

CASELOAD HIGHLIGHTS

EXAMINING THE WORK OF
THE STATE COURTS

VOLUME 14, NUMBER 2

JULY 2007

What type of trial errors are associated with appellate reversal rates?

See Figure 2



How long does it take Courts of Last Resort to resolve cases?

See Figure 4



Civil Trials on Appeal - Part 2

Why do civil litigants appeal? How often do litigants appeal to the state's highest appellate court? Part II of this two-part Caseload Highlights series explores appeals by litigants in civil jury and bench trials to 33 intermediate appellate courts and 13 courts of last resort across the nation.

The data reported in this issue are from the *Civil Justice Survey of State Courts, 2001 - Supplemental Study of Civil Appeals*, conducted by the National Center for State Courts (NCSC) with funding from the Bureau of Justice Statistics (BJS) (See also [BJS Report on Civil Appeals](#)). This study examined 1,204 appeals from civil bench and jury trials in 46 large, urban courts. Part I of this series highlighted activity in intermediate appellate courts (IAC). Part II further explores IAC appeals by examining alleged trial court errors raised on appeal and also includes an analysis of discretionary appellate review by the courts of last resort (COLR).

As discussed in [Part I](#) of this series, the highest state appellate court is referred to as the court of last resort (COLR). With the exception of Virginia, participating states have a two-tiered appellate court structure for civil cases. In these states, the IAC has mandatory jurisdiction, or must hear the appeal, assuming the appeal is filed properly (e.g., no procedural errors, appropriate jurisdiction). The COLR has discretionary jurisdiction and may deny an appellant's petition to consider an appeal.

Appellate Courts Address Alleged Error

Appellants (parties initiating the appeal) allege that the trial court erred through written legal briefs to the IAC. Appellees respond to these issues in their own legal brief. After submission of both of these briefs and the trial court record, a panel of appellate judges more often than not hear oral arguments from the appellants. In participating states, the panels usually consisted of 3 judges for IACs and 7 judges for COLRs. After a review of the issues on the record, the appellate court typically issues a decision on each of the issues presented in a written opinion.

The NCSC collected opinions, both published and unpublished, from all participating appellate courts. We then analyzed each alleged trial error addressed by the courts to determine the type of legal issues raised and how the appellate court resolved them. On average, the IACs addressed 3 issues per case. In total, there were 667 opinions containing 2,106 legal issues.

The primary purpose of all appellate courts is to review the events at trial. However, COLRs, more frequently than IACs, take on a policy making role. Courts with mandatory jurisdiction, such as IACs, hear a wide variety of appeals

continued

Alleged Errors Heard by Intermediate Appellate Courts

Appellate Courts Address Alleged Error, *continued*

addressing both legal and factual issues. IACs address appeals in which the applicable law dictates a result and those involving disputed facts on which reasonable people might disagree. Generally, the IAC is highly deferential to the trial court and will only reverse if it finds that the trial court erred in a decision that materially prejudiced

the outcome. Courts with discretionary jurisdiction generally accept more complex appeals and through their policy making role will establish new rules or clarify existing rules.

Since appellate opinions address multiple issues raised by the appellants and appellees, we present our findings based on each separate issue addressed by the court in its opinion. We begin by presenting alleged errors for IACs with mandatory jurisdiction. Later we turn our attention to the courts of last resort.

