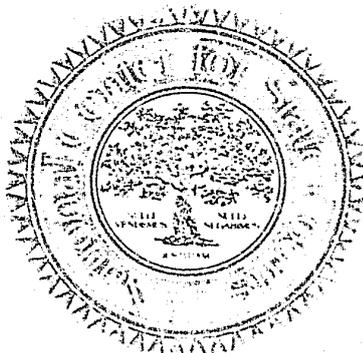


THE APPELLATE PROCESS AND  
STATE COURT AUTHORITY IN  
THE ILLINOIS APPELLATE COURT

A Report of the Appellate Justice Project  
of the National Center for State Courts  
1972-73



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THE APPELLATE PROCESS AND  
STAFF RESEARCH ATTORNEYS  
IN THE ILLINOIS APPELLATE COURT

A Report of the Appellate Justice Project  
of the National Center for State Courts  
1972-1973

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Publication No. W0010

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# National Center for State Courts THE APPELLATE JUSTICE PROJECT

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## Preface

This is one of a series of four reports issued by the Appellate Justice Project of the National Center for State Courts. Similar reports are being published on the year-long project experiences with central staff attorneys in the Supreme Court of Nebraska, the Supreme Court of Virginia, and the New Jersey Appellate Division. The project at all four courts was funded by the Law Enforcement Assistance Administration.

In the Illinois Appellate Court, First District, the operational aspects of the project were the responsibility of the staff director, John M. O'Connor, Jr. The preparation of this report was the responsibility of the reporter, Professor Jo Desha Lucas of the University of Chicago Law School. The analysis and the conclusions are his and not necessarily those of LEAA, the National Center, or the staff attorneys. It was the work of the latter, however, which provided to a large extent the basis for this report. Thus appreciation is due to all of the Illinois project personnel. This report should prove helpful to other heavily burdened appellate courts as they seek ways to meet their responsibilities; it will also be of value to students of the appellate process.

The experiences in Illinois and in the other three project courts will be drawn together and evaluated in a covering report to be published under the title, Appellate Courts: Staff and Process in the Crisis of Volume.

Daniel J. Meador  
Project Director

May 1974

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## I. THE APPELLATE COURT OF ILLINOIS

### A. ORGANIZATION OF THE APPELLATE COURT

The Appellate Court of Illinois was created as a constitutional court by the 1962 amendments to the Illinois Constitution of 1870.<sup>1</sup> Prior to that time district appellate courts operated under statute by assignment of judges elected to the trial bench.<sup>2</sup> The 1962 organization of the Appellate Court was substantially carried over into the 1970 constitution.<sup>3</sup>

In the 1970 constitution it is provided that the Appellate Court judges be elected from five judicial districts, one of which shall be Cook County. The other four are fixed by law, with the proviso that they be compact, of substantially equal population, and consist of contiguous counties.<sup>4</sup> The number of judges to be elected from each district is left to statute.<sup>5</sup> The judges are elected initially in a partisan

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<sup>1</sup> Ill. Const. (1870), Art. VI, sec. 6, as amended effective January 1, 1964.

<sup>2</sup> Ill. Const. (1870), Art. VI, sec. 1.

<sup>3</sup> Ill. Const. (1970), Art. VI, sec. 5.

<sup>4</sup> Ill. Const. (1970), Art. VI, sec. 2.

<sup>5</sup> Ill. Const. (1970), Art. VI, sec. 5.

election for a term of 10 years, but run for reelection on a nonpartisan retention ballot.<sup>6</sup>

The constitution provides that the Supreme Court shall assign the judges to divisions of at least three judges, and that there shall be at least one division in each of the five judicial districts.<sup>7</sup> The 1962 provision subjected assignment outside the district from which a judge was elected to a requirement that a majority of the judges elected from the district to which he was assigned give their consent, but this limitation was dropped in 1970.<sup>8</sup> Thus under the present provision the court consists of a single pool of judges who may be assigned to sit on any division in any judicial district.

While in this sense the court is a single state-wide court, the constitution provides that a quorum of the court is a majority of the judges of a division, and that the concurrence of a majority of the judges of a division is necessary to a decision.<sup>9</sup> Since the divisions must be created within the districts, and no provision is made for decisions other than by a majority of the judges of a division, the geographical decentralization of the court is constitutionally required and operation as a centralized court with rotating panels is precluded. As a matter of actual practice, though judges are

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<sup>6</sup> Ill. Const. (1970), Art. VI, sec. 12.

<sup>7</sup> Ill. Const. (1970), Art. VI, sec. 5.

<sup>8</sup> Cf. Ill. Const. (1870), as amended effective January 1, 1964.

<sup>9</sup> Ill. Const. (1970), Art. VI, sec. 5.

sometimes assigned temporarily to serve in districts other than those from which they are elected, the Appellate Court operates as five separate courts, with five separate clerk's offices.

Such state-wide organization as exists, and the internal organization of the Appellate Courts within each district, are provided for in Rule 22 of the Illinois Supreme Court Rules. Under its provisions the initial assignment of judges to the divisions is made by the Supreme Court, but the Chief Justice of the Supreme Court may make changes in assignments or may assign a judge to serve temporarily on any division. Each division selects one of its members to serve a one year term as presiding judge and the presiding judge is ex officio a member of the Executive Committee of the Appellate Court of Illinois. Meetings of the Executive Committee may be called by any three of its members, and the Executive Committee may call meetings of the Appellate Court.

In the First Appellate District. (Cook County), there are five divisions. Like other divisions of the court, each selects a presiding judge. In addition each division selects one of its members, who need not be the presiding judge, as a member of the Executive Committee of the Appellate Court in the First Appellate District. Under rule, this executive committee is given general administrative authority. Its members select a chairman. There is no chief judge of the court, and the chairman does not have the authority or duties typically associated with a chief judge.

Within the First Appellate District, then, the divisions, while linked through an executive committee and its chairman, sit as independent units. Provision is made for temporary assignment of judges by the executive committee at the request of a division, but not on the initiative of the committee. This appears to be of constitutional origin, for while the Supreme Court could create a single division in the First District, if it did so a decision would require the concurrence of a majority of the judges, and therefore there appears to be no way in which, even within the First Appellate District, the court could operate as a single unit with rotating panels.

When the Appellate Justice Project began, there were 18 judges authorized by the General Assembly for the First Appellate District, but since there were two vacancies the court consisted of 16 judges, five divisions of three judges each and one judge who served as illness or disqualification might create a need. Since that time the two vacancies have been filled and two more judges have been authorized and supplied. At the present time, therefore, the court consists of 20 judges. Instead of creating a sixth division, an extra judge has been assigned to each of the five existing divisions. Pursuant to Supreme Court Rule<sup>10</sup> only three judges sit on any particular case.

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<sup>10</sup> Illinois Supreme Court Rule 22(c).

## B. JURISDICTION OF THE APPELLATE COURT

### 1. Appeals from Final Judgments of the Circuit Court

All final judgments of the circuit (trial) court not appealable as of right to the Supreme Court of Illinois are appealable as of right to the Appellate Court. The Constitution of 1970 provides that an appeal from a judgment imposing a sentence of death shall be taken directly to the Supreme Court and that other direct appeals may be provided for by Supreme Court rule.<sup>11</sup>

### 2. Appeals from Orders of the Circuit Court Other Than Final Orders

The jurisdiction of the Appellate Court in appeals from orders of the circuit courts that are not final orders is governed by the Rules of the Supreme Court of Illinois. Under Rule 304(b), a judgment or order entered in the administration of an estate, guardianship, or similar proceeding, or in the administration of a receivership or similar proceeding, that disposes of the rights of one or more of the parties, an order granting or denying a motion to reopen a judgment, and a final judgment or order entered in a supplemental proceeding, are made appealable as of right.

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<sup>11</sup> Ill. Const. (1970), Art. VI, sec. 4(b).

Under Rule 304(a), other orders disposing of the rights of fewer than all of the parties or fewer than all of the rights of a party may be made final for purposes of appeal by an express finding by the trial court that "there is no just reason for delaying enforcement or appeal."<sup>12</sup>

Rule 307(a) of the Supreme Court Rules provides for an appeal as of right in a number of interlocutory orders dealing with injunctions, receivers or sequestrators, orders placing or refusing to place a mortgagee in possession of mortgaged premises, certain orders in connection with the appointment of receivers or similar officers for banks or other financial institutions, orders terminating parental rights or in connection with temporary commitment in adoption cases, and certain orders in connection with eminent domain proceedings. In other cases the Appellate Court has discretionary jurisdiction to review interlocutory orders of the circuit courts upon finding by the circuit court that the order "involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation."<sup>13</sup>

3. Appeals from Orders of the Circuit Court Granting a New Trial

The Appellate Court is given discretionary jurisdiction

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<sup>12</sup> Cf. FRCP, Rule 54(b).

<sup>13</sup> Cf. 28 USC Sec. 1292(a).

to review orders of the circuit court granting a new trial.<sup>14</sup>

#### 4. Appeals from Orders of Administrative Agencies

The constitution provides that "(t)he Appellate Court shall have such powers of direct review of administrative action as provided by law."<sup>15</sup> Under Supreme Court Rule 301(a), proceedings to review orders of the Industrial Commission are brought directly in the Supreme Court. Under the Illinois Administrative Review Act most decisions of administrative agencies are reviewed by the circuit court, with appeal lying to the Appellate Court.<sup>16</sup> Under the Illinois Environmental Protection Act, however, it is provided that decisions of the Environmental Protection Agency are appealable to the Appellate Court.<sup>17</sup>

#### C. APPELLATE PROCEDURE IN ILLINOIS

The Illinois Constitution of 1970 provides that the Supreme Court "shall provide by rule for expeditious and inexpensive appeals."<sup>18</sup> Prior to 1970, the law governing appeals was to be found in the Civil Practice Act<sup>19</sup> and numerous special statutes scattered throughout the code.<sup>20</sup>

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<sup>14</sup> Illinois Supreme Court Rule 306.

<sup>15</sup> Ill. Const. (1970), Art. VI, sec. 6.

<sup>16</sup> Ill. Rev. Stat. (1973) Ch. 110, pars. 264-279.

<sup>17</sup> Ill. Rev. Stat. (1973) Ch. 111½, par. 1041.

<sup>18</sup> Ill. Const. (1970), Art. VI, sec. 16.

<sup>19</sup> Ill. Rev. Stat. (1963) Ch. 110, pars. 74-92

<sup>20</sup> E.g. Ill. Rev. Stat. (1963) Ch. 57, par. 19, et seq. (Forcible Entry)

The General Assembly has repealed the code sections dealing with appellate procedure and the subject is now covered in its entirety in the Supreme Court Rules.<sup>21</sup>

1. Post-Trial Motion Practice

Post-trial motions, as an aspect of trial court procedure, are governed by statute. Under section 68.1 of the Civil Practice Act<sup>22</sup> motions for a directed verdict made at the close of the evidence may be granted, denied or reserved, and if the court denies the motion or reserves its decision, the motion is waived if not renewed in a post-trial motion.<sup>23</sup> Failure to move for a directed verdict at the close of the evidence does not waive the right to move for entry of judgment after trial.<sup>24</sup> After verdict, or in case no verdict is reached, after the discharge of the jury, the party has 30 days to make his post-trial motion. Unlike the federal practice,<sup>25</sup> section 68.1(3) permits extensions of time limited only by the requirement that a motion for extension be made within the original 30 days or any extension thereof. Like the federal practice, a timely motion for post-trial relief destroys the finality of the judgment and appeal time

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21 Illinois Supreme Court Rules, Arts. III (civil) VI (criminal)

22 Ill. Rev. Stat. (1973) Ch. 110, par. 68.1.

23 Id.

24 Ill. Rev. Stat. (1973) Ch. 110, par. 68.1(2).

25 Cf. FRCP Rule 6(b).

runs from the date on which the motion is ruled upon.<sup>26</sup> It will be noted that this in effect permits the trial court to extend appeal time indefinitely by extending the time within which a post-trial motion may be made.<sup>27</sup> While no statistics were collected on such extensions, the Reporter is informed that they are rarely made or granted. Table 3 in the Appendix records the number of post-trial motions made in the 611 cases taken from the ready lists for September 1, 1972, through August 31, 1973, and decided during the same period. Table 3 shows that such motions were made in 21% of all civil cases and 12.1% of criminal cases. No statistics were collected on the grant and denial of post-trial motions. It is generally believed, however, that very few are granted.

