

Committee on Arizona Appellate Case Processing Standards

Comments received during comment period on committee website.

Comments by: Mikel Steinfield and Tennie Martin from the Maricopa County Public Defender's Office regarding National Time Standards for State Appellate Courts. Interests of the Maricopa County Public Defender's Office.

The Maricopa County Public Defender's Office (MCPD) is the largest single indigent defense agency in the State of Arizona. The MCPD employs 14.5 full-time equivalent appellate attorneys and handled more than 255 appellate cases over the last year.

Overall, as long as adequate time is allowed for briefing to insure a criminal defendant is accorded due process and effective assistance of counsel, MCPD does not have any concerns with the proposed time standards for the Supreme Court. MCPD is concerned, however, that the proposed time standards for the Court of Appeals does not break down into further components. Without breakdown into further components, it will be difficult to evaluate the reasons for improper delay. Completing 75% of appeals within 450 days, and 95% within 600 days, is a realistic goal. But creating such standards without considering the stages is problematic. Accordingly, MCPD would ask the committee to further establish guidelines for each of three stages in the Court of Appeals process: (1) transcript/record generation, (2) briefing, and (3) decision. Such a breakdown will ensure responsibility for delays is accurately assigned and will ensure that delays are not masked.

Court clerks and reporters have no control over how long the second (briefing) or third (decision) stages take. Attorneys have no control over the first (record/transcript generation) or third stages. And blame should not be malapportioned. But malapportionment is possible unless standards are created for each stage:

- Lengthy record/transcript generation might create a breakdown even if the briefing and decision are accomplished quickly.
- A long briefing period could generate a breakdown although the record generation and decision periods are efficient.
- A swift record generation and briefing could be derailed by a drawn out decision period. Creating just an overall standard does little to identify if and where potential breakdowns occur.

Further, a single standard could mask existing problems:

- A protracted record/transcript generation period would be masked by speedy briefing and decision.
- A longer briefing period would be concealed by prompt record generation and decision.
- A prolonged decision period would be veiled by efficient record generation and briefing.

A generalized standard would only identify a breakdown somewhere in the process; a generalized standard would not identify where the breakdown occurs.

The Supreme Court time standards, on the other hand, appropriately evaluate the components involved in discretionary review:

- (1) initial filing to the discretionary review decision and
- (2) case accepted to disposition. The Supreme Court standards do exactly what MCPD wants for the Court of Appeals standards—they break down the time standards to pertinent stages.

Where record/transcript generation is unnecessary in discretionary review cases, it is a necessary stage for the Court of Appeals standards. Where the "Review by Permission" standard encompasses the briefing and initial decision, the Court of Appeals standard does not break down to a briefing stage.

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Where the “Review Granted” stage considers the decision period, the Court of Appeals standard does not break down to a decision stage.

However, this is not a one-to-one ratio. Briefing before the Court of Appeals takes longer than at the Supreme Court because the parties must read the record, identify issues, research, and draft the briefs from a blank slate. While the briefing process for the Review by Permission stage is not simple, it does not take as long. By that time, the parties are familiar with the record and issues and have already drafted initial briefs.

The review granted stage is also likely more intensive at the Supreme Court than the Court of Appeals. The Supreme Court expressly seeks more complex legal issues. While such cases are considered by the Court of Appeals, they are the outliers. More complex and nuanced cases are the norm for the Supreme Court. The Supreme Court does not resolve many Anders or pro se briefs at the review granted stage. The distinction between the two sets of standards is important. In the Supreme Court standards, it is possible to identify where a breakdown occurs; in the Court of Appeals standards, there is no way to identify when breakdowns take place.

MCPD’s second and greatest concern is how this would impact a criminal defendant’s right to an appeal. Article 2, section 24 of the Arizona Constitution guarantees a right to appeal for criminal defendants. Adequate time is necessary to give effect to these rights. On occasion, a court files a Notice of Completion when the record is not actually complete. Such an error should not be coupled with slavish enforcement of deadlines or customs. Even when there is no error, sometimes records must be reconstructed and additional transcripts ordered. Occasionally, the need to supplement or reconstruct a record does not become clear until the attorney is already researching and drafting a brief. And sometimes there are correlating concerns that must be considered—budgetary issues related to the generation of transcripts, personal illness or schedules of attorneys. Additionally, at times, given the record or the number of transcripts or the state of the law, it simply takes longer to adequately brief certain issues.

For example, MCPD does not request every transcript in every case. MCPD has to pay for requested transcripts. Thus, MCPD endeavors to identify the transcripts that will be necessary based upon the minute entries. But minute entries are not perfect. Attorneys have realized another transcript was needed or reconstruction required after the attorney finished reading the case and started research. In that circumstance, blind adherence to time standards would interfere with an attorney’s ability to represent their client and would negate a criminal defendant’s right to effective assistance of counsel. A criminal defendant’s right to effective assistance of counsel on direct appeal “arises from considerations of due process and equal protection.” *State v. Pruett*, 185 Ariz. 128, 130, 912 P.2d 1357, 1359 (App. 1995) (citations omitted).

