents of which could not be effectively refuted during oral argument, helped reduce client cost on appeal. Counsel have cited the use of tentative opinions in discussions with clients as a reason for waiving oral argument. Moreover, counsel reported that receipt of the tentative decision was helpful in determining whether oral argument should be waived in light of potential malpractice concerns. Essentially, counsel felt that once the tentative decision was received, the decision to proceed with oral argument became easier, and could be discussed with clients in light of the cost savings that accompany waiver of oral argument.\textsuperscript{77}

Another predictable and immediately noticeable result of the release of a tentative opinion before oral argument is that the identified winner in the tentative decision generally declines to argue and submits oral argument based on the contents of the tentative decision. Some closely track and respond to the argument of opposing counsel, but without rehashing the contents of the tentative decision. The net result was a reduction in the time consumed in oral argument by at least fifty percent.\textsuperscript{78} Moreover, argument is generally more focused. Counsel recognize from the tentative opinion the case or cases which the court is relying upon for its draft opinion and are generally well prepared to discuss those cases in the context of the facts and tentative opinion. In our jurisdiction, it is common practice to raise multiple issues on appeal. After receipt of the tentative decision, counsel generally do not contest the court's intended opinion on each issue.

\textsuperscript{77} Although the court did no formal follow-up in canvassing the bar after the beginning of the program, the number of lawyers who practice in the appellate court from our district are relatively few. Based on conversations with these counsel and remarks (some in writing from counsel who practice in other areas of the state) the ancillary benefits to them became apparent.

\textsuperscript{78} There were notable exceptions to this time savings which prompted a major change in the tentative decision program in 1992. Under California Rules of Court, rule 22, parties are entitled to thirty minutes of oral argument unless otherwise ordered by the court. \textit{Cal. R. Ct.} 22. Because some of the parties insisted on arguing each point of the tentative decision, sometimes neglecting to argue the most significant issues, the court began to limit oral argument to fifteen minutes. This encouraged the parties to use the tentative decision to refine their argument to reach the significant issues in the draft.
raised, but tend to focus on only one or two issues still open to argument. Thus, the remaining non-essential issues involve no extra time consumption in oral argument.

One of the most notable changes in oral argument is that the dynamics of argument are radically altered. In the traditional system of oral argument, counsel advocate positions contrary to each other. Where a tentative opinion has been released, a winner and loser have already been identified. This changes the nature of argument completely. Counsel no longer argue against each other but become proponents or opponents of the tentative decision draft.\textsuperscript{79} Put another way, the opponent of the tentative decision views the panel that is hearing oral argument, rather than opposing counsel, as their adversary.\textsuperscript{80} The court is sometimes directly challenged on the contents of the tentative decision.\textsuperscript{81} Counsel have occasionally indicated that it is somewhat awkward to argue a tentative decision because it is somewhat like arguing with the court. Experience in argument since the adoption of the Tentative Opinion Program has been that counsel direct their criticism of the tentative decision more toward the court than counsel. The court has, on occasion, responded to the criticism during oral argument and spirited debate has ensued.

However, there has never been a time during the four-year history of the use of tentative opinions when the debate has been less than collegial or respectful. No members of this court have ever suggested that they felt uncomfortable or were offended by argument of counsel concerning the content of a tentative decision. Moreover, since the court has conferenced on the tentative decision and studied the briefs before oral argument, the draft opinion generally does not need much defense. Where counsel raise legitimate concerns about the contents of the tentative opinion, the court, rather than becoming embroiled in a defense of it, defers to the op-

\textsuperscript{79} In his work suggesting the use of tentative opinions, Justice Thompson discussed concern for judges who might be called upon to defend their work with each other during calendar conferences. However, with the system in place and working, that concern has never become an issue. See Thompson, \textit{supra} note 54, at 519.

\textsuperscript{80} During one memorable oral argument, a former colleague from this court remarked, "I hope one of you (the panel members on the bench) didn't write this!"