When post-trial motions are made, Table 3 indicates that they are sometimes disposed of on the same day, but in some cases take 6 or 7 weeks. In criminal cases, 90% of such motions are disposed of within 18 days; in civil cases 90% are disposed of in 24 days or less.

In the planning stages of the Appellate Justice Project one of the innovations discussed as having a potential for accelerating effect on appeals was the elimination of post-trial motions. Certainly in some cases it would have this

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al) <sup>26</sup> Ill. Rev. Stat. (1973) Ch. 110, par. 68.1(4).

<sup>27</sup> It was to foreclose this possibility that Rule 6(b) of the FRCP was drafted to preclude any extension of time to move under Rule 59.

effect in Illinois, since the trial court occasionally takes as long as 51 days to dispose of such a motion. In the gross, however, it appears that post-trial motions do not contribute materially to delay. In the mean case the motion is denied within 16 days in civil cases and 12 days in criminal cases. Since such motions are made in only 21% of civil cases and slightly over 12% of criminal cases, the total impact upon the elapsed time between judgment and disposition on appeal is very small. Thus if one multiplies the mean time consumed by the number of motions and divides by the total number of cases, it appears that the average elapsed time between judgment and disposition on appeal accounted for by the time it takes to decide post-trial motions is only 2.26 days (3.36 days in civil cases and 1.4 days in criminal cases). When it is recognized that the mean elapsed time between judgment and disposition on appeal is 681 days in civil cases, 732 days in criminal cases, and 717 days in all cases together, 510, 561, and 546 days respectively beyond the time permitted under the Rules, it is apparent that the disposition of post-trial motions accounts for less than one half of one percent of the delay past the normal schedule, and less than one third of one percent of the total elapsed time. These figures would be altered somewhat by adding the time between judgment and the filing of the motion, but in total post-trial motion practice appears to be of very little significance in the overall time required to appeal.

## 2. The Notice of Appeal

An appeal taken as of right is initiated by filing a notice of appeal. The form of the notice is provided in the Supreme Court Rules. It contains simply the name of the court to which the appeal is being taken and from which it is being taken and the title of the case, and must specify the judgment or part of a judgment appealed from and state the relief sought from the court appealed to.<sup>28</sup>

The notice of appeal must be filed within 30 days from the judgment, or in the event a post-trial motion has been timely filed, from the date on which the motion is denied.<sup>29</sup> On motion made within 30 days from the expiration of the time for filing the notice of appeal, the Appellate Court on a showing of reasonable excuse for failure to file the notice within the time allowed may grant leave to appeal.<sup>30</sup> In criminal cases, on motion supported by a showing by affidavit that there is merit to the appeal and that the failure to file the notice of appeal on time was not due to appellant's culpable negligence, filed in the Appellate Court within 6 months of the expiration of the time for filing the notice of appeal, the court may grant leave to appeal.<sup>31</sup>

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<sup>28</sup> Illinois Supreme Court Rules 301, 303(c).

<sup>29</sup> Illinois Supreme Court Rule 303(c)(4).

<sup>30</sup> Illinois Supreme Court Rule 303(e).

<sup>31</sup> Illinois Supreme Court Rule 605(c).

Motions for leave to appeal despite the failure to file a timely notice of appeal are relatively rare. In the calendar year 1971, 55 such motions were filed, and in 1972, only 33, representing 5% and 2%, respectively, of the cases in which appeal was sought from final judgment.

Table 1 in the Appendix gives the elapsed time between the steps in an appeal. During the year of the study phase of the project, the staff screened 903 cases from current ready lists. In 611 of these cases the court disposed of the case within the year, leaving 292 cases pending on August 31, 1973, the closing date for the year under observation. The figures in Tables 1 through 7 in the Appendix are based upon a universe of these 611 cases. For this reason they must be viewed with a certain caution since the 611 disposed of during the year may not be typical of the 903 taken from the ready lists. It should be noted, however, that items 7 and 8 in Table 1 indicate that in cases argued orally the mean elapsed time between argument and decision in the cases actually decided was roughly 5 months. This fact suggests that the 292 cases pending at the end of the year represent the normal lapse of time between ready list and disposition rather than atypicality.

Item 1 in Table 1 shows the elapsed time in days between the date on which the judgment became final either by entry or by denial of a post-trial motion, and the day on which the notice of appeal was filed. There it appears that while appeal has been allowed as long as 294 days after judgment,

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in 90% of the cases in the sample the notice of appeal was filed by the 27th day, with a mean of 24 days. As might be predicted from the "reasonable excuse" standard, a fairly high percentage of motions for leave to file a late notice of appeal is granted. In 1971, of 66 such motions pending before the court (11 carried over from 1970 and 55 filed during the year), 28 (42%) were allowed, and 30 (45%) were denied. Five (8%) were dismissed, and 3 (5%) were carried over to 1972. In 1972, of the 36 pending motions (3 from 1971 and 33 filed during the year), 21 (58%) were granted, 13 (36%) were denied, and 2 (6%) carried over into 1973.

### 3. Filing the Record in the Appellate Court

The rules provide that within 14 days after the filing of the notice of appeal the appellant must file a praecipe for the record, designating the parts of the record he desires to have incorporated into the record on appeal. The appellee has 7 days after receiving service of appellant's praecipe to file a request for inclusion of other portions of the record not designated by the appellant.<sup>32</sup> The report of proceedings must be submitted to the court for its certification of correctness, certified, and filed in the trial court within 49 days of the filing of the notice of appeal. The trial court may extend this time, but extensions by the trial court cannot aggregate more than 42 days.<sup>33</sup> On motion

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<sup>32</sup> Illinois Supreme Court Rule 322(a).

<sup>33</sup> Illinois Supreme Court Rule 323(e).

made within the original or extended time, or on a showing of reasonable excuse, within 35 days of its expiration, the Appellate Court may grant further extensions.<sup>34</sup> If no extensions are granted, the record must be prepared by the Clerk and filed by the appellant in the Appellate Court within 63 days after the filing of the notice of appeal. If the time has been extended, the record must be filed in the Appellate Court within 14 days of the extended time.<sup>35</sup> Extensions of time to file the record in the Appellate Court may be granted by the Appellate Court or a judge thereof on motion made within the original time, or on a showing of reasonable excuse, within 35 days of its expiration.<sup>36</sup>

While statistics were not gathered on motions to extend the time for the filing of the report of proceedings granted and denied by the trial court, the figures on elapsed time shown in item 2 in Table 1 indicate that extensions are often granted. The median civil case is docketed by filing the record in the Appellate Court 112 days after the judgment appealed from. Since the notice of appeal must be filed within 30 days of judgment, this means that the record is filed at the least 82 days after the notice of appeal, or to put it another way, in at least half the cases there have been extensions of 19 days or more. In criminal cases, in

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34 Id.

35 Illinois Supreme Court Rule 326.

36 Id.

the median case the record is filed 140 days after judgment. Deducting 30 days for the filing of the notice of appeal, in half the criminal cases the record is filed 110 days or more after the filing of the notice of appeal, when the maximum time under the Rules, absent a motion in the Appellate Court, is 105 days (49 days + 42 days aggregate extension by the trial court + 14 days). Reference to Table 2 indicates that the Appellate Court granted 73 motions to extend the time for filing the report of proceedings. Figures from the Clerk's Office indicate that during all of 1971 there were only 28 motions to file a late record, and in 1972, only 24. While some few of the cases may be ones in which a late notice of appeal was filed, it appears that at least in criminal cases the court has not been rigid in enforcing the time limit under the Rules, and that numbers of records are accepted late without the formality of a motion. When motions to file late are timely made, they appear to be granted in a large proportion of the cases. In 1971 there were 30 such motions before the court, 2 carried over from 1970 and 28 filed during the year. Eleven were dismissed (apparently as filed beyond the 35 days permitted by the Rule). Of the remaining 19, 16 were granted and 3 denied. In 1972, of 25 pending motions, 23 were granted and 1 denied, 1 remaining for disposition in 1973.

#### 4. Docketing; Assignment; Agenda Sheets

When the record is filed in the Clerk's Office the case is entered in a docket book and assigned a number, and a

folder file is created in which motions, appearances, and the like are kept. Every two weeks or so the cases entered on the docket book are assigned among the divisions. The method of assignment is by rotation in the order of entry except that cases that have been before the court before are assigned to the division that heard the earlier proceeding, and except for cases in which some judge on the division that would normally hear them would be disqualified. The Clerk prepares an agenda sheet for each division listing by name, docket number, and filing date the cases assigned to that division. The agenda sheet goes to the presiding judge of the division with a copy to each of the other judges.

In some divisions assignment to individual judges of the division is made by the division itself. In others it is left to a secretary. As in the case of assignment to divisions the method of assignment is normally by rotation.

The agenda sheets are used as a control sheet for the division's business and a record of motions made and disposed of.

#### 5. The Bailiff's Office; Custody of Records

Each division maintains a bailiff's office with storage space for the records and briefs and abstracts or excerpts from the record in cases assigned to that division. As cases are assigned to a division, the record is delivered to the bailiff's office of the division to which it is assigned. Later, as the briefs and abstracts or excerpts are received, the Clerk retains one copy and delivers the rest to the bailiff's office.

## 6. The Briefing Schedule

The timetable for the filing of briefs and abstracts or excerpts from the record is provided by the Supreme Court Rules. The appellant must file his brief within 35 days of the date on which the record is filed. The appellee must file his brief within 35 days of the due date of the appellant's brief. The reply brief, if any, must be filed within 14 days after the due date of the appellee's brief. This makes a total of 84 days for the filing of all briefs.<sup>37</sup> The abstract or excerpts from the record must be filed 14 days after the due date of the appellee's brief.<sup>38</sup> The time for the filing of the briefs may be either extended or shortened by the Appellate Court or a judge thereof, sua sponte or upon the motion of a party supported by an affidavit showing good cause.<sup>39</sup> Table 1 in the Appendix indicates that the schedule for briefs set forth in the Rules bears very little resemblance to actual practice. Extensions are granted to appellants in nearly 97% of the cases, and to appellees in nearly 91%. In half of the cases the appellant receives extensions of 177 days or more, and the appellee 162.

## 7. Rule Compared With Practice

Table A on the following page summarizes the discussion of the time period between judgment and the time at which the

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<sup>37</sup> Illinois Supreme Court Rule 343(a).

<sup>38</sup> Illinois Supreme Court Rule 342(b).

<sup>39</sup> Illinois Supreme Court Rule 343(b).

TABLE A

Actual Elapsed Time in Days for Steps in Appeal (mean case) Compared with Time Allowed in the Rules: 611 Cases from Ready Lists from September 1, 1972, through August 31, 1973, and Decided during the Same Year.

