Eisenberg Reply

I have not previously responded to allegations made by Jon Eisenberg. The allegations were made to the Commission on Judicial Performance and while Mr. Eisenberg chose to share his complaint with the news media, I thought it best to restrict my response to the Commission, believing as I did that the Commission could sort through the various accusations, some overblown and some not, and act appropriately.

I have decided that his latest claims, set forth in a petition to the Supreme Court, are of a different sort. His claims are simply wrong. He claims the Third District is "systemically" denying statutory calendar preference for many criminal appeals. Not so. There are a multitude of statutes providing calendar preferences for various categories of cases, and other priorities are established by motions in individual cases. There is no "systemic" denial of calendar preferences. Preferences are accorded when mandated.

Perhaps, what Mr. Eisenberg fails to appreciate is the volume of cases handled by our court. According to Mr. Eisenberg, "once a criminal case is fully briefed, it must be placed on the next available oral argument calendar—which in most Courts of Appeal usually means three or four months later." There is no basis for Mr. Eisenberg's rule. Our caseload is such that many criminal cases must wait in line behind other criminal cases before being assigned to an attorney and judge for the preparation of an opinion.

We do not place cases on calendar until a tentative opinion is prepared and the parties request oral argument or we set it for argument without a request. Mr. Eisenberg complains about 278 appeals purportedly denied calendar preference since 2018. Nearly 3,000 criminal appeals were filed with our court during that period of time, each of which was accorded calendar preference. We could not comply with Mr. Eisenberg's suggested timeline without a substantial increase in personnel.

Mr. Eisenberg claims a decade-long practice of failing to accord calendar preference commenced with my appointment as presiding justice in September 2010. He claims to have found only two criminal appeals that were "prejudicially delayed" during the two years preceding my appointment. I personally reviewed Judicial Council reports dating back to 1999 documenting the time to filing opinions in criminal appeals from close of briefing or notice of appeal. I cannot assess Mr. Eisenberg's claim of "prejudicial delay" but the Judicial Council reports would not support a claim that delays increased following my appointment.

Finally, I am disappointed with Mr. Eisenberg's claim that the systemic failures of which he complains were "presaged" by testimony I delivered before a legislative committee four decades ago on behalf of a measure supported by the Attorney General. I was doing my job as a staff member speaking on behalf of the Attorney General and don't recall the bill, which would have apparently eliminated appeals as a matter of right in criminal cases. Mr. Eisenberg seems to suggest my remarks reflect a bias which lingers and led me to be hostile to calendar preferences for criminal appeals. Nothing could be further from the truth.