\textsuperscript{81} The author of the tentative opinion is never identified in the tentative decision or during oral argument.
posing counsel to respond to the concerns. In this fashion, the court avoids a direct confrontation by allowing opposing counsel to defend the tentative decision. By asking opposing counsel (the side who is tentatively identified as the prevailing party) to respond to specific issues raised during oral argument, the court draws the litigants back together and argument becomes more traditional. While it is fair to say that the difference in the dynamics of oral argument is immediately discernible, the difference does not hamper communications between the court and neither counsel nor this court have found it to be confrontational or offensive.

Costs became an issue very quickly after the beginning of the tentative decision program. Costs rose in three distinct areas. First, because the court was sending out two sets of opinions, the tentative decision to counsel and the later signed opinion, postage costs doubled. Second, the printing budget also suffered because of the costs of double printing all opinions where a tentative decision was involved. This issue has been controlled to some extent by reusing clean sides of paper for drafts, thus reducing the paper requirements in the preparation of cases. Finally, additional costs manifested themselves in an unlikely but expensive area; electronic cite-checking. Because opinions were cite-checked with twice the frequency, the court’s heavy reliance on both manual and automatic electronic cite-checking became apparent when the bills were received by the librarian.

82. The concern about the court becoming a litigant for purposes of oral argument is a familiar one in California. The California Academy of Appellate Counsel has proposed and urged the use of tentative opinions for many years in this state and the issue of the court becoming a litigant in argument to defend the tentative decision has become a familiar reason not to use tentative opinions. However, experience in this court suggests that even the most vigorous litigants do not forget their manners nor professional obligations during argument. In short, most recognize that those who might be insulted will make the ultimate decision in the matter after oral argument.

83. California appears to have opinions which are noticeably longer than most other jurisdictions. As noted earlier, all cases must be decided by opinion. During the last decade, the average length of an appellate opinion has grown to over ten pages with many reaching thirty to forty pages.

84. This was also resolved when the court was able to contract for a "flat rate" from the vendor. No longer being charged for on-line time drastically reduced the costs of electronic cite-checking.
C. Benefits to the Court

The initial experience with tentative opinions produced several anticipated and unanticipated benefits. We had anticipated two main benefits when the program began. First, we assumed that oral argument would be shortened. Indeed it was shortened to almost one half the time consumed before the tentative opinions began. Second, we assumed that argument would be more productive. Indeed, argument was noticeably more focused and there seemed anecdotally to be more “bottom line” changes after the court began using tentative opinions.

There were unanticipated benefits to the use of tentative opinions. Petitions for rehearing dropped to almost zero after the beginning of the program. One of the reasons for this phenomenon was that the losing party in the tentative decision tends to treat oral argument as an oral petition for rehearing. Where the losing party is unsuccessful in orally persuading the court, the arguments supporting a written petition for rehearing have been made. If further review is requested, the party generally requests a petition for review by the California Supreme Court. Thus, the court saved time it would have spent reviewing petitions for rehearing.

One unanticipated benefit was some aid on the issue of publication. In California, the publication of opinions in the appellate courts are done by majority vote of the panel and based upon the criteria set forth in the California Rules of Court. In our tentative opinions which are released to

85. See supra note 78.
86. Productivity can be measured in two fashions. First, argument may be considered more productive if it focuses counsel on issues which will decide the appeal. In that sense, the argument becomes more meaningful and useful in reexamining the tentative opinion to determine its correctness. Second, the value of tentative opinions and oral argument may be measured in changes in the “bottom line.” Regrettably, no statistics were kept in the early years of the program to determine whether there were more changes in the outcome of the case before and after the program began.
87. In California, a party may petition for rehearing within 15 days after the filing of a decision. Cal. R. Ct. 27(b).
88. A decision from the Court of Appeal becomes final within 30 days after decision unless a petition for review with the Supreme Court has been filed. Cal. R. Ct. 28(a)(1).
89. Rule 976(b) provides:
No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

counsel, the court indicates whether it intends to publish the proposed opinion.\(^9\) In this way, while the court normally does not solicit comments on the issue of publication, frequently counsel will provide the court with argument on the issue of publication. Thus, the court may consider the requests of counsel from the bench regarding publication which frequently eliminates a subsequent request in writing on the issue.\(^9\) Not infrequently, comments made during oral argument on the issue of publication have been of great benefit in determining whether to publish. One of the principal reasons for this is the unique opportunity for the court to have personal interaction on the issue. Because counsel have a draft of the opinion and can relate the rules of court to the draft, the court and counsel have an opportunity to have a dialogue about the reasons for, or against, publication.