Time in Days from Judgment <sup>1</sup>	Time Allowed by Rule		Time Mean Civil Case		Actual Time Compared With Rule		Time Mean Criminal Case		Actual Time Compared With Rule	
		Cum.		Cum.		Cum.		Cum.		Cum.
Notice of Appeal	30	30	24	24	- 6	- 6	27	27	- 3	- 3
Filing of Record	63	93	97	121	+ 34	+ 28	127	154	+ 64	+ 61
Appellant's Brief	35	128	171	292	+136	+164	222	376	+187	+248
Appellee's Brief	35	163	148	440	+113	+277	149	525	+114	+362
Reply Brief	14	177	19	459	+ 5	+282	23	548	+ 9	+371

<sup>1</sup> The time is measured from the date on which the judgment was entered or from the date on which a post trial motion was denied.

case is ready for oral argument or submission. It will be noted that the filing of the record and the briefing schedule, designed to take up to 147 days, in fact take on the average 435 days (459 less the 24 days between judgment and the filing of the notice of appeal) in civil cases, and 521 days in criminal cases. This means that the process of readying a civil case for appeal takes on the average nearly three times the time allotted in the Rules, and in criminal cases three and a half times the time allotted in the Rules.

Obviously there is much room for improvement. On the other hand these figures must be read against a background of a large backlog in the Appellate Court, to be discussed later. Since it has been impossible to reach the cases that are filed during the year, the court has generally taken the position that it makes no sense to put pressure on the bar to ready cases for the court when it is not in a position to hear them when they are ready. Thus the fact that extensions have been freely given is one known to everybody and does not raise a question of reforms that might make it possible to shorten the process below the periods prescribed in the Rules. It is noted elsewhere that with the start of the project and the addition of three judges to bring the court up to 20 judges, there has been some inroad made in the backlog. Since the beginning of the project in September, 1972, the number of pending cases has been reduced by 309, or 15%. A check on 259 cases decided during the closing months of 1973 indicates that the elapsed time between judgment and the filing of the

reply brief is crawling downward. The average elapsed time for civil cases was 419, a drop of 40 days or about 9%. The average in criminal cases was 521, down about 5%. If the present trend toward currency continues of course the court will become progressively less generous in its extensions of time and the average pre-ready time will fall. A current docket being at best well beyond the period of the project, there was no exploration of the potential of the staff concept in reducing pre-ready time. Nevertheless, because the collection of data on the cases screened during the year made the information available, figures were compiled on two factors sometimes mentioned as possible sources of delay. The effect of post-trial motions has already been discussed. The other factor explored is the relationship of change of counsel between trial and appeal to the time consumed in the preparation and decision of appeals in criminal cases. Table 5 in the Appendix shows the distribution of cases (252 criminal appeals taken from the ready lists during the period September 1, 1972, and August 31, 1973, and decided during the same period) according to the character of counsel: court appointed, the public defender or legal aid, private counsel, counsel on appeal from the same office that handled the trial, and counsel by the same individual who handled the trial. Table 6 shows the effect of change of counsel between trial and appeal on (A) the lapse of time between judgment and appellate decision, and (B) the reversal rate. When the same individual handles both trial and appeal, the median case

takes 588 days. When counsel on appeal is from a different firm or office than that handling the trial, the median case takes 698 days. These figures suggest that the appeal can be handled more expeditiously when the same counsel represents the defendant at the trial and on appeal. It is to be noted, however, that appeals handled by counsel from a different firm than that handling the trial show a slightly higher reversal rate (27.3% as compared to 24% in cases in which trial and appellate counsel were the same). This is perhaps predictable since one obvious reason for changing counsel is dissatisfaction with the performance of trial counsel. The longest period between judgment and disposition on appeal (731 days in the median case) and the lowest percentage of reversal (17.6%) occur in appeals handled by a different person in the same office or firm handling the trial. On the surface this might appear anomalous, but the difference in elapsed time undoubtedly reflects the fact that the public defender's office, which handles over three fourths of all criminal appeals, is overworked. As to the lower percentage of reversals, any answer would be highly speculative, since it would have to account for the fact that willingness to obtain private counsel may well be connected with an appraisal of the chances of reversal.

#### 8. The Ready Lists

After an appeal has been docketed by the filing of the record, the briefs and abstract or excerpts are filed in the Clerk's Office. As they are filed, the date is noted in the

docket book and checked off on a card. In the event they are filed late, the Clerk's Office may advise counsel that they should be accompanied by a motion to file instanter. When the reply brief is filed, the card is pulled for preparation of the ready list. If an appellant's brief is filed and no appellee's brief has been received within the 35 days allowed by the Rule, or an appellee's brief and no reply brief within the 14 days allowed, the practice has been to wait about three weeks to see if a motion for extension of time will be filed, and then place the case on the list.

Until the advent of the Illinois project the practice was to send the ready lists to the divisions. They were prepared at irregular intervals, averaging roughly three weeks. Between ready lists a judge might send his secretary to check the docket book to see if briefs had been filed in cases on his agenda sheet, and proceed with those that were ready.

As subsequently noted, the present practice is to send the ready lists to the Staff Director, who selects cases to be processed by the staff, and then sends to each judge on the court a copy of the list, identifying those cases selected for staff processing. In cases so identified the division awaits receipt of the staff memorandum and draft of the opinion. In other cases appearing on the lists, if oral argument has been requested argument is set, or if oral argument has been waived, the court takes the case as submitted and proceeds to decision.

## 9. Oral Argument

Under the Illinois Supreme Court Rules the parties are entitled to argue orally unless they waive oral argument, though the court may limit the time allotted.<sup>40</sup> Argument is requested by stating at the bottom of the cover page of the brief that oral argument is requested.<sup>41</sup> The Rule goes on to provide that a party who has not so requested oral argument may do so later by giving prompt notice to the Clerk and to other parties, and that a party who has requested oral argument but has decided to waive it must give prompt notice to the Clerk and the other parties. Unless the time is limited by the court or additional time is granted, the oral argument is scheduled for 30 minutes for each side, plus an additional 10 minutes for appellant for rebuttal. Illinois lawyers routinely request oral argument. In 1971, the last full year before the start of the Appellate Court Project, the court heard 864 oral arguments, as against 97 cases in which it was waived. Thus approximately 90% of the cases were argued orally. In 1972, a year that includes four months of operation under the project, 706 arguments were heard, as against 133 cases in which argument was waived, a percentage of 84.1%.

The setting of oral argument in cases in which it has been requested is handled variously by the different divisions

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<sup>40</sup> Illinois Supreme Court Rule 352(a).

<sup>41</sup> *Id.*

of the court. In some instances it is done by the division in conference. In this way the time allotted for argument in individual cases can be determined in advance. In other divisions argument is set by a secretary. Generally the order of argument is by docket number, lowest number first, with a priority given to criminal cases as provided by Supreme Court Rule 611(a). Two to four weeks' notice of the scheduled argument is given by publication in the Law Bulletin and mailed to counsel.

Each of the five divisions sits to hear oral argument one day a week. Normally arguments are heard in the morning and conferences are held in the afternoon of the same day. It is usual to hear argument in about four cases on a day.

The subject of oral argument in cases handled by the staff during the year of operation of the project is discussed at some length elsewhere in the report.

#### D. THE DOCKET OF THE ILLINOIS APPELLATE COURT FOR THE FIRST DISTRICT

Table B on the following page and Table C which follows it give a profile of the docket of the court by jurisdictional head and type of case. Table B, which shows the jurisdictional basis for the cases pending before the court at the end of 1971 and at the end of 1972, makes it plain that the court is almost wholly without control of its docket, since approximately 99% of its cases are either appeals from final judgments of the circuit court, as to which there is a constitutional right to appeal, or interlocutory appeals made appealable as

Table B

Business of the First District of the  
Illinois Appellate Court by Jurisdictional  
Category, Calendar Years 1971 and 1972

	Total Cases Pending Dec. 31, 1971		Total Cases Pending Dec. 31, 1972	
	No.	%	No.	%
<u>Appeals of Right</u> (Final Judgments)				
Civil	850	51.5	841	42.7
Criminal	769	46.6	1078	54.8
Total	1619	98.2	1919	97.5
<u>Interlocutory</u> <u>Appeals of Right</u>	13	0.8	34	1.7
<u>Permissive Appeals</u>				
Interlocutory	4		2	
Late Notice of Appeal	3		2	
Late Record	0		1	
New Trial Orders	10		9	
Pre-trial Bond	0		1	
Total Permissive	17	1.0	15	0.8
Total	1649	100.0	1968	100.0

TABLE C

Distribution of Decided Cases by Type; All Cases Screened by the Staff from Ready Lists September 1, 1972, through August 31, 1973, all 611 cases Decided after August 31, 1973.

	Number of Cases	Percent	Percent of Total
Criminal	498		57.2
Civil			
Administrative Law	41	11.0	4.7
Contacts	78	21.0	9.0
Domestic Relations	25	6.7	2.9
Property	33	9.0	3.8
Taxation	13	3.5	1.5
Torts	137	36.8	15.7
Trusts & Estates	12	3.2	1.4
Workmen's Compensation	19	5.1	2.2
Other	14	3.8	1.6
Total Civil	372	100.0	42.8
Total	870		100.0

of right by rule of the Supreme Court. In 1971, of the appeals from final judgment, criminal cases constituted 46.6% of all cases pending, and civil cases 51.5%. In 1972, criminal cases had risen to 54.8% of pending cases, with civil appeals dropping to 42.7%. Thus at the start of the project the court was faced with a growing backlog of cases with criminal cases growing faster than civil cases despite a statutory priority for the decision of the former. This was due in some measure to the fact that new filings during 1972 were 54.4% criminal appeals, and partly to the fact that the delay between docketing and the filing of briefs was longer than the delay in civil cases. Figures available since the end of the first year of operation of the project suggest that in 1973 the figure for criminal cases filed will drop slightly, to approximately 52%.

A breakdown between categories of civil cases filed is not possible, since these figures are not recorded. Table 4 in the Appendix breaks down the 257 civil cases screened by the staff from ready lists prepared during the year of project operation and decided during the same period, and since the end of the project year it has been possible to check these figures against 115 civil cases decided during the following months. Table C on the preceding page shows the total 372 civil cases, with the number of cases falling into each of nine categories and the percentage each category constitutes of civil cases, and of all cases. The distribution as between civil and criminal cases, it will be noted, is somewhat higher

than the figures on filings heretofore given. This is to be expected because criminal cases are given priority in disposition. As among civil categories, however, it appears likely that the number decided is a rough guide to the number that are filed.

Table C shows that tort cases make up nearly 37% of all civil cases, contract cases 21%, with the rest scattered.

E. THE WORK LOAD OF THE ILLINOIS APPELLATE COURT FOR THE FIRST DISTRICT

Prior to 1964, criminal cases were appealable directly to the Supreme Court of Illinois. With the amendments to Article VI of the Illinois Constitution effective on January 1 of that year, jurisdiction in criminal appeals was transferred to the Appellate Court, and in 1966 the Supreme Court transferred some 300 cases to the Appellate Court for the First District. The court has never quite recovered.

Table D, on the following page, shows that by September 1, 1970, two years before the Appellate Justice Project commenced, the backlog of cases had reached 1386. During the following year the court disposed of 934 cases and 1010 new cases were filed, leaving a backlog of 1462 cases at the end of the year. From September 1, 1971, through August 31, 1972, the year immediately preceding the start of the project, despite the fact that the number of cases disposed of rose to 1102, there was an unprecedented increase in new filings (1638) and the court completed the year with 1998 cases pending.