Time standards—especially when they are broken down to pertinent phases—are likely a beneficial tool to evaluate whether the courts are operating efficiently. But they should not interfere with a defendant’s right to a meaningful appeal.

MCPD’s concern is illustrated by Division 1’s current accelerated process. While there is still an understood first continuance available to each party, the Court has implemented two important policies that impact MCPD. First, the Court has drastically cut down on second continuances – sometimes seemingly without consideration as to the right of a criminal defendant to have a meaningful appeal. Attorneys within MCPD have found it difficult to obtain second, necessary continuances, even though a

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drastic amount of time has not elapsed.

Second, the Court has implemented a motion to supplement deadline: motions to supplement must be filed within 30 days of the Notice of Completion. Division 1 Administrative Order 2014-05. This deadline is reasonable if the need to supplement is clear from a cursory review of the minute entries. But this deadline is not reasonable if the Notice of Completion has been incorrectly filed and the court refuses to withdraw the Notice or if the need to supplement becomes clear only after reading all the transcripts and/or if the need for additional supplementation arises after reviewing material that was previously ordered supplemented.

Indigent appellate attorneys, and likely most appellate attorneys, have several appeals proceeding at the same time at different stages. Balancing several briefing deadlines sometimes means an attorney has not finished critically thinking about all transcripts and issues by the 30 day deadline. And sometimes an attorney may innocently overlook the need to supplement. Neither circumstance should deprive a defendant of their right to a meaningful appeal.

The Administrative Order, however, also demonstrates why it is so important to break down time standards to the different stages. Certainly, “untimely request[s] for the preparation of transcripts ... and/or ... multiple extensions of time for the filing of a brief” can contribute to undue delay. See Administrative Order 2014-05, pg. 1. But it is difficult to determine if these briefing stage delays are the primary cause of systemic delay unless compared against the time it typically takes to generate the record and transcripts and reach a decision.

Proposed Addition: Because there is a need to further break down the time standards, MCPD would propose the following guidelines for the pertinent stages:

Record/Transcript Completion:

- 75% of cases completed in 70 days
- 95% of cases completed in 100 days

Potential Reconstruction/Supplementation:

- 75% of cases completed in 30 days
- 95% of cases completed in 60 days

Briefing:

- 75% of cases completed in 260 days after the record is complete
- 95% of cases completed in 320 days after the record is complete

Decision:

- 75% of cases completed in 90 days
- 95% of cases completed in 120 days

These proposed guidelines fit within the National Model Time Standards for State Appellate Courts: the 75% guideline accounts for 450 days and the 95% guideline accounts for 600 days. Beyond matching the National guidelines, these proposed guidelines avoid the disadvantages discussed above: (1) systemic breakdowns can be identified by stage and are not malapportioned and (2) dilatory compliance at one stage is not masked by efficient performance at another.

Finally, no Standard or Administrative Order should serve to essentially deny a criminal defendant their

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right to effective assistance of counsel and a meaningful appeal – form over substance should not deprive a criminal defendant of the ability to have an adequate record from which to base their appeal.

Comments by: Anonymous

Criminal cases should be handled more quickly than most civil cases. People have lost their liberty and if that occurred in error, it should be corrected quickly. Also, if these guidelines are quicker than what Arizona courts are currently doing, then by all means adopt them. I thought Arizona courts were faster than this, though, and if that is the case, then please don't adopt standards that would have justice take longer.

Comments by: George O. Krauja

I prefer the having the appellate courts continue to focus on the analysis needed to reach the right result, rather than on bright-line time to disposition benchmarks.

Comments by: Anonymous

I need more information to answer this question, like how do these compare to our courts' current disposition times?

Comments by: Anonymous

It would seem to me that commencing the time periods from case filing is unfair insofar as the matters aren't really before the courts at that time. In this regard, if the briefing schedules are delayed (which is often the case), the courts really have no ability to advance their speed of disposition during that period.

Comments by: Anonymous

I agree with the National standards. They should be adopted in Arizona.

Comments by: Peter Swann

The gross parameters reflected by these standards are reasonable, and I do not oppose them as aspirational goals. But I suggest that they measure the wrong milestones. If standards are to have value, they must encourage efficient case processing by the courts. Measuring time to disposition from the initiation of a case works in the trial court setting, because trial courts are involved in case processing early. But in appellate courts, the "front end" is out of the court's control - the preparation of the record and transcripts, and the submission of briefs, happen over widely-varying time frames that do not reflect on the actual efficiency of the court. To accurately measure the courts' performance, and incentivize efficient case management, the standards should measure the period between the time a case is at-issue and disposition. (Of course, the time standards could then be shortened considerably as well).

Comments by: Anonymous

These are a good "floor," but hopefully our appellate courts can do even better and set the pace nationally for quick and efficient review. Justice delayed is often justice denied, especially for consumers.