Another benefit of tentative opinions is the error correcting which it affords. Essentially, the court places the tentative decision in front of counsel like a target. Where there are misstatements or misunderstandings in the draft, counsel may point these problems out, frequently with citations to the record, so that they can be corrected. Even with exhaustive cite-checking before the release of a draft opinion, errors occur. The court also includes record citations in the tentative opinion which counsel may refer to in argument to point out discrepancies. Where counsel have a draft opinion before oral argument, they also have the opportunity to aid the

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(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; 
(2) resolves or creates an apparent conflict in the law; 
(3) involves a legal issue of continuing public interest; or 
(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

**CAL. R. CT. 976(b).** Rule 976(c) provides: "An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b)." **CAL. R. CT. 976(c).**

\(^9\) The court sends the same tentative opinion to counsel which it keeps on file for its own use during oral argument. The only difference between the version which counsel receive and the one in the court file is that the identity of the authoring justice is omitted from counsel's copy.

\(^9\) Counsel may request publication of an opinion not certified for publication and which has been filed by the court. **CAL. R. CT. 978(a).**
court by pointing out errors in the opinion. For this reason, there are few modifications to opinions to correct misstatements after the opinion has been filed.

The principal tangible benefit to the court from tentative opinions was in calendar management. While the court was experiencing a dramatic increase in the number of filings and number of cases on calendar, the time spent in oral argument actually decreased substantially. Before the program began, the court had always conducted oral argument over a two-day period. However, because of increased numbers and complexity of cases, we frequently spent a third day each month on oral argument with oral argument sometimes consuming an hour or more for each case. As previously noted, after the program began the requests for oral argument increased. However, the number of cases which were actually argued after the initial request dropped significantly. Oral argument sometimes consumed no more than two hours during each day and on occasion the entire calendar waived oral argument after the tentative opinion was received. The one disconcerting aspect of this was that the court had little idea, until counsel appeared, about which parties were going to orally argue and which were going to waive argument and submit on the briefs filed.92

To resolve this problem, the court modified its working rules for the program to provide that during the calendar conference, in addition to discussion about the tentative decision, the court would also discuss whether the panel would like to have additional argument on the tentative decision. Two letters were devised, one which encouraged oral argument and one which indicated that the court felt that the case could be resolved based upon the contents of the briefs without oral argument.93 Which of the two letters is sent out is resolved by the panel during conference. In addition, the rules were amended to require that counsel notify the court if they still seek oral argument after receipt of the letter and tentative decision. With few exceptions, counsel have complied with

92. This was a rather interesting phenomenon. One can postulate that the reason counsel initially asked for oral argument was curiosity about tentative opinions. Once counsel received the tentative opinion, most of them waived oral argument. However as time went on, counsel began to challenge the contents of the tentative decision and the time consumed in oral argument grew dramatically. See infra part III.E.

93. See supra note 4.
the directions to reconfirm and the court now has sufficient notice of which cases will actually proceed to oral argument before the calendar is called.

Finally, as noted earlier, the judiciary in California operates under a rigid time restriction for the release of an opinion after oral argument. One of the principal benefits of the tentative opinion program has been to speed the process of releasing the final draft. This is a result of the tentative opinion being conferenced, cite-checked, and in finished form prior to its release in advance of oral argument. The tentative decision can thus be easily changed and the final opinion is circulated for signature within one week after oral argument. Anecdotally, before the beginning of the Tentative Opinion Program, it was not unusual to have cases circulated literally on the last day before their due date to avoid the consequences of the ninety-day rule. Since the implementation of our program, almost no cases have fallen into that category.