Table D

Growth of Backlog in First District of Illinois Appellate Court during the Two Years Prior to Commencement of Project by Month (Sept. 1, 1970, through Aug. 31, 1972)

	Number of Cases Pending at Beginning of Month	Number of Cases Disposed of During Month	Number of New Cases Filed During Month	Number of Cases Pending at End of Month	Net Increase or Decrease in Number of Pending Cases	Cum.
Sept. 1970	1386	86	79	1379	- 7	- 7
Oct. 1970	1379	94	90	1375	- 4	- 11
Nov. 1970	1375	39	61	1397	+ 22	+ 11
Dec. 1970	1397	54	78	1421	+ 24	+ 35
Jan. 1971	1421	59	88	1450	+ 29	+ 64
Feb. 1971	1450	55	68	1463	+ 13	+ 77
Mar. 1971	1463	137	87	1413	- 50	+ 27
Apr. 1971	1413	110	82	1385	- 28	- 1
May 1971	1385	81	87	1391	+ 6	+ 5
June 1971	1391	104	117	1404	+ 13	+ 18
July 1971	1404	68	74	1410	+ 6	+ 24
Aug. 1971	1410	47	99	1462	+ 52	+ 76
		934	1010			
Sep. 1971	1462	88	93	1467	+ 5	+ 81
Oct. 1971	1467	94	131	1504	+ 37	+ 118
Nov. 1971	1504	77	154	1581	+ 77	+ 195
Dec. 1971	1581	100	168	1649	+ 68	+ 263
Jan. 1972	1649	78	114	1685	+ 36	+ 299
Feb. 1972	1685	91	135	1729	+ 44	+ 343
Mar. 1972	1729	120	143	1752	+ 23	+ 366
Apr. 1972	1752	97	124	1779	+ 27	+ 393
May 1972	1779	112	159	1826	+ 47	+ 440
June 1972	1826	88	163	1901	+ 75	+ 515
July 1972	1901	111	97	1887	- 14	+ 501
Aug. 1972	1887	46	157	1998	+ 111	+ 612
		1102	1638			
Sept. 1972	1998					

Table E, following this page, shows the way in which cases were disposed of. In 1971, 740, or 73.3%, were disposed of by opinion. Since the court at that time consisted of 16 judges, this averaged  $46\frac{1}{2}$  majority opinions per judge. In 1972, 865, or 69.8%, were disposed of by opinion. Assuming the court remained the same size, this would require an average production of majority opinions of 54 per judge. From September 1, 1971, through August 31, 1972, the new filings increased to 1638 from 1010 the previous twelve months, and the court fell 536 cases behind. If the 1972 percentage of disposal by opinion were applied to an annual load of 1638 new cases, it might be expected that to stay even the court would have to produce 1143 majority opinions. For a court of 16, this would be an average of 71 opinions a year per judge. During 1972 and early 1973, however, the court was expanded to 20 judges. If the opinions were spread among the 20, each would have to produce 57 majority opinions a year.

TABLE E

Disposition of Cases during the Calendar  
Years 1971 and 1972, by type of Disposition

	No.	1971 Per cent	No.	1972 Per cent
By Opinion	740	73.3	865	69.8
Dismissal	226	22.2	324	26.2
Transfer to Sup. Ct.	7		6	
Confession of Error	10		1	
Pre-trial bond			11	
Denial-Permissive Interloc.	4		9	
Denial-Late Notice Appeal	30		13	
Denial-Late Reocrd	3		1	
Denial-Leave to Appeal (New Trial)	0		8	
Total	1020		1238	

## II. THE APPELLATE JUSTICE PROJECT

### A. OBJECTIVES OF THE PROJECT AS A WHOLE

The Appellate Justice Project had a number of separate objectives. It was to be in part an assistance operation, providing the participating courts with money to assist them in devising means of reducing a growing lapse of time between the filing and hearing of appeals. It was also designed in part as a study project in judicial administration, directed toward experimentation with methods of improving the efficiency of the appellate process and toward measuring and reporting the results. Third, it was to be in part a demonstration project. While there was to be an emphasis on experimentation, the central theme was to be the use of a centrally organized and supervised staff of attorneys as an aid to the judges.

According to original plans, the project was to be funded for two years. It was hoped that if the demonstration aspects of the project proved successful the states involved would pick up the cost of the staff operation after the project funds ran out. In this connection it was recognized that a one year project would make recruitment of the staff more difficult, and would allow insufficient time for arrangements for financing the operation in the event the states were

inclined to continue it. The study phase of the project, however, was planned only for the first year. In view of the fact that information from the study would be of use in the decision as to whether to institutionalize the staff operation, this was understandable. On the other hand, it carried with it the problem of designing and putting into operation whatever experiments were to be made, and operating them sufficiently long to appraise their result, without extending the study and report phase. This was complicated by the fact that the precise nature of the experiments was not determined in advance, it being supposed that local circumstances of the four courts participating in the project being very different, the individual projects would take shape after operation commenced.

It was agreed on all sides that in its initial phase the project would emphasize the work of central staff in preparing pending appeals for disposition by the courts, operating roughly along the lines of the staffs in the Michigan Court of Appeals and the California Court of Appeal for the First District. This phase of the project was to operate largely in furtherance of the aid and demonstration objectives. Since the Michigan and California courts had both found the utilization of staff helpful in handling appellate cases in larger volume, it was hoped that the utility of staff preparation of cases could be demonstrated in a relatively short time. In addition, it was hoped that the effect of the use of staff in the preparation of ready cases for disposition could be measured and recorded in courts of rather different

organization and circumstances as a guide to other courts that might be interested in experimenting with methods of increasing the efficiency of the appellate process.

The Michigan and California models for staff operation were somewhat different, that in Michigan stressing the preparation of prehearing memoranda, such memoranda being prepared in all cases. The California model emphasized staff screening of cases, the staff serving primarily as an aid in the identification and disposition of the easiest cases, leaving the preparation of prehearing memoranda in more complex cases to the judge's personal law clerk. For a number of reasons the California model was chosen. In the first place since a staff of four could not possibly be expected to prepare memoranda in all cases, some sort of selection was a necessity. In the second place, Justice Winslow Christian, the first Director of the National Center for State Courts, was of the opinion, on the basis of his personal experience in the California system, that pre-screening and staff processing of the easiest cases had the greater promise of savings in judicial time and effort. This was thought to be so because the early identification of cases of little complexity would permit the court to place such cases on a separate track and reduce the number of oral arguments, formal conferences, and detailed published opinions.

It was hoped that this initial phase would take about six months. After that it was contemplated that other and less conventional experiments could be launched. A number of

possibilities were discussed. It was thought that it might be possible to utilize staff in the acceleration of the period between the filing of the appeal and the point at which it is ready for hearing. Also mentioned was the possibility that in certain cases the appeal might be initiated by filing the notice of appeal directly in the Appellate Court with a short statement of the issues to be raised, and heard orally without briefs or abstracts. Also discussed was the possibility in certain cases of reversing the usual order of briefs and oral argument, with the court requesting briefs on particular issues.

#### B. ABANDONMENT OF THE EXPERIMENTAL PHASE

Insofar as the Illinois project was concerned, for a number of reasons the second, or experimental, phase of the project was abandoned. In the first place it was recognized that in a court that is two years behind on its docket the most immediate problem is to demonstrate that the staff could make a contribution to elimination of the backlog. Indeed most of the suggested experiments, being designed to shorten the time between judgment and the hearing of the appeal, would be calculated to accentuate the problem of a court presently unable to handle the cases as they become ready. It was recognized as well that the long delays in preparation of the cases, already discussed, were in large measure attributable to the perfectly understandable position of the court that there is no point in being harsh in the application of time limits for the filing of records and briefs if the court will be unable to hear the case when it is ready. Further,

given the size of the staff any diversion of its efforts into acceleration of the disposition of cases from the ready lists would postpone the time at which the court would be current with its docket.

Accordingly, the decision was made to concentrate upon the use of staff in aiding the court in its drive to eliminate the backlog and leave experimentation with other innovations in appellate procedure to other times. This report deals, then, with one year's operation in the Illinois Appellate Court for the First District under what is substantially the California model of the use of centrally organized and supervised staff in screening cases to identify the easiest ones and the preparation in cases selected of a staff memorandum, a recommended disposition, and the draft of an opinion.

### III. THE ILLINOIS PROJECT

#### A. THE STAFF

The Illinois project was funded on the assumption that the staff would be composed of persons with some actual experience. The budget provided for two grades of staff attorney, one at \$22,500 and the other at \$20,000, with two positions at each grade. These figures compare with the salary of \$13,800 then paid to law clerks serving individual members of the court, and \$14,600 paid to staff members in the prehearing section of the Michigan Court of Appeals, where staff members are recruited from among current law school graduates.

There are some theoretical advantages in experienced staff. First, recruitment from current law school classes might be expected to result in less continuity in the staff personnel. In Michigan the experience has been that the minimum tenure is one year and the maximum two. There the Director estimates that a new staff member takes about three months to gain the confidence necessary to efficient operation. Second, the short time employee may be devoting considerable energy and attention to looking for permanent employment, making for both a "warm up" and a "taper off" period. Third, since the Illinois project was designed to experiment with

staff screening, with a special track for cases that were selected for staff treatment, the level of confidence the court could develop in the work of the staff was important. It was felt that this necessary confidence might be more easily developed between the court and a permanent professional staff than it would if the staff were looked upon as simply a pool of law clerks under the supervision of the Director.

The theoretical advantage of recruiting recent law school graduates and assuming a rapid rate of turnover lies in the assumption that one can recruit a better quality of person if one aims at the beginner. This is thought to be so because the salary that can be offered is more competitive with others available to the beginner and the opportunity for valuable experience can be used as a lure. Assuming that the supply would stand up, for example, the \$85,000 budgeted for four staff members in the Illinois project would have bought six graduating law students at the \$13,800 figure then paid clerks to the individual judges, or \$87,600 would have bought six at the figure paid to staff members in Michigan. It is to be noted in this connection, however, that the theoretical advantage of higher quality in short term younger people can be achieved only at the expense of regular recruiting at the law schools in competition with the recruitment of the judges' personal law clerks. Further, since the Appellate Justice Project was designed to begin in the Summer, and the delays in funding postponed any binding offers until

after May, any effort to locate suitable recent graduates from the June class of 1972 would have been hampered a great deal by its timing.

It is to be emphasized that the resolution of the question as to whether permanent staff at a higher compensation or a larger staff of less well paid beginners, with a higher turnover, makes for a more efficient operation is not resolved by the Illinois experience. First, the size of the Illinois operation is so small that any comparisons would be highly individual. Second, the prospects of recruitment of staff members from the law school graduating classes remains locally unexplored. Third, any comparison between the work of present staff members and that of present clerks to individual judges would be largely meaningless since the clerks work under direct supervision of the judges, and on tasks that are different.

The actual recruitment of the staff began with an advertisement in the Chicago Law Bulletin on May 18, 1972. The court had a number of responses to this advertisement, but postponed its selection of the staff attorneys until it had decided on a Director. On June 23, 1972, it announced its appointment of Mr. John M. O'Connor, Jr. Mr. O'Connor was at the time with the firm of Kirkland and Ellis in Chicago, where he had specialized in the handling of appeals in the Illinois state courts. After his appointment Mr. O'Connor and the court proceeded with the selection of the four staff attorneys. The selection was made with an emphasis on experience in

appellate practice and in criminal law. One of the four was at the time of his appointment a special assistant Corporation Counsel, having served in the Office of the Corporation Counsel since 1939, and as head of the Appeals Division from 1956 to 1967. Another had been admitted to the bar in 1963 and at the time of his appointment was consultant to the Chicago-Cook County Criminal Justice Commission, having previously served as a research attorney at the American Bar Foundation where he directed Foundation projects in mental health and criminal law and in rural criminal justice. A third, also admitted to the bar in 1963, had served since that time as law clerk to one of the justices on the court. The fourth had been admitted to practice in 1967 and from then until the time of his appointment had served as an assistant State's Attorney in Cook County.