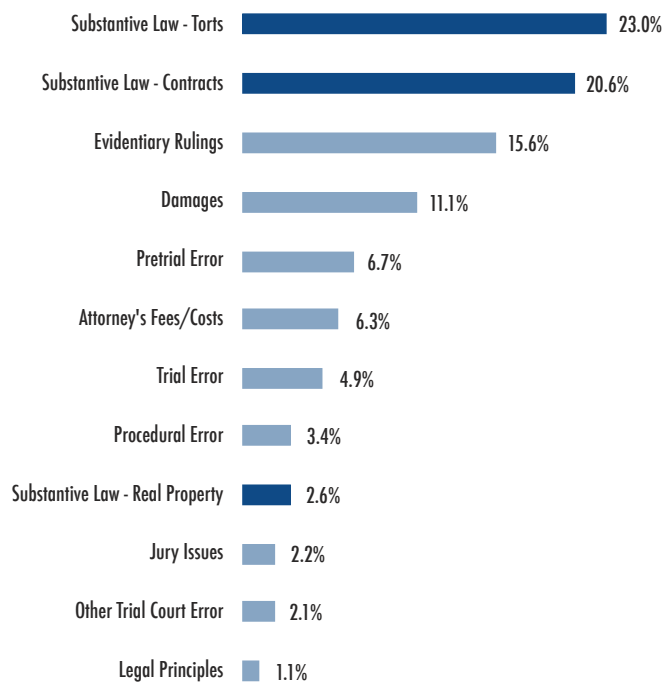
Legal errors fall under two general categories. Substantive law on civil liability defines one's rights and duties. In contrast, procedural law dictates the methods by which substantive law is administered.

Nearly half (46 percent) of the legal issues addressed by the IAC opinions claimed relief related to the applicable substantive law for specific factual situations (e.g., negligence determinations, contractual obligations). Most surprisingly, errors peripheral to litigants' substantive or procedural issues, awarding attorneys' fees, interest, sanctions, and court costs comprised 6 percent of all errors. (see Figure 1).

Another 21 percent of the issues alleged that the trial court erred in how the substantive contract law was applied at trial.

Of all alleged errors proposed by appellants, 16 percent questioned a judge's evidentiary ruling. Of particular interest among the evidentiary legal issues is that nearly 5 percent of all errors (or 31 percent of evidentiary errors) pertained to expert testimony. These errors included permissibility

Figure 1:
Legal Issues Raised in IAC Appeals – Percent of Total Issues Reviewed (n = 2,064)



Reversible Error

of expert witness testimony, proper procedures for admitting the proffered expertise, adequacy of the expert witness' qualifications, and other issues related to experts.

On appeal, alleged errors concerning award amounts or how awards are calculated most often pertained to economic rather than non-economic or punitive damages. In fact, in the IAC opinions, the court addressed punitive damages and non-economic damages, combined (3 percent), less often than economic compensatory damages (4 percent).

As part of the trial component of this project, we examined post-trial activity. Litigants in trials can pursue court review after trial through both post-trial motions and notification of appeal. On appeal, six percent of legal issues pertained to attorneys' fees and costs incurred by a litigant, of which, almost half questioned the eligibility or calculation of those fees and costs. The prevalence of costs and fees among appellate issues is somewhat expected by the finding that 20 percent of all post-trial motions filed were motions to amend a final award or determine costs and fees. Forty-two percent of those motions were granted. If a post-trial motion requesting or adjusting costs, fees, or interest is resolved by the trial court, it reduces the frequency of these issues on appeal. Of course, filing post-trial motions is dictated by the local culture of the jurisdiction. For example, in over half of the trials held in Florida, litigants filed for post-trial relief. In Milwaukee, Wisconsin, litigants requested post-trial relief in only 7 percent of the trials.