D. The Problems for the Court

Aside from the increase in initial requests for oral argument and the budget implications for postage and printing, there were some negative aspects to tentative opinions that became apparent after the program was up and operating. Among these negatives were the "super-editor," roll-over orders, increased demands on secretarial staff, the potential to mislead counsel, a lack of attorney preparation and the "locked-in" phenomenon.

The "super-editor" appears on the argument calendar just enough to be annoying. This is the lawyer who wants to comment on everything, not just what is critical to his or her case, but also on grammar, unimportant issues, and punctuation. What has been most annoying about the "super-editor" is that frequently the legal issues in the tentative decision become secondary to the style of the draft. Fortunately, this

94. This was not true under the prior system where the drafts were less fleshed out and much editing was needed before the final version was ready for release. Occasionally, the drafts of opinions which the author shared with panelists were somewhat uninspired and represented only the approach to the resolution of the case without the level of legal discussion normally seen in the final version of the case.
A second issue, which has diminished over the past several years, is that the time constraints to prepare the tentative opinion have occasionally resulted in continuances of cases because the tentative opinion had not been completed. A problem can develop when the record is extraordinarily long or when an unbriefed issue arises. During the last four years, this has become an issue and has resulted in a change in the creation of panels. Tentative opinions by their nature require adherence to a set timetable regarding their preparation. To facilitate conferencing, cite-checking and mailing, their prompt preparation is an important key to the success of the program.

Another concern is the extra duties which are placed on secretarial and clerical staff. The work-load on the clerical staff has increased because, under this system, calendars are essentially set up twice, once as to those who request oral argument after receipt of the calendar notice, and again after counsel reconfirm oral argument. Additionally, the tentative opinions are mailed from each of the chambers as opposed to

95. It has been helpful in those types of arguments to remind counsel of time restraints and direct them to a specific issue in the tentative decision.

96. Government Code section 68081 provides:

Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.


97. Our division historically created panels when the case was assigned to an author for preparation. Panel members were aware of the assignment and had access to the briefs and record if necessary almost immediately after the assignment of the case to an author with oral argument generally scheduled about three months in the future. Because of difficulties in getting the tentative decision ready for discussion with the panel members, cases were continued to another oral argument which necessitated the creation of "special panels." This created a serious hardship for the clerk's office and began to lead to numerous special panels during oral argument calendar. In subsequent meetings, the judges agreed to postpone the assignment of panel members until after the preparation of the case at which time the other panel members would be assigned in random fashion. This has almost eliminated the need to set up special panels, even where the preparation of the tentative opinion has been delayed.
the final opinions which are filed with the clerk of the court and are mailed by the clerk's office. Thus, judicial secretaries are now responsible for overseeing the mailing of the tentative opinions which can amount to a sizable task. Also, since some of the judicial secretaries must perform cite-checking tasks, they have had to adapt their work schedule to insure that tentative opinions are handled in a timely manner.

In spite of the cover letter that accompanies every tentative opinion, counsel still tend to rely on the tentative decision results when making their arguments and determining how to respond to opposing counsel's remarks. Occasionally, the court has received a petition for rehearing after receiving the final opinion. Counsel claim that they have been misled because of a change in the approach of the opinion. We have not been disposed to grant rehearing under circumstances where the final determination did not track the tentative opinion, particularly where the court did nothing to suggest that the winner in the tentative opinion should rely on his or her position during argument. However, care must be taken not to suggest that the winner has been so identified for purposes of the final draft so as not to mislead counsel into abandoning their role as an advocate for the tentative position the court has taken. This has been only an occasional problem but if recognized as a potential problem area,

98. In a sense, the court can be seen to be part of the problem. We frequently encourage appellant to waive opening argument when he or she has been identified as the prevailing party. While the waiver of at least part of the argument saves the court time during oral argument, it adds to the concern that counsel will assume that the court has indeed identified the winner for all time and that the winner need not protect the winning position, even in the face of an excellent argument against the tentative decision. By encouraging counsel to treat the tentative decision as the ultimate disposition in the matter, the court gives counsel a mixed message about what has been conveyed in the cover letter.