#### B. QUARTERS

Although there would have been advantages in having the staff quartered in the same building with the court, there was no room for the operation in the Civic Center and quarters had to be located elsewhere. The court was fortunate enough to locate space directly across the street at 127 N. Dearborn Street. The staff offices are on the 10th floor of the Civic Center, occasioning some traveling, but the separation from the court's quarters does not seem to have created any great problems. It should be noted, however, that in the planning stages of the project it was assumed that the staff would serve a court of 16 judges. In the course of the year the

court was expended to 20. Further, since the Fourth Division has not been serviced by the staff, the four-man staff has served only four of the five divisions of the court. During part of the time these divisions consisted of three judges each, during the rest of the time four. At no time, then, has the staff served more than 16. If the court were to institutionalize the staff operation, and it were contemplated that the Fourth Division would also be served, to maintain the increased rate of production that appears to have resulted from the use of staff it would have to add a staff member, and while the present quarters seem adequate for a Director and four staff attorneys, it would be difficult if not impossible to house a Director and five staff attorneys in the same quarters.

### C. STAFF OPERATION

#### 1. Screening

##### a. Screening Criteria

At the outset it was agreed that the criteria for staff treatment would be ease of disposition. In the first few months the staff developed some rules of thumb to eliminate cases that would be too time consuming. It avoided, for example, cases involving zoning -- this on the theory that in such cases the records are customarily long and involved. It was later agreed that all cases would be screened on the same basis without regard to subject matter. Just what constitutes a case that will be identified as "easy" is difficult to describe. There are clear cases of course. On

one ready list the Director identified two cases assigned to the same division that raised an issue of law settled by the Illinois Supreme Court after the briefs had been filed. Some other cases have been identified as raising issues only recently researched by a staff attorney. Except in such unusual cases, the general criteria have been simplicity of the issues and length of the record. Most of the cases selected have been criminal cases. There have been cases involving validity of the waiver of trial by jury, and cases involving an alleged failure of the trial judge to give required advice before accepting a plea of guilty. Misdemeanor cases raising the issue of reasonable doubt have been taken with some frequency, since the record is normally short. Reasonable doubt cases with long records (some have exceeded 600 pages) have been passed over. Usually cases raising a large number of issues have been passed over. The Director has tried to stay within a limit of three to four.

Among civil cases, the criteria have been largely the same. Cases involving the application of the doctrine of res judicata, appeals from grant or denial of motions to reopen judgments under Ill. Rev. Stat. (1973) Ch. 110, par. 72, and from grant or denial of motions to vacate defaults under Ill. Rev. Stat. (1973) Ch. 110, par. 50, and an appeal raising the issue of denial of a petition for a change of venue are examples of the cases taken.

Normally cases involving conflicting precedents that must be resolved by the court have not been taken.

b. Mechanics of Screening

The preparation of the ready list containing the docket numbers of cases ready for argument or submission has already been discussed. When the Clerk prepares the ready list, he sends it to the Staff Director. The Staff Director goes to the Bailiff's Office, where the briefs and records are located, and there examines the briefs in each case appearing on the list. If a case is obviously one suitable for staff treatment, it is marked "yes" on the list. If it is obviously too complex, it is marked "no." If it is borderline, it is marked "?". The Staff Director then checks on the availability of the records in the "yes" cases. If the record is immediately available, he withdraws it, and the briefs and abstracts or excerpts from the record, giving the Bailiff a receipt. If the record is not immediately available, either because it has been withdrawn by one of the counsel for work on the briefs and has not yet been returned, or if it cannot be located immediately, he skips the case and fills in with one of the "?" cases. This avoids the time consuming task of tracing the record. He then returns to staff quarters with the records and briefs and abstracts or excerpts in the cases ultimately selected.

c. Time Consumed in Screening

While no record has been kept on the time consumed in screening, the Director estimates that the cases can be selected on the basis of a two to five minute examination of the briefs. During the year of operation considered in

this report the ready lists have been prepared by the Clerk on the average of once every three weeks. To expedite the flow of cases the task of preparing the lists has since been transferred to the court's Administrative Assistant. It is contemplated that henceforth they will appear weekly. This will necessitate weekly trips to the Bailiff's Office to do the screening, adding slightly to the time involved, but it is calculated to expedite the business of the staff since occasionally during the year of operation under consideration the staff has come close to exhausting the supply of ready cases before the publication of the next list.

After the Director has selected the cases to be handled by the staff, he prepares a list of the docket numbers of cases on the ready list, noting which ones have been selected for staff treatment, and sends a copy to each judge of the court. In this fashion each judge is kept apprised of which cases assigned to him have been selected for staff treatment, and how many cases the staff is handling for other divisions. In this connection it should be noted that while the staff knows what division each case is assigned to, it does not know at this point what individual judge will handle it.

d. Anders Cases

In addition to cases screened from the ready list, the staff has handled a considerable volume of cases in which motions to dismiss the appeals as frivolous were filed under Anders v. California, 386 U.S. 738. These cases are referred to the staff directly by the division or judge to which the case is assigned.

## 2. Assignment of Cases to Staff Attorneys

When the Director returns from the Bailiff's Office with the records and briefs and abstracts or excerpts from cases selected from the ready list, he places them in a pile on a shelf in the walk-in safe in the staff quarters, in numerical order by docket number, with the lowest number on top. Anders cases received from the judges are placed on top of the pile as received.

When a staff attorney needs a case to work on, he goes to the safe and takes the top case. Occasionally, however, the cases are taken out of order. For example, one member of the staff with extensive experience in the handling of criminal appeals may skip a civil case. Also there has been some swapping of cases to adjust to the varying backgrounds of the staff attorneys. Some of the staff attorneys prefer to work on more than one case at a time, so at times they may take more than one case from the pile. In summary, the cases are generally assigned as needed in the order in which they were originally filed, with a priority to Anders cases, and with some accommodation to the experience and work habits of individual staff attorneys.

## 3. Preparation, Review, and Transmission of the Memorandum and Draft of Opinion

### a. The Memorandum

(1) Form of the Memorandum

(a) Memoranda for the First, Second, and Third Divisions

The staff does not prepare memoranda for the Fourth

Division. In cases assigned to the First, Second, and Third Divisions, the model used in the preparation of the memoranda is roughly that used in the California Court of Appeal for the First District. It is typed in separate sections under the following headings:

NATURE OF THE CASE

ISSUES

CONTENTIONS OF THE APPELLATE

CONTENTIONS OF THE APPELLEE

STATEMENT OF FACTS

DISCUSSION AND ANALYSIS

RECOMMENDATION

The statement of facts is prepared directly from the record, ignoring both the statements of facts in the briefs and the abstract. Each fact, as stated, is cited to the page of the record on which it appears. In the discussion and analysis quotations from cases are avoided, the propositions of law being plainly stated, followed by the case citation.

(b) Memoranda for the Fifth Division

The staff does not prepare a separate draft of an opinion in cases assigned to the Fifth Division. The judges of this division prefer a single document that can be reduced to an opinion by striking unnecessary matter and making such emendations as may be necessary. The form for the Fifth Division memoranda differs from that prepared for the other divisions chiefly in style. The headings are omitted and the text is written in the form of an opinion.

(2) Length of the Memoranda

The memoranda normally run between 7 to 10 legal size pages. In the early days of the project some of the memoranda were substantially longer. In answer to the questionnaire sent to the judges after the project had been in operation for a year and appearing in the Appendix, 12 of 13 judges who responded were of the opinion that the memoranda were about the right length. One thought them too long.

(3) Preparation of the Memoranda

In preparing the memoranda the staff attorney works from the briefs and from the record, ignoring the abstract or excerpts from the record. He reads the brief and the record in all cases. The extent to which he may engage in independent research varies somewhat from case to case and from staff attorney to staff attorney.

While the work is largely individually prepared, there are times at which a staff attorney may be dealing with a case in which another may be thought more current or more experienced in the law, and in such cases the attorney to whom the case is assigned may seek help from another staff attorney, or on occasion consult the Director. On rare occasions all five members of the staff have discussed a particular issue in a given case.

b. The Draft of the Opinion

In cases from the First, Second, and Third Divisions the memorandum is accompanied by a draft of an opinion setting forth the reasons for the decision and prepared in a form

that can be adopted as the opinion of the court. These opinions normally are from 3 to 5 legal size pages. In the first days of the project there were some drafts that were considerably longer, though the Staff Director reports that there has been no significant change in the average length. In the questionnaire appearing in the Appendix and submitted to the court after six months of operation and after one year, the six months answers revealed that 8 of 12 judges thought the drafts too long, while 4 thought them about the right length. In the answers at the end of a year of operation, 10 thought them about the right length and 3 thought them too long.

c. Review by the Staff Director

The Staff Director reviews all completed memoranda and drafts of opinions. If he has questions, he discusses the matter with the attorney who prepared the work. They have always been able to come to an agreement on changes. Occasionally the Director will suggest that the matter be talked over with one of the other staff attorneys, and in one or two instances the whole staff has participated in the discussion.

d. Transmission to the Court

When the memorandum and the draft of the proposed opinion are completed and have been approved by the Director, the record, briefs, and abstracts or excerpts are returned to the Bailiff's Office and the memorandum and draft of the opinion are transmitted to the chief judge of the division to which the case was assigned.

#### 4. Volume of Staff Work

Table F on the following page shows the number of cases screened from the ready lists for the year September 1, 1972, through August 31, 1973, broken down by division. Table G, following Table F, shows the number taken, number of reports submitted, and the number of opinions filed during the year. Table H, following Table G, shows the number of cases processed by the staff during the year, broken down into civil, criminal, and Anders cases, by month, with the total for the month and the average per staff attorney.

Reference to these tables indicates that during the year the Staff Director screened 903 cases from the ready lists, selecting 303 cases. The staff submitted memoranda, and in most cases drafts of an opinion, in 287 of these cases, and the court handed down opinions in 233. In addition the court referred to the staff 47 Anders cases. In these cases 45 memoranda were submitted to the court during the year and 36 opinions were filed.