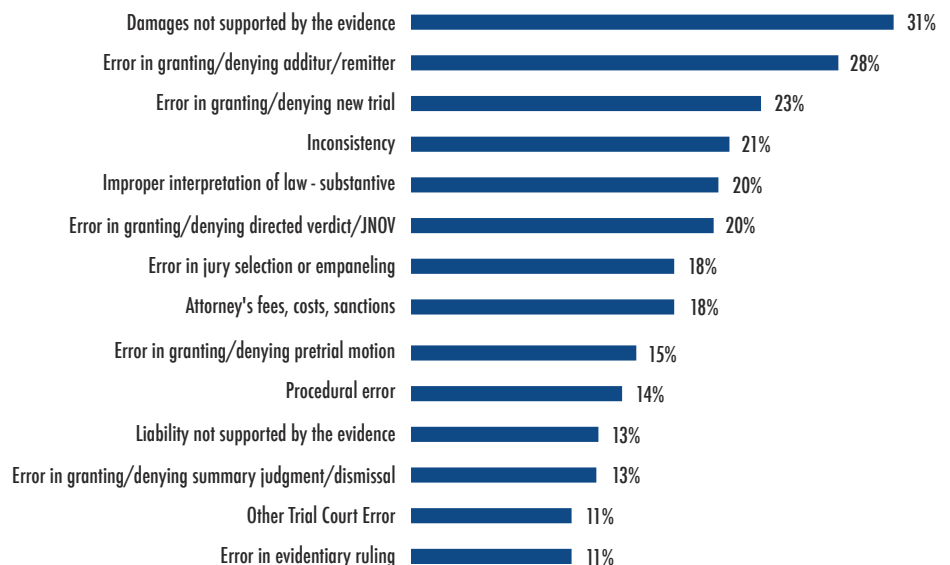
Appellate courts defer to trial courts to a degree determined by the applicable standard of review. The three most common standards employed by appellate courts in this study were the "abuse of discretion," the "*de novo* review," and the "clearly erroneous" standards (applied to 39, 36, and 25 percent of the legal errors, respectively). Under the abuse of discretion standard, an appellate court will only overturn a trial court decision if it finds that the trial court abused its discretion on a decision involving pretrial or trial procedure. The clearly erroneous standard is similar, but applies to the trial court's decisions concerning factual matters related to the merits of the case. *De novo* review is the least deferential standard, under which the appellate court decides the issue without regard to the trial court's resolution of the matter.

Figure 2 shows that IACs reversed the trial court's decision concerning damages in nearly one-third of the appeals where appellants claimed insufficient evidence to support a finding for damages. Likewise, IACs reversed the granting or denying of additurs or remitters nearly one-third of the time (28 percent). As seen in Figure 2, appellate courts were least likely to reverse evidentiary errors.

Although economic damages are awarded more often than non-economic or punitive damages, tort reform advocates most often question whether non-economic damages or punitive damages are calculated appropriately. Although alleged errors regarding economic damages were more frequently raised, the reversal rates were lower (19 percent) compared to reversal rates for non-economic compensatory (21 percent) or punitive damages (33 percent).

Figure 2:

Reversal Rates at IAC by Type of Alleged Trial Error – Percent of cases reversed for each type of alleged trial error



JNOV = Judgment notwithstanding the verdict

Note: Issues not decided on the merits of the case were excluded.

Remanded and Modified Outcomes

As discussed in Part I, only appellate outcomes that affirm the trial court decision in whole are considered affirmed. However, the appellate court can render nuanced opinions that combine a variety of responses. For instance, the IAC may choose to modify the trial judgment of a case by dictating what changes should be made to the case, or it may remand the case to the trial court to either make specified changes to the judgment or to retry the case. Of those appeals in which the IAC rendered a decision, 13 percent were remanded, 3 percent were modified, and 9 percent were both remanded and modified. Typically, the appellate court also issued a reversal (either in whole or in part) in conjunction with the remand or modification.

The difference between a modification and a remand may depend upon the jurisdiction in which the appeal is heard. For instance, in some jurisdictions the IAC modified the verdict or judgment, while in others, the court specified the modification, but remanded it to the trial court for implementation.

Most modification orders reduced the award amount. Interestingly, several modifications detailed instructions on how the trial court must calculate the amount of the costs, fees, or interest. While some remands accompanied an order for a new trial, most instructed the trial court to conduct a reanalysis of a particular aspect of the original trial, typically the amount of the award.

Courts of Last Resort

Most courts of last resort have discretionary jurisdiction over whether to consider an appeal from a civil judgment or verdict. The only exception in our study was Virginia where the IAC has no jurisdiction over general civil appeals; all civil appeals are discretionary by the Supreme Court of Virginia. (See Part I for a description of appellate court structure).