99. This is particularly true where the court relies on something raised in response to the tentative decision during oral argument which opposing counsel may have thought was insignificant or an argument which would not defeat his or her position as the winner. Not infrequently, these issues arise where there is a question of prejudice and the court reverses its position from the tentative decision in the final draft after oral argument.

100. Panel members occasionally remind counsel during argument that the tentative opinion is just that, a tentative decision. The court may also indicate to counsel in the cover letter with the tentative opinion that the court is split on the tentative decision or that the court desires argument on a particular point.
the issue can be dealt with, all but stopping petitions for rehearing on the basis of surprise. 101

Perhaps the most disappointing aspect of the Tentative Opinion Program is that a significant number of counsel either do not adequately prepare for or use the tentative opinion in oral argument. Anecdotally, we have had cases where counsel began oral argument by stating "as I was reading the tentative opinion for the first time on the way to the courthouse." The more usual scenario is that counsel will simply begin argument never acknowledging or referring to the tentative opinion. For those members of the bar, the tentative decision only provides a clue as to who the intended winner will be but counsel never examines the proposed reasons which the court relies upon for its conclusion. Thus, oral argument returns to the original unenlightened, uninspired approach so frequently seen today. 102 Again, our experience suggests that this approach to the use of tentative opinions is practiced by a distinct minority of counsel. Nonetheless, tentative opinions are no guarantee of an improvement in oral argument in all cases.

Finally, the most vociferous critics of tentative opinions suggest that the court becomes locked into a position after the release of a draft. This argument has been one of the principal reasons cited by other courts in deciding not to institute such a program. The realities are that the same arguments about the court becoming locked into a position in a tentative decision can also be made after the use of traditional oral argument and release of an opinion which for some reason has been shown to be erroneous. It can be argued that petitions for rehearing are meaningless exercises in such circumstances because the court has taken a public position by releasing an opinion and that the court is unlikely to change, even in the face of a clear showing of error. In reality, it is the front-loaded system that begins the process of early decision making. The tentative opinion simply sheds light on the court's thinking to allow counsel an opportunity to comment before the final draft is signed and filed. Indeed,

101. Petitions for rehearing for this reason are extremely rare. Personal experience suggests that no more than one case per year involves this problem. The insignificant number in part comes from the fact that the court carefully avoids a situation which might lead to such a petition.

102. Kelso, supra note 40, at 464.
the need to change an incorrect analysis or disposition becomes *more compelling* where counsel can show the court during argument why the proposed opinion is wrong. Experience has demonstrated that the court will not release an indefensible analysis or result after oral argument. Counsel have seen where the court started and can measure whether well reasoned oral argument adds anything to the appellate judicial system or whether it is a hollow right leading to no substantive result. In sum, there is no evidence that the release of tentative opinions prior to oral argument locks the court into adopting the draft as the ultimate decision on appeal.

It may be more germane to examine the system of front-loading, a system which is practiced in all courts of this state, to determine whether that system locks courts into positions which become intractable. In a front-loaded system, one where the court has considered all of the briefs, conducted its own independent review of the record, and conferenced on the matter, the decision as to the way the case should be decided is essentially made before oral argument. Oral argument becomes something of a petition for rehearing. However, the major difference where tentative opinions have been issued, as opposed to cases where they have not, is that counsel have knowledge of what the court has decided in preparing their oral petition for rehearing.

Courts that do not use a front-loaded system claim a high rate of change of position after oral argument. It is not surprising that courts around the country that do not engage in front-loading have a much higher rate of change of positions after hearing oral argument. The reason for this is two-fold. First, when no position is taken, there is no position to change. Second, a judge who might have in mind a broad solution to a problem before oral argument may later find that actually writing an opinion and attempting to support the conclusion with existing law is difficult. It may simply be a

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matter that the first conclusion will not "write," and a different resolution is necessary. Thus, unlike a front-loaded system where the determination of whether the solution will "write" or not has been made, and the oral argument is an effort to "unconvince" the court of its tentative position, courts that have not taken positions truly have no formalized position to change.