On the basis of the experience in Michigan the project began with the preconceived notion that each staff attorney should be able to handle about 8 memoranda per month. This estimate proved to be very close. During the first four months of operation, the productivity per staff member grew from 2.72 a month in September, 1972, to 8 per month in December of the same year. After that, while 9 per staff attorney were turned out in May, 1973, the production leveled off to between 7 and 8 a month, with an average of 7-3/4 per

TABLE F

Number of Cases Screened from Ready Lists from September 1, 1972, through August 31, 1973, by Division of the Court and Date of Ready List

Ready List of:	Staff List No.						Total	Cumulative Total
		1st	2d	3d	4th	5th		
9/5/72	1	18	13	10	21	18	80	80
9/18/72	2	17	15	15	13	10	70	150
10/16/72	3	8	16	18	10	14	66	216
11/6/72	4	17	11	7	0	20	55	271
12/4/72	5	7	8	19	0	6	40	311
1/4/73	6	11	10	9	12	13	55	366
1/15/73	7	7	11	5	0	5	28	394
2/1/73	8	8	7	13	0	13	41	435
2/23/73	9	5	8	5	0	6	24	459
3/19/73	10	8	10	6	0	7	31	490
3/26/73	11	12	12	12	0	8	44	534
4/6/73	12	7	12	8	0	13	40	574
4/18/73	13	12	8	13	0	12	45	619
5/7/73	14	10	11	10	0	12	43	662
5/29/73	15	19	21	29	0		86	748
6/26/73	16	8	9	11	0	7	35	783
7/17/73	17	7	11	10	0	12	40	823
7/31/73	18	11	8	11	0	8	38	861
8/23/73	19	10	10	8	0	14	42	903
Total		202	211	219	56	215	903	

TABLE G

Cases Taken by the Staff, Reports Sent to the Court, and Opinions Filed by the Court  
in Staff Processed Cases, by Division, September 1, 1972, through August 31, 1973

	CASES TAKEN			REPORTS TO COURT			OPINIONS FILED		
	Cases From Ready Lists	Anders Cases	Total	Cases From Ready Lists	Anders Cases	Total	Cases From Ready Lists	Anders Cases	Total
First Division	68	13	81	63	11	74	51	7	58
Second Division	78	11	89	74	11	85	56	8	64
Third Division	67	10	77	65	10	75	52	8	60
Fourth Division	16	0	16	16	0	16	16	0	16
Fifth Division	74	13	87	69	13	82	58	13	71
Total	303	47	350	287	45	332	233	36	269

TABLE H

Number of Cases Processed by Staff  
by Month, September 1, 1972 through  
August 31, 1973

	From Ready List			Total	Per Staff Member
	Civil	Criminal	Anders		
September	3	8	0	11	2.75
October	5	13	0	18	4.5
November	9	15	0	24	6
December	12	17	3	32	8
January	8	18	3	29	7.25
February	6	16	8	30	7.5
March	10	14	7	31	7.75
April	4	22	5	31	7.75
May	8	24	4	36	9
June	1	24	4	29	7.25
July	3	21	5	29	7.25
August	3	23	6	32	8

month for the last 9 months of the year. These figures distribute all memoranda among four staff attorneys. Actually during the year of operation the Staff Director prepared 19 memoranda, or 1.6 a month. Subtracting these, the average per staff attorney, excluding the Director, was 7.36. It should be recognized, however, that the figures do not include a substantial number of other memoranda prepared and submitted to the court. In cases that prove more complex than originally anticipated, short memoranda have been prepared and appended to the cases when they were sent back to the court. The staff has been asked to prepare an occasional memorandum on a petition for rehearing. And in some instances the cases have been returned to the staff for the preparation of supplemental memoranda. During the last 9 months of the project the staff prepared in all 97 memoranda in addition to memoranda and drafts of opinions in cases taken from the ready lists. It might be expected that over time experience in the preparation of the memoranda would reduce the number of occasions on which supplemental memoranda would be called for, thus adding somewhat to the output of primary material. The amount of time that would be saved is problematical, however, since no figures were kept on the distribution of time between preparation of initial memoranda and draft opinions and the preparation of supplemental and miscellaneous memoranda.

It has already been mentioned that while a majority of the court was of the opinion that the memoranda submitted during the first 6 months of project operation were too long,

by the end of the year a large majority of those expressing an opinion thought that both the memoranda and the draft opinions were about the right length. There appears, then, little likelihood that material amounts of time could be saved by reducing the length of the memoranda. It has also been noted that the Fifth Division has its staff work done in the form of a single document that can be revised into an opinion rather than having the staff prepare an opinion and a memorandum. On the surface, at least, this mode of operation could result in a saving of time and consequent increase in production. The staff is of the opinion, however, that conceding the time saved by the fact that only one document need be typed, there is very little total time saved since the staff attorney must collect his thoughts on paper at least in rough form, before he is able to frame them in the form of an opinion. There remains the possibility that dealing with only one document saves time in the court's internal procedures.

Any speculation on the subject of increase in productivity must also take into account that the criterion that has been used to select the cases has been ease of handling. Theoretically, then, every increase will result in producing cases in ascending order of difficulty unless it may be assumed that the staff is presently unable to reach all the cases of equivalent simplicity. During the year the staff processed 31.8% of the cases screened. Due to the immediate unavailability of the record, cases that are doubtful are sometimes

substituted for cases originally selected. It seems probable, then, that any selection of a larger number of cases from present ready lists would be calculated to produce cases discernibly more complex. In this connection, however, it must be observed that the court still operates with a considerable backlog of cases and has been generous in granting extensions of time in the pre-ready period. Accordingly, as the need arises the court could easily increase the number of cases on the ready lists and this should increase proportionately those suitable for staff treatment.

Taking all these factors into consideration, it seems safe to assume that 9 memoranda a month, the figure for May, 1973, is about the highest average monthly rate than can be expected. If the staff produced at that rate for a full year, it would be preparing memoranda and draft opinions in 432 cases. If one accepts the more conservative figure 7-3/4, the average for the last 9 months of operation during the year under consideration, a full year would generate 372 staff processed cases.

#### D. DECISION OF STAFF PROCESSED CASES

##### I. Procedure in General

The memoranda and drafts of the opinions are delivered to the secretary of the chief judge of the division to which the cases are assigned. While the internal procedures of the divisions may vary, the general practice appears to be for the secretary to route the material to the individual judge to whom the case is assigned. If the judge to whom the case is

assigned is dissatisfied with the memorandum, or has questions about it, he sometimes contacts the staff attorney who prepared it for clarification, or requests supplemental work on the memorandum. If he approves the recommendation and the opinion, he initials it and passes it on to the other judges of the division. If they all approve, counsel on both sides are sent a letter indicating that the case has been examined by the court and it is of the opinion that oral argument would not be helpful in the disposition of the case and advising them that unless within 14 days they request oral argument the case will be considered as submitted. If no request is forthcoming during the 14 days, the court files the opinion per curiam, thus disposing of the case. The 14-day letter is discussed at greater length later in this report.

If any judge disagrees with the staff recommendation, the case may be set for oral argument in due course and decided after conference with a signed opinion, or if the court is unanimous in its disagreement, on occasion the staff has been called upon to draft an opinion in accordance with the court's disposition. If any judge has questions about the substance of the memorandum, the judge to whom the case was assigned may ask for supplemental staff work to clarify the issue about which his colleague is doubtful.

Table I on the following page shows the disposition of staff processed cases by the court in number per month during the year under consideration. At the beginning the opinions were slow to come down. By December 1, 1972, three months

TABLE I

Staff Processed Cases Handled by the Court September 1, 1972 through August 31, 1973:  
 No. of Memoranda Submitted and Cases Disposed of, by Month. The figures include  
Anders cases.

	Staff Processed Cases be- fore the Court at Beginning of Month	Staff Processed Cases Sub- mitted During the Month	Staff Processed Cases Dis- posed of During the Month	Staff Processed Cases be- fore the Court at End of Month
September	0	11	0	11
October	11	18	1	28
November	28	24	3	49
December	49	32	31	50
January	50	29	24	55
February	55	30	23	62
March	62	31	30	63
April	63	31	32	62
May	62	36	38	60
June	60	29	27	62
July	62	29	32	59
August	59	32	28	63

after the staff began its work, it had submitted 53 cases, and only 4 of those had been decided. In December, the court decided 31 staff processed cases, one fewer than the number submitted that month. Since that time, the decisions have come down in rough approximation of the number submitted. During the last 6 months of the year, there were 188 reports submitted and the court disposed of 187 staff processed cases. It appears then that the staff processed cases are being disposed of with an average interval of 60 days between submission of the memorandum by the staff and the filing of an opinion in the case. Some of the Anders cases, since they do not require the sending of the 14-day letter, are disposed of in as little as two weeks. In other cases the 14-day letter must be sent, and therefore except for the Anders cases each case must be put over for at least 14 days after the court has reached a tentative agreement on the disposition. It has been mentioned that in some cases the file has been returned to the staff for supplemental work. In about 10% of the cases oral argument has been scheduled, either by the court because it disagreed with the staff recommendation, or because after receiving the 14-day letter a party requested oral argument.

## 2. Treatment of the Staff Memorandum by the Court

Just exactly how the staff memorandum is treated by individual judges is obscure. Such information as we have on the subject is derived from observations by the judges at a meeting of the court on March 2, 1973, and from answers to the questionnaire submitted to the judges after 6 months of project

operation and again after a year of operation. The answers to this questionnaire are tabulated in the Appendix.

Both sources indicate that among the judges there is considerable variation in the handling of the staff material. At the meeting of March 2, attended by Justice Christian, the Project Director, the Staff Director, and the Reporter, it was suggested by Justice Christian that to make the maximum utilization of staff work, first the work of the staff should not be duplicated by the judge or his personal law clerks. If it is found inadequate or in need of supplementation it should be returned to the staff. Second, the memorandum should be read first, with reference to the briefs and the record as necessary. Several of the judges reacted to this second suggestion with some skepticism, indicating that they thought it necessary personally to read the briefs in their entirety in every case, using the memorandum as an additional source. Most made no comment.

The answers to items 2, 7, 9, and 10 of the questionnaire provide a somewhat more detailed picture of the use of the staff work by the court. In item 2 the judges were asked to indicate what part of the memorandum they found most helpful. Their responses are shown below, after 6 months of project operation and after one year.

	No. of Responses After 6 Months	No. of Responses After 1 Year
The statement of facts	5	4
The discussion of the issues and the legal analysis	7	4

	No. of Responses After 6 Months	No. of Responses After 1 Year
The recommendations	0	0
All of the above are about equally helpful	3	8
None of the above is especially helpful	0	0

Item 7 requested the judge answering the questionnaire to check the ways in which he was able to save time as a result of staff work. The categories listed in the questionnaire and the number of times each was checked are set out below.

	No. of Responses After 6 Months	No. of Responses After 1 Year
By not reading the trans- cript or the record	4	2
By not reading the briefs of the parties	1	2
By reading shorter portions of the transcript or the record than it would be necessary to read if it were not for the staff work	5	4
By reading only portions of the briefs of the parties	2	2
By being able to grasp the facts more quickly	6	8
By being able to grasp the arguments more quickly	5	9
By not having to prepare the initial drafts of per curiam opinions	6	10

Since all 11 judges answered the 6-month questionnaire and 13 the 1-year questionnaire, it is apparent that some of those responding checked more than one box in their response to items 2 and 7.

Items 9 and 10 deal with the function of the judges' personal law clerks in the disposition of staff processed cases. Item 9 was an inquiry as to whether the judge's personal law clerk reads all, some, or none of the staff memoranda. Item 10 inquired as to why. In the answers submitted after 6 months of operation, of 10 judges responding to these items, 2 indicated that in every staff processed case his clerk read the memorandum, 4 that in some cases his clerk read the memorandum, and 4 that in no case did his clerk read the memorandum. Six indicated that the purpose of having his clerk read the staff work was to verify its accuracy. Three indicated that the purpose was to assist the clerk in discussing the case with the judge. One of the judges who indicated that his clerk read some of the staff memoranda noted that this was so only in cases in which the court had reached a result different from that recommended by the staff. The answers to the questionnaire submitted after a year of operation indicate that this duplication of work has been eliminated to some extent. Only one judge reported that his clerk read every staff memorandum. Seven reported that their law clerks read none of the memoranda, while 4 indicated that the clerk read some of the memoranda, 1 noting that this is only in cases in which questions arise. Only 6 responses appeared to item 10, evenly divided between "to verify the accuracy of the memoranda" and "to assist him in discussing the case with me."

These responses suggest what might have been expected. First, they suggest that in a court that is not centrally administered the decisional process is a somewhat individual matter, and a uniform routine, however desirable that might be from the standpoint of the most efficient use of staff work, has not developed and in all likelihood will not. Second, even after a year of operation of the system a number of the judges on the court approach the question of reliance upon the staff work with considerable caution. One reason for this may lie in the disappointment of the early expectations of some of the judges. In the answers to the questionnaire submitted after 6 months of operation (item 3), 7 judges reported that the staff memoranda were "always accurate on the facts." In the answers to the questionnaire submitted at the end of the year, this response had dropped to 4. In the former, 4 judges had found that the memoranda were "always accurate on the law." In the latter, this response dropped to 2. Third, if there is an emerging pattern of treatment of the staff memoranda it appears to be to use the memorandum as a vehicle for the quick grasp of the case, its facts, issues, and arguments, to be supplemented by reading the briefs and making such reference to the record as may prove necessary. Routine duplication of the staff work has diminished, however, and the court has followed the practice suggested by Justice Christian at the meeting of March 2 to the effect that staff work that is inadequate should be returned for supplementation or correction rather than have

the judge or his clerk re-do the work. At least one of the judges has also undertaken to go over some of the memoranda with their authors to aid the learning process, and reports considerable improvement as a result. It seems probable, therefore, that time will see a growing confidence in the staff work and it will make even more of a contribution in saving judicial time than it now does.