For all other COLRs, appellants may motion the IAC to reconsider or rehear the appeal before petitioning the COLR. As such, appellants

in 15 percent (178 of 1,175) of IAC appeals filed a motion with the IAC to reconsider or rehear the appeal, of which the IAC granted only 10 percent (18 appeals). However, of those denied rehearing, approximately two-thirds of the appellants petitioned the COLR for review. An additional nine percent of the IAC appellants did not file a motion to reconsider or rehear, but directly petitioned the COLR. In total, almost one-fifth of appellants in IAC appeals (218 appeals) petitioned the COLR for review (see Figure 3).

Composition of COLR Appeals

Since appeals under a second round of appellate review tend to be more similar in nature, the remaining discussion examines the characteristics of the 20 appeals reviewed at the IAC and subsequently heard by the COLR.² Of the 20 appeals in which the COLR offered a full appellate review (i.e., reviewed petitioner and respondent briefs, held oral arguments), 15 arose from a jury trial, four from a bench trial, and one from a directed verdict. The COLR published a signed majority opinion in 18 of these appeals and issued a dissenting opinion in three.

The COLR reviewed 12 appeals of tort trials, of which nine involved personal injury (including one wrongful death) and eight appeals arose from contract disputes. In the 20 appeals the COLR

addressed 42 legal issues. Resembling the type of legal issues heard by IACs, COLRs reviewed claims of errors in damage awards (21 percent), in the application of substantive law on civil liability (19 percent), and in evidentiary rulings (17 percent).

The 20 appeals were roughly split between appeals by the original trial plaintiff and defendant (9 and 11, respectively). Of the 12 appeals in which one party won monetary damages, the median award was \$828,385, compared to a median award of only \$170,124 for all appeals heard at the IAC. These appeals included six defense wins at trial, five plaintiff wins, and one appeal without trial award data. Of the appeals with trial awards, five amounted to over \$1 million and in two of those cases the plaintiff won punitive damages of approximately \$500,000.

² For this publication, we included updated information on appeals that were pending in 2005.

Courts of last resort considered 218 discretionary petitions. Discretionary COLRs accepted only 21 petitions (10 percent), one of which was later dismissed due to procedural error. Virginia's COLR accepted four appeals, Hawaii's COLR accepted six appeals,¹ and COLRs in

Connecticut and Massachusetts directly transferred six appeals from their IACs.

¹ See *Caseload Highlights: Civil Trials on Appeal - Part 1* for more information on Virginia and Hawaii's appeal process.

As reported in Part I, (see Figure 5, Part I) only four IACs met the American Bar Association (ABA) Reference Model guidelines that 75 percent of all appeals should be resolved in 290 days. According to the ABA Reference Models, the standards for COLRs with discretionary review state that 50 percent of petitions should be resolved in 290 days or fewer