Thus, at least in California and probably in other states where tentative opinion drafts have been prepared, the argument that the release of tentative opinions locks the court into position is simply not true. In fact, the release of tentative opinions probably has the opposite effect, because the court has exposed its tentative opinion ruling to the parties for them to knowledgeably argue as opposed to requiring them to argue blindly. The fact that counsel have the draft before oral argument gives them at least some chance to change the court's view of the case because counsel have the ability to focus on the issues which have tentatively decided the case.

E. Retrospective Analysis

When the Tentative Opinion Program began, it was difficult to predict what effect it would have on the flow of cases and how it would be received by counsel. As earlier reported, anecdotal evidence from counsel strongly supported the program; however, its overall effect on the court calendar was

107. Id. at 65.
108. In a related concern about the release of tentative opinions, judges have voiced concern that the court might get locked into a position because the tentative opinion has been made available to the press. Our experience has shown that where the press has access to a tentative opinion and even publishes the contents of that opinion, the case is handled no differently than any others. The fact that a prevailing party has tentatively been identified does not influence the handling of a case in any way. More importantly, the fallacy of the argument becomes self-evident when one considers that where an opinion has been issued in a non-tentative decision court, petitions for rehearing would be moot since the court would be loathe to change its position because the previous position had been publicly released. If such were the case, petitions for rehearing would be an idle act. More importantly, that the court actually did change its position after oral argument where a tentative decision had been released suggests that the court carefully considered the argument of counsel and that the tentative opinion was just that, a tentative opinion. On a number of occasions this court has rewritten entire opinions after oral argument.
never fully established until well into the experiment. Moreover, while it was clear that there had been an increase in the number of cases where counsel requested oral argument, the extent of the increase was not regularly monitored. For purposes of this analysis, we surveyed the entire calendar of civil, criminal, and juvenile cases and totaled them to determine what the increases were compared to the period one year before the program began.

The graph in Figure 1 shows that requests for oral argument increased after the beginning of the program in 1990. However, as the graph also reflects, the overall increase was about 20% compared to the base level when the program began.
To analyze the effect on the calendar since the beginning of the program, we looked at the number of cases that actually went to oral argument as represented in Figure 2. This graph represents cases where counsel requested oral argument initially and after receiving the tentative opinion ultimately waived or submitted the matter based on the contents of the tentative decision. The graph in Figure 1 demonstrates that the number of cases which waived oral argument has risen rather dramatically from an average number of about twelve percent at the beginning of the survey and to a peak number of about fifty-five percent. The graph in Figure 2 demonstrates that the percentage of waivers far exceeds the increase in the number of cases where oral argument was requested. Moreover, as we had suspected, the increase in court time and preparation time before actual bench time has gone down dramatically leaving the court more time to process additional cases.

The final statistical analysis is perhaps most interesting in measuring the effect of a released draft opinion on changes in outcome. For a period of eight months, this court and another division of a different district kept careful track of cases where oral argument was requested. The comparison court was chosen because that court was heavily front-loaded. That court conferenced before writing began on the case to
obtain the panel members’ views before oral argument. The
court was asked to monitor changes in traditional, unre-
leased tentative opinions from the original working draft un-
til the final draft was signed and filed. Thus, this statistical
analysis represents a factual depiction of the impact of tenta-
tive opinions and oral argument on the final opinion. Stated
differently, this graph measures the effect of oral argument
on cases where counsel has or has not had the benefit of a
tentative opinion.109