### 3. Treatment of the Staff Recommendation

No judge, in response to either the 6-months or 1-year questionnaire, indicated that he considered the recommendation as to the disposition of the case the most helpful part of the staff work. In the early days of the project the fact that an occasional case was decided contrary to the staff recommendation led to murmurs of doubt as to the screening process. Since the cases processed by the staff were selected on the criterion of ease of disposition, some were troubled by the fact that even in cases so selected the court should come to a contrary conclusion. On the whole, however, the vast majority of cases that have been staff processed have been decided in the way recommended in the report. In the 45 cases treated under the ruling in Anders v. California that have been decided during the year of staff operation the agreement between staff recommendations and court disposition has been 100%. In the 233 cases taken from the ready lists and decided during the year, the court was in agreement with the recommendation in 217, or 93.0% of the cases. In 12, or 5.0% of the cases, the staff recommendation was not followed

and the case decided in the contrary fashion. In 4 cases, or 1.7%, the court has been in partial disagreement with the recommendation. A comparison of the staff recommendation and the court's disposition of cases appears in Table J on the following page. These percentages must be taken with some caution since they are derived from a universe of the 611 cases taken from the ready lists during the first year of project operation and decided during the same period. Since it is possible that cases taken from the ready lists during that period and not decided by the end of the year would include a higher percentage of cases in which there was a disagreement, the figures given above may be somewhat lower than the actual percentage of disagreement. It has been noted, however, that it has been the practice of the court to contact the staff in case of disagreement, and the Project Director has noted no increase in such instances since August. Further, the rate of disposition of staff processed cases from February, 1973, through August, 1973, appears to have been almost exactly the same as the rate of submission of memoranda by the staff, with a 60-day lag in time. Since the number of cases submitted to the court during the year of the project and still undecided on August 31 was 63, including 9 Anders cases, it appears quite unlikely that the court has held back any substantial number of staff processed cases from earlier months. Thus it seems probable that the final figures for the year of the project will not be greatly different from those derived from the 611 cases decided during the 12 months of operation.

TABLE J

Recommendations of Staff Compared with Disposition by Court

Staff Recommendation	Disposition by Court																					
	Affirm			Reverse or Remand			Affirm as Modified or Remand in Part			Vacate in Part			Reverse in Part		Dismiss in Part							
	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.				
Affirm	36	130	166	34	122	156	2	5	7	0	0	0	0	0	0	0	2	2	0	1	1	
Reverse or Remand	27	22	49	2	3	5	24	19	43	0	0	0	0	0	0	0	0	0	0	1	0	1
Affirm as Modified or Remand in Part	2	12	14	0	0	0	0	0	0	2	12	14	0	0	0	0	0	0	0	0	0	0
Vacate in Part	0	4	4	0	0	0	0	0	0	0	0	0	0	4	4	0	0	0	0	0	0	0
Total	65	168	233	36	125	161	26	24	50	2	12	14	0	4	4	0	2	2	1	1	2	

If these percentages prove to be close to correct for the entire year, it appears to the Reporter that they are very satisfactory. It must be remembered that the staff recommendation is not, and cannot be, a substitute for the court's decision. The occasional case in which the court comes to a contrary conclusion is but proof that the court has not treated it as such. While continued work with the staff might bring the margin of disagreement below the present 6.8%, if it were much lower there might arise an inference that the court was giving staff processed cases insufficient independent consideration. Some measure of disagreement is bound to exist, for it is doubtful that even after selecting cases on the basis of ease of disposition there would be 100% agreement among the judges themselves, let alone between the staff and the judges.

Thus the staff recommendation should not be looked upon in any sense as a decision to be reviewed by the court, but as an adjunct to the practice of staff preparation of the draft of an opinion. The court decides the case; the staff does not. But if the staff is to accompany its memorandum with a draft of an opinion, of course it must anticipate the decision. If its prediction is erroneous the time spent in writing the draft of the opinion is largely wasted. Therefore if the measure of disagreement is sufficiently large it might be better to postpone the drafting of opinions until after decision. This process would involve a certain amount of inefficiency, however, as the case would have to make two

trips to the staff, and it appears probable that the time involved in preparation of draft opinions is less when the draft is produced with the initial memorandum and while the briefs, record, and the product of independent research are fresh in the mind of the author. It has been mentioned that since the study phase of the project was to last only a year it was necessary to get the staff operating along some routine so that it could develop its volume of production and the court and the staff could develop some working relationships. It should be emphasized, however, that one of the objectives of the project was to encourage experimentation with different patterns of staff operation. Thus if one of the divisions were to consider cases on the basis of the staff memorandum without a staff recommendation and return them to the staff after decision for the draft of the opinion, the relative efficiency of such a system could be tested. As we shall see, however, the present pattern seems to be working and the judges that are using it appear to believe that, despite the 6.8% of cases in which the court must disregard the recommendation in whole or in part, (5.7% if Anders cases are included), substantial time is saved by the staff preparation of the initial draft of the opinion.

#### 4. Oral Argument in Staff Processed Cases

It has been pointed out that Illinois Supreme Court Rule 352(a) provides that oral argument is requested by printing "Oral argument requested" on the cover page of the brief and entitles the parties to argue orally unless they waive the

right. Initially there was some doubt that consistent with the Rule oral argument could be dispensed with in staff processed cases. The solution adopted was the one used by the California Court of Appeal for the First District, which operates under a similar rule. When a staff processed case has been submitted to a division and the judges of the division are unanimous in their agreement with the staff recommendation and have agreed on the form of an opinion, the court sends counsel for each party a letter indicating that the court has examined the case and is of the opinion that oral argument will not be helpful in the disposition of the case, but indicating that if any party nevertheless wishes to argue orally he may do so on request made within 14 days. If no request is made within the 14 days, the opinion is filed and the case is thus disposed of. If oral argument is requested, the case is set for argument in due course.

This procedure appears to have been very effective in reducing the number of oral arguments in staff processed cases. Table K on the following page compares the occurrence of oral argument in staff processed cases with its occurrence in cases not processed by the staff. In all cases taken together, in only 10.3% of the cases processed by the staff has oral argument been held. This is to be compared with 83.3% in cases not processed by the staff. The percentage in criminal cases has been even less (8.9%), though the difference must be read in the light of the fact that in criminal cases the percentage argued orally in cases not processed by the staff is also lower (80.0%).

TABLE K

Number and Percentage of Cases in which Oral Arguments are Held: Staff Processed Cases Compared with Cases Not Staff Processed (Cases from Ready Lists September 1, 1972 Through August 31, 1973, and Disposed of within that Period)

	Number of Cases	Number Argued Orally	Percent Argued Orally
Cases Not Staff Processed			
Criminal	175	141	80.0
Civil	203	174	85.7
Total	378	315	83.3
Cases Staff Processed			
Criminal	179	16	8.9
Civil	54	8	14.8
Total	233	24	10.3
Total Criminal	354	157	44.4
Total Civil	257	182	70.8
Total Cases	611	339	55.5

While it might be supposed that the staff processed cases being selected on the basis of ease of disposition a larger percentage of waiver could be expected even without staff screening and the sending of the 14-day letter, it seems probable that this is not the case. The Clerk's report for 1972 indicates that during the calendar year 1972, the court heard 706 oral arguments as against 133 waivers, a percentage of 84.1. In 1971, the percentage of cases decided by opinion that were argued orally was 89.9. Based on the 611 cases taken from the ready lists during the project year and decided during the same period, the percentage for all cases was 55.5. Had this percentage obtained during the calendar year 1972, there would have been 461 oral arguments instead of 706, a saving of 245, or 28.6%. As in the case of the figures dealing with staff-court disagreement the fact that the sample of 611 includes only cases that were both taken from the ready lists and decided during the year makes it somewhat biased, for it is likely that cases remaining at the end of the year are more apt to be the harder cases, and thus it is more likely that they will show a larger percentage argued orally. Further, the cases screened during the year did not include but 56 cases screened from those assigned to the Fourth Division. Since the Fourth Division did not use the staff except in 16 cases, cases decided in that division will undoubtedly show a larger percentage argued orally. Nevertheless, if the present percentage of staff processed cases is applied to the 54 that remained undecided on August 31,

and the 83.3% is applied to the Fourth Division cases and the 238 cases not processed by the staff that remained undecided on August 31, not an unreasonable assumption since any bias toward oral argument appears to be as probable in the non-staff processed cases as in those handled by the staff, the project year will show 638 oral arguments in 1053 cases taken from the ready lists, or approximately 63%. This is a saving of approximately 209 oral arguments. Translating this into judicial time, it has already been observed that the court normally hears about four cases in a morning, with the afternoon devoted to conference. Passing over the possible saving in circulating staff work without formal conference, dispensing with 209 oral arguments represents a saving of 52 mornings or 63 days of judge time.

In the 24 cases from the sample of 233 staff processed cases decided within the project year that were actually argued orally, 22 were ultimately decided in accordance with the staff's original recommendation. This is a disagreement of 8.3%. This compares with the overall disagreement between court and staff of 6.8%. While the very small numbers being considered make the comparison of percentages largely meaningless, the figures show that oral argument produced a negligible change in ultimate disposition.

##### 5. Treatment of the Staff Prepared Draft of Opinions

Responses to item 4 of the questionnaire submitted to the court after 6 months of operation indicated that two thirds of the judges responding were of the opinion that the staff

drafts of opinions were too long. Responses to item 7 showed that only a fourth of the judges responding believed that the preparation of draft opinions saved them any significant amount of time. Responses to the same items submitted after a year of operation under the project disclose that 10 of 13 judges now believe that the drafts are now approximately the correct length, and 8 of 12 who responded to item 7 believe that the preparation of the drafts do save them time.

The drafts have been variously treated. Some have been adopted without change. Some have been materially revised and adopted by the court as revised. Some have been used for such aid as they might provide in the writing of signed opinions. Most have been adopted per curiam, however, and in such cases the practice is to print the head notes only.

It has already been mentioned that the Fifth Division receives a single document from the staff. This document is in opinion form but longer and more detailed than an opinion for filing. The court by deletions and such emendations as it thinks necessary works the document into an opinion. Until April, 1973, these opinions were reported to the Clerk's Office as allotted to the individual judges of the division without identifying by judge how many per curiam opinions were filed. Beginning with the quarterly report for the second quarter of 1973, the per curiam opinions are distributed among the judges, rather than included in the number of opinions filed by each judge.

The Third Division has reported the number of signed opinions by judge and has preferred to report the number of per curiam opinions as a single number for the division, and this reporting practice continues.

E. EFFECT OF THE STAFF ON THE PRODUCTIVITY OF THE COURT

Table L shows the number of cases pending at the beginning of the year, the number disposed of during the year, the number filed during the year, the number pending at the end of the year, and the net increase or decrease in the number pending, for the year of the project's operation and the two preceding years. Table M breaks these figures down by month for the year of the project. Table L shows that the total number of dispositions during the year of the project was 1627. This represents an increase of 525 over the previous 12 months, or 47.6%. This very large increase in dispositions, coupled with the fact that the number of new cases filed during the 12 months period dropped by 120, resulted in a net gain on the court's backlog of 109, reducing the number of cases pending at the end of the year from 1998 to 1889.