Figure 3:
Number of IAC Appeals Petitioning COLR

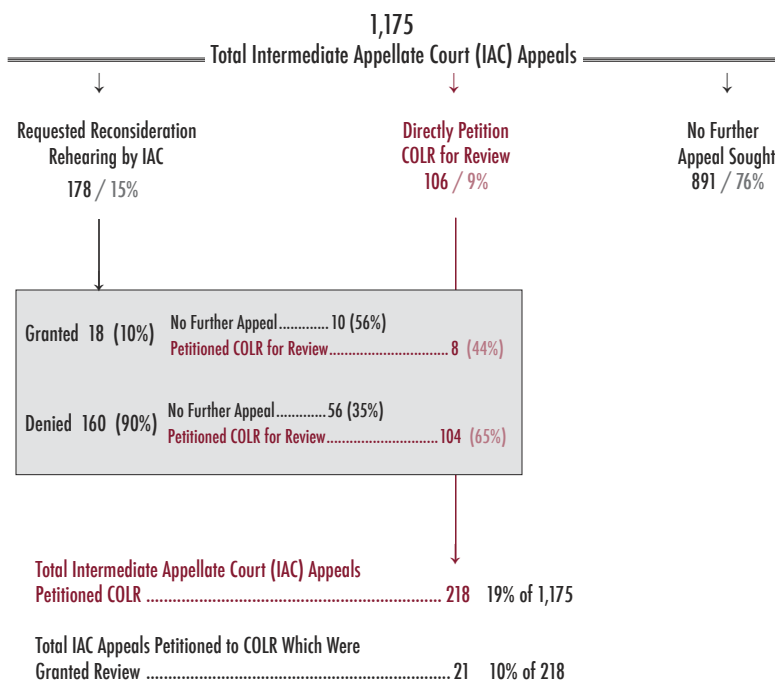
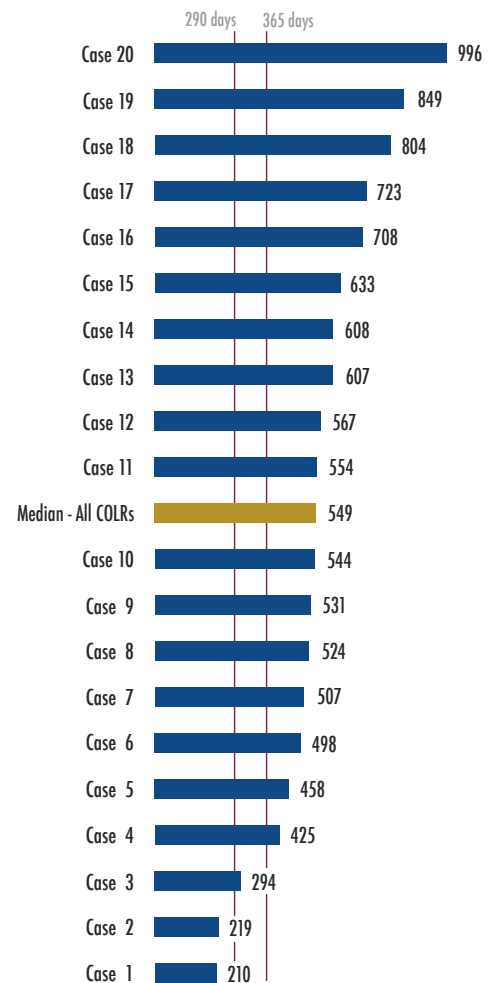


Figure 4:
Median Time of COLRs - Filing to Resolution Duration
(ABA Standard 50% within 290 days and 90% within 365 days)



What is the COLR Reversal Rate?

Reversal rates for the COLR tended to be higher than those reported for the IAC. The COLR affirmed the trial decision in 8 appeals and reversed the decision in 12 appeals. Of the reversals, the COLR reversed 4 decisions

in whole, and affirmed in part and reversed in part 8 appeals. Of those reversed in part, the COLR remanded 6 appeals to the IAC or trial court for further action.