The methodology of the survey deserves some discussion.
Recognizing that both courts had some similarities and differ-
ences in the pre-oral argument preparation of cases, an at-
ttempt was made to choose a court with many similarities in
the intensity of pre-argument preparation. Only those cases
which initially opted for oral argument were tracked, includ-
ing both writs and appeals.110 Other than the person who
collected the data for each court, no personnel had access to
the data prior to its being tabulated.111 In cases where there
was a waiver of oral argument before the hearing date, the
case was not considered for comparison purposes but re-
ported earlier in this article concerning trends in waivers of
oral argument. In cases where oral argument was waived af-
after a tentative decision was sent out, changes to the tentative
decision are reported in the graph in the columns reflecting
changes to the draft before conference and after cite-check-
ing.112 The graph represents percentages for comparison
purposes. However, for purposes of determining the signifi-
cance of what is depicted, and conclusions that might be
drawn from this survey, raw numbers are also an important
consideration.

109. Recognizing that major and minor changes may be defined differently,
we tried to standardize what those terms meant. A major change in the final
draft was defined as either a bottom-line change or a substantial rewrite of a
significant portion of the opinion or issue.

110. There was no attempt to differentiate the writs from appeals in the rec-
ord keeping. Both are numbered for calendaring purposes the same way and
both are prepared similarly before oral argument. The number of writs repre-
sented in the number of cases which were tracked is relatively small — less
than ten cases during the eight-month period.

111. The time period involved in this study was from the fall of 1993 through
the spring of 1994.

112. Cite-checking changes occur twice in this court, once before the tenta-
tive decision is sent out and again before the final draft is ready for circulation.
The changes after cite-checking from both courts represent the final cite-check
before the opinion is circulated in its final form.
During the comparison, this court prepared 192 tentative opinions for counsel. During that same period, the comparison court prepared 122 cases for oral argument, which included the preparation of a draft opinion that had been conferenced on by the court. During that eight-month period, the tentative decision court changed its position as a result of oral argument with regard to the final disposition in the case only four times. In the comparison court, the number was even smaller; that court changed its position only once after oral argument. During that time, nine cases were substantially rewritten after oral argument in this court as compared to three cases in the comparison court.\textsuperscript{113} Most significantly, of the 192 cases studied from this court, seventy-eight of those cases chose to waive oral argument after counsel received a tentative opinion. Thus, the actual number of cases where the court heard oral argument was 114, eight cases less than the comparison court.\textsuperscript{114} Thus, the graph represents changes in approximately the same number of cases even though this court started with a larger number.

\textsuperscript{113} Substantial rewrites include both a change in the court's treatment of an issue, perhaps agreeing with the assignment of error but finding it harmless, and situations where we may affirm the trial court's judgment but modify the disposition. Sometimes such a modification may be extremely significant, i.e., in cases where the court may affirm a small judgment for economic loss but strike a large punitive damage award. Such a change would be reflected as a major change for the purposes of this study.

\textsuperscript{114} No effort was made to differentiate between criminal and civil cases during the study. The purpose of the study was to determine whether releasing tentative opinions prior to oral argument had any impact on the court's final determination in the matter. While there was no effort to differentiate between civil and criminal, there is no difference between the two in terms of impact of tentative opinions on ultimate determinations.
As depicted in Figure 3, the use of tentative opinions does create more changes in the final opinion after oral argument. However, on cases where there has been extensive work done before oral argument, in both courts the majority of such cases were filed with no additional changes to the tentative opinion. Moreover, there were clearly more changes to tentative opinions where counsel had an opportunity to comment on the court's initial determination.\textsuperscript{115}

\textsuperscript{115} It may be fairly argued that the reason there are more non-dispositional changes with the use of a tentative opinion is that the court is simply responding to direct criticism of the court's handling of an issue in the tentative decision. However, it should be pointed out that change in the tentative decision after oral argument suggests that the court has agreed with the argument and has rewritten a portion of the opinion. Minor changes in the final draft are likewise a response to oral argument where the court sometimes supplements its tentative decision with additional discussion to answer an argument made during the oral discussion.
VI. SUMMARY AND CONCLUSIONS