Precisely what part the staff work played in the gains from September 1, 1972, through August 31, 1973, is more difficult to state with confidence. In the first place, total dispositions by the court include cases disposed of by written opinion, dismissals, transfers to the Supreme Court, confessions of error, denial of permissive interlocutory appeals, denial of permission to file notices of appeal out of time, denials of permission to file the record out of time,

TABLE L

Effect of Dispositions During the Year of the Operation of the Appellate Court Project on the backlog. Number of Cases Pending, Dispositions, and New Cases Filed: Year of Project Compared With Two Previous Years

	Number of Cases Pending at Beginning of Year	Number of Cases Disposed of During Year	Number of New Cases Filed During Year	Number of Cases Pending at End of Year	Net Increase or Decrease in Number of Pending Cases
Sept. 1970 - Aug. 1971	1386	934	1010	1462	+ 52
Sept. 1971 - Aug. 1972	1463	1102	1638	1998	+ 111
Sept. 1972 - Aug. 1973	1698	1627	1518	1889	- 109

TABLE M

Effect of Dispositions During the Year of the Operation of the Appellate Court Project on the Backlog: Number of Cases Pending, Dispositions, and New Cases Filed by Month, September 1, 1972, through August 31, 1973

	Number of Cases Pend- ing at Be- ginning of Month	Number of Cases Dis- posed of During Month	Number of New Cases Filed During Month	Number of Cases Pend- at End of Month	Net Increase or Decrease in Number of Pending Cases	Cum.
Sept. 1972	1998	105	122	2015	+ 17	+ 17
Oct. 1972	2015	108	123	2030	+ 15	+ 32
Nov. 1972	2030	112	116	2034	+ 4	+ 36
Dec. 1972	2034	170	104	1968	- 66	- 30
Jan. 1973	1968	109	145	2004	+ 36	+ 6
Feb. 1973	2004	121	128	2011	+ 7	+ 13
Mar. 1973	2011	132	158	2037	+ 26	+ 39
Apr. 1973	2037	166	106	1977	- 60	- 21
May 1973	1977	153	133	1957	- 20	- 41
June 1973	1957	186	121	1892	- 65	-106
July 1973	1892	147	136	1881	- 11	-117
Aug. 1973	1881	118	126	1889	+ 8	-109
Sept. 1973	1889	Tot 1627	Tot 1518			

and denials of permission to appeal from orders granting a new trial. Since figures on these dispositions on motion are not recorded except by calendar years and quarters of the calendar year, it is impossible to state accurately how many such dispositions there were during the September through August period, either during the project year under study or in previous comparable periods. The figures for the calendar year 1971 show that there were 280 such dispositions, compared with 740 dispositions by opinion, or 25% of the total number of cases disposed of. During the calendar year 1972, there were 373, compared with 865 dispositions by opinion, or 30% of the total. In 1973 the percentage appears to be approximately the same. During the year under study the staff had no direct duties in the processing of such cases. Further, since the Clerk's Report does not distribute such dispositions among the five divisions of the court, there is no way to compare the number of such dispositions by the four divisions using staff assistance, and the number disposed of by the Fourth Division, which operated without staff assistance.

In the second place the inability to distribute total dispositions to individual judges makes it impossible to adjust precisely for the impact of the addition of four judges during the project year. Figures are available on the number of opinions filed by these four judges during the second, third, and fourth quarters of the calendar year 1973 (the first three quarters of their service), but their precise contribution to the motion practice is impossible to measure.

Further, the number of majority opinions filed is not a precise equivalent to the number of cases disposed of by opinion, as that designation is used in the figures reported by the Clerk's Office. This is so because in cases in which there are related appeals they sometimes are given different docket numbers, and therefore recorded as separate cases, though all disposed of in a single opinion. In 1971 the figures show 691 majority opinions, but 740 cases disposed of by opinion. In 1972, the figures were 822 majority opinions, but 865 cases disposed of by opinion. When the dispositions by motion, or otherwise than by opinion, and the dispositions accounted for by consolidation of related cases are added, the figures for the years 1971, 1972, and 1973 indicate that they total about 50% of the number of majority opinions filed (48% in 1971, 51% in 1972, and 56% in 1973). If it could be assumed that the contribution of the four new judges to the motion practice during their first five months on the court was in the same proportion as their contribution of majority opinions, and further assumed that five-sixths of their opinions during their first six months can be treated as produced during their first five months, it is possible to approximate the number of total dispositions accounted for by the addition of judges during the project year. During the first two quarters of their service, the four judges filed 70 opinions. Treating five-sixths of these as occurring during the project year, they accounted for 58 majority opinions. Multiplying this number by 1.56, the ratio of total dispositions to

majority opinions for the whole court during the year 1973, it can be estimated that the expansion of the court during the seventh month of the project year increased the total dispositions for the year by approximately 90 cases. Subtracting 90 from 525, it can be estimated that if the court had remained the same size, it would have shown a gain of 435 cases during the first year of the project operation over the number disposed of during the previous 12 months, or 39.5%. This appears to be a conservative estimate since it takes no account of the fact that three of the four added judges served on divisions served by the staff. Had no judges been added, whatever proportion of staff time that went into services to the three new judges on these divisions would have been available to the original judges. It seems likely, therefore, that the gain in dispositions would have been somewhat in excess of the estimate of 435.

Figures for the first four months of the second year of staff operation (September 1, 1973, through December 31, 1973) indicate that the number of total dispositions has continued to rise. The number of cases disposed of during this period compares with dispositions during the same months in 1972 as follows:

	1972	1973
September	105	128
October	108	141
November	112	186
December	170	146
Total	495	601

This represents a gain of 106 cases, or 21.4%. If this figure is adjusted to eliminate the contribution of the added judges in the same fashion, and making the same assumptions outlined above, however, it appears that had the court remained as it was constituted at the beginning of the project year the number of dispositions would be 494, or almost exactly the estimate for the same months in 1972. Since the last four months of 1972 included two months start-up time during which the production of the staff was significantly lower than it was in succeeding months, it might be expected that the figure for the same period in 1973 would be larger. Here, again, it must be taken into account that the figure is a fictional one indicating how many cases would have been disposed of had no judges been added to the court, and the expected gain through increased productivity of the staff is largely eliminated by the fact that in the subject period in 1972 the original judges received the benefit of 100% of the staff work, while in 1973 they received only 75% of the services:

It has been pointed out that the comparison of the number of total dispositions during the project year September 1, 1972, through August 31, 1973, with the number of dispositions during the previous 12 months is possible, but suffers from the fact that total dispositions are not distributed among judges or among divisions and therefore it is not possible to measure precisely the effect of the addition of four new judges during the project year. In the case of production of majority opinions it is possible to eliminate those filed

by the new judges and those filed by the judges of the Fourth Division, which did not receive assistance from the staff, and thus to compare the production of majority opinions by the original 12 judges sitting on the four divisions that were assisted by the project during successive periods. Unfortunately, however, since the number of opinions filed has been recorded only for calendar years, and quarters of the calendar year, it is not possible to construct figures for successive 12-month periods beginning on September 1, and ending on August 31. What has been done is to compare the number of majority opinions filed by the First, Second, Third, and Fifth Divisions in 1971 (the last calendar year before the project was started), 1972 (during which the project operated for four months), and 1973 (a full year of project operation, though including four months outside the period originally selected for study). To preserve comparability, the opinions of judges replacing a sitting judge are included, but the opinions of the judges that were added to these divisions were excluded.

These figures are set forth in Table N. They show that in 1971, the four three-judge divisions filed 519 majority opinions, or an average of 43.25 per judge. In 1972, the same divisions accounted for 656 majority opinions, or 54.67 per judge. In 1973, they accounted for 806 majority opinions, or 67.17 per judge.

This represents a gain of 137 majority opinions in 1972, or 11.4 opinions per judge, and 150 in 1973, or 12.5 per judge.

TABLE N

Comparison of the Number of Cases Disposed of by Opinion in the First, Second, Third, and Fifth Divisions, Excluding Cases Disposed of by Judges Assigned to the Divisions in 1973, by Division, 1971, 1972, and 1973.

	First Division	Second Division	Third Division	Fifth Division	Total
Number of Cases Disposed of by Opinion in 1971	134	126	130	129	519
Average per Judge	44.67	42.00	43.33	43.00	43.25
Number of Cases Disposed of by Opinion in 1972					
By Signed Opinion	158	156	153	158	635
Per Curiam		2	7	12	21
Total	168	158	160	170	656
Average per Judge	56.00	52.67	53.33	56.67	54.67
Number of Cases Disposed of by Opinion in 1973					
By Signed Opinion	156	113	138	146	553
Per Curiam	58	67	65	63	253
Total	214	180	203	209	806
Average per Judge	71.33	60.00	67.67	69.67	67.17

In 1973, one division averaged 71.33 majority opinions, a gain of 15 per judge over the figure for 1972.

As in the case of total dispositions, however, there remains the question of causal connection. Between 1971, the last full year of operation without staff assistance, and 1972, during which the four divisions involved disposed of only 21 staff-processed cases, the number of majority opinions per judge rose from 43.25 to 54.67, an increase of 11.4 per judge. It is apparent, then, that in 1972 the court was able to make a sharp improvement in its internal efficiency with but negligible aid from the staff operation. It is worthy of note, however, that even after this sharp increase during 1972, the year 1973 showed an even larger increase in majority opinions per judge. Theoretically, of course, such an increase was possible independent of the project. It is to be noted, however, that during 1972 no single judge produced more than 65 majority opinions. In 1973, the average production of the veteran judges who were assisted by the staff exceeded this figure.

Further evidence that the staff screening and processing of cases had a very considerable role in the increase in rate of disposition is to be seen by comparing the number of majority opinions filed during 1973 by the Fourth Division, which did not work with staff assistance, and the number filed in the four divisions that did. In 1971, the Fourth Division produced 143 majority opinions, compared with an average of 130 in the other four divisions. In 1972, the Fourth produced

179, compared with an average of 158 in the other divisions. In 1973, excluding the new judge, it produced 168 majority opinions, compared with an average of over 201 for the four staff assisted divisions.

These figures suggest that absent some change in the mode of operation, the 1972 level of majority opinions may have been approaching a maximum, and that the substantial gains of 1973 are largely attributable to the staff assistance. This suggestion is buttressed by an examination of the figures for individual judges. Of the 13 judges who served during all of 1972 and all of 1973, three did not receive staff assistance during 1973. One of these three produced exactly the same number of majority opinions as he did in 1972. One dropped by 5%, and one by 14%. The remaining 10, working with the assistance of the staff, showed individual increases ranging from 5% to 63%, with an average gain of 29% over their production in 1972. Eight of the 10 produced more majority opinions than the largest individual figure for any judge during 1972, and one exceeded this figure by 20%.

It is also of interest to note that during the last three quarters of the calendar year 1973, the first three quarters during which figures for the four new judges appear in the Clerk's statistics, these figures indicate that the three who operated with staff assistance all produced a significantly larger number of majority opinions than the one who operated without it, by margins varying between 25% and 71%. While comparisons within such a small group are of no statistical

significance, these figures appear strikingly similar to those on dispositions by the other judges.

Another reason for believing that the operation of the staff has resulted in substantial savings in judicial time convertible into higher productivity is the fact that despite initial doubts on the part of some, 11 out of 12 judges who operated under the system for a year believe it to be true. This matter is discussed in connection with the general discussion of judicial opinion of the project in a subsequent section.

#### F. THE PROBLEM OF