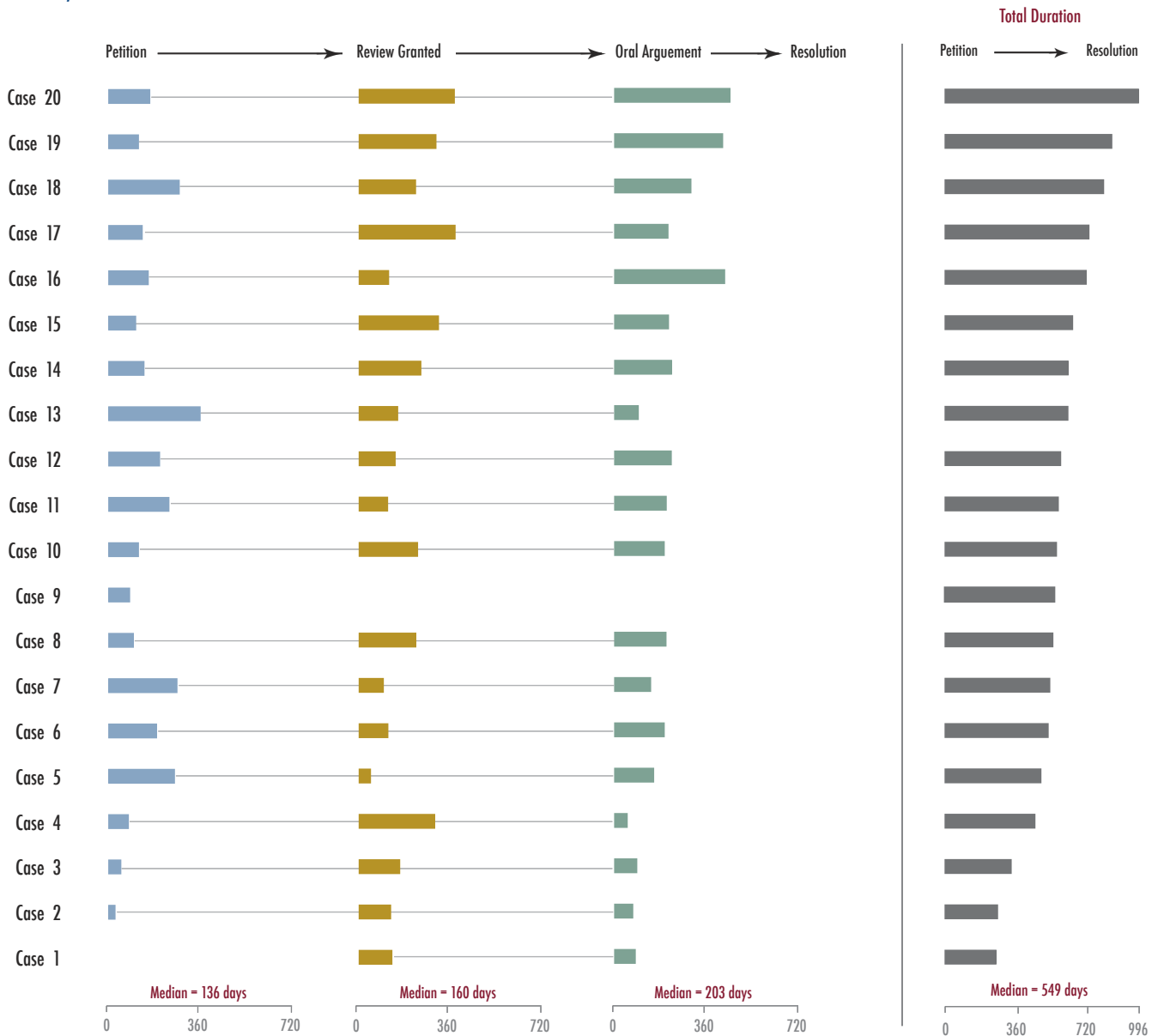
Do COLRs Stack Up to Time Standards, *continued*

and 90 percent of petitions should be resolved in 365 days or fewer. Only three appeals (15 percent) approached the 290-day standard, (see Figure 4).

Discretionary COLRs processed 50 percent of appeals (median) in just over a year and a half (549 days). A breakdown of the various milestones is shown in Figure 5. The median time for a COLR to accept an appeal is 136 days, another 160 days passed

after accepting the petition before oral arguments commenced, and another 203 days between oral arguments and COLR's issuance of a decision. Time to disposition for the discretionary COLRs ranged from seven months to nearly three years (210 days to 996 days).

Figure 5:
COLR - Days Between Milestones



Appeals heard at the COLR level revolve around very different issues, and may have a wide range of responses. The following provides examples of two COLR appeals.

Case 1

Supreme Court of Washington
Court of Appeals of Washington
Division One

The plaintiff presented a gender discrimination suit against her employer before a jury, which found in her favor. The court entered a judgment in the amount of \$638,764 for back pay, future pay, and emotional distress, and a supplemental judgment in the amount of \$235,625 for prejudgment interest, attorney and expert fees, and costs. The plaintiff unsuccessfully moved for an additional supplemental judgment to compensate her for the federal income tax obligations she would incur upon the defendant's payment of the judgment.