The use of tentative opinions in this court has enhanced the court’s ability to control its calendar and make oral argument more beneficial to the court and counsel. When California courts have discussed the implementation of a tentative decision program, one of the initial concerns is its costs and benefits to the court. This article clearly demonstrates that where the court institutes such a program, it will reduce its oral argument calendar significantly. The court achieves more focused oral argument and additional chambers time resulting from the overall reduction in oral argument. The court also provides a direct service to those underwriting the criminal justice system by creating an environment where counsel are more willing to waive oral argument, thus sparing taxpayers the cost of counsel time, transportation, and lodging. Perhaps most significantly, in California, where oral argument is a matter of right, tentative opinions are a practical way of dealing with an otherwise uncontrollable number of appellate cases. As demonstrated, large calendars that would have ordinarily taken the better part of three days to hear are reduced to a much smaller number of cases heard in a matter of hours over two days.

An ancillary benefit, not susceptible to quantification, is the openness and confidence in the system which tentative opinions foster. Counsel are suspicious that the court has tentatively ruled on a matter and often have grave concerns that the tentative ruling will be the ultimate determination irrespective of what is presented during oral argument. Where counsel have a draft of what the court is considering, the suspicion evaporates and counsel is able to see the system operate rather than speculate on its operation. By comparing the tentative decision with the final opinion, the effectiveness of the oral argument on the court can be measured. Thus, the openness which is created by the court “laying its cards down face up” breeds confidence that counsel’s words are both understood and considered.116

Finally, the nature of the work of intermediate appellate courts lends itself to the use of tentative opinions. As one

116. Counsel frequently are heard to complain that the court drafts opinions prior to oral argument and refuses to acknowledge counsel’s arguments in the interest of closing the case by simply issuing the draft as the final opinion.
commentator stated, "[i]t is time to explode the myth of midlevel appellate judges with the power to do as they choose. Intermediate-level courts hear predominantly routine, boring matters by legislative fiat. And, as they do so they are not free to use their own judgment in a majority of cases."

This scholar has defined the role of standards of review in appellate decision making as setting, the height of the hurdles over which an appellant must leap in order to prevail on appeal. Unfortunately, the role left for intermediate appellate judges is often just to see if an appellant has jumped high enough to clear the hurdle. If the answer is yes, appellant wins. If the answer is no, appellant loses. Thus, intermediate appellate courts are left to struggle not with questions of justice but with dispositive questions of substantial competent evidence, abuse of discretion, failure to preserve an issue for appeal, harmless error, and other variations on this theme.

Tentative opinions are particularly well suited to the work of intermediate appellate courts. Most cases involve application of existing law. While appellate courts serve a role as legal rule makers, most of the rules made further define, expand or limit existing rules. Matters of public policy are much less prevalent in the intermediate appellate court than in the court of last resort. Thus, application of existing rules to predetermined facts can be aided by releasing tentative opinions because counsel can grasp both procedural difficulties and application difficulties in the context of the draft opinion. Counsel can focus oral argument on the issue that turns the case, rather than using time in oral argument discussing legal issues which are not germane.

Finally, a close examination of the statistics contained in this article and a review of legal literature on the subject of oral argument suggests that the issue of oral argument as a matter of right in California in all cases needs reexamination. In light of the volume of cases and attendant expenses of oral argument, not all appeals merit oral argument. The analysis of bottom-line changes to opinions after oral argu-

118. Id.
ment raises serious concern about the value of oral argument. ¹²⁰ For instance, would counsel provide a better service to their clients by polishing appellate briefs which are the basis of the decision, rather than attempting to persuade the court by oral advocacy?¹²¹ However, where oral argument is to be conducted and the court prepares drafts of opinions prior to hearing that argument, the time spent by counsel and the court in that exercise will be more productive if the court releases the draft to counsel in advance.

¹²⁰ Because briefs provide the court with a more concrete form of argument that the court may study and analyze for a longer period of time, the written brief has more impact on the court than a fifteen-minute period of oral argument, most of which is spent answering questions. See Aldisert, supra note 103, at 455 n.25.

¹²¹ Martineau, supra note 45, at 22-23.