The defendant appealed on the grounds that the instructions to the jury to determine the award for future pay damages based upon testimony from an expert as to the date the plaintiff could reasonably expect to retire was improper. The defendant argued that the duration of employment is calculated using either a date of retirement or date of probable termination, was a question of fact that the jury was not asked to determine. The plaintiff filed a cross-appeal citing the trial court's denial of a post-verdict supplemental judgment to offset the adverse federal tax consequences of the award and requested attorney fees.

Although the IAC agreed that the jury instructions regarding date of retirement were erroneous, they determined that there was no prejudice and that the error was harmless. The IAC did, however, reverse the denial of the request for adverse tax consequences and remanded this issue, as well as the issue of attorney fees, to the trial court.

Upon review by the COLR, it affirmed the IAC's decision regarding jury instructions, although the court differed regarding her tax obligation - the COLR rejected the characterization of the fees as "actual damages." One judge from the COLR panel dissented, opining that the error regarding jury instruction was not harmless - the issue was a question of law for the jury to determine length of potential employment and jurors were not given the opportunity to do so.

Case 2

Supreme Court of California
Court of Appeal, California
1st District, Division Three

Plaintiffs sued defendants, an insurance broker and agent, seeking benefits for an underinsured motorist claim. The jury found for the defendants, after which defendants moved for misconduct sanctions against the plaintiff. The defendants claimed that the plaintiffs submitted an interrogatory during discovery with false statements and engaged in deceptive conduct. Defendants requested sanctions to cover costs incurred due to the plaintiff's misconduct during discovery and trial. The trial court denied sanctions, stating that the statute was inapplicable to lawsuits initiated within a specified time frame.

The defendants appealed the denial of sanctions to the IAC, and the IAC reversed the trial court decision. The IAC interpreted the two procedural rules for awarding sanctions. It then remanded the case back to the trial court for determination of the sanction amount after which the plaintiff petitioned the COLR.

The COLR granted review, but only on the applicability of sanctions for misconduct as interpreted through the statute at hand. In a unanimous opinion, the COLR opined that this statute was not repealed by the Legislature, and instead, that legislative intent was to create three statutes that apply consecutively to various time frames and not a revision of exclusions. The IAC ignored previous case law applying the statute and misinterpreted the legislative intent. As a result, the COLR reversed the IAC opinion and reinstated the trial court's denial of sanctions.

Conclusions & Implications

This two-part Caseload Highlights series explored nationwide data on the appellate court process of civil litigation in state courts. The most surprising finding was how often appellate courts addressed the eligibility and basis for fees and costs, a peripheral issue, compared to other issues raised on appeal.

Sizeable appellate caseload was one impetus for the implementation of a two-tiered appellate system. Separate man-

datory and discretionary jurisdiction appellate courts effectively reduced the proportion of appeals reviewed by the court of last resort. After a mandatory review by the IAC, only 20 percent of appellants petition the court of last resort for appellate review. Due to their discretionary jurisdiction, COLRs grant a review for less than 10 percent of those who petition for it. However, appeals granted review by the COLR gain the benefit of a 60 percent reversal rate.

Intermediate appellate courts and courts of last resort did not meet the time standards set by the ABA. Such a finding calls for the court community to consider whether the ABA standards are appropriately attainable and, if not, to propose new standards. If the court community deems that the standards are reasonable, then substantial work is needed to explore the source of widespread delay in state appellate courts.

The Court Statistics Project (CSP)

Since 1975 the Court Statistics Project (CSP) has provided a comprehensive analysis of the work of state courts by gathering caseload data and creating meaningful comparisons for identifying trends, comparing caseloads, and highlighting policy issues. The CSP is supported by the Bureau of Justice Statistics and obtains policy direction from the Conference of State Court Administrators. A complete annual analysis of the work of the state trial and appellate courts will be found in *Examining the Work of State Courts, 2005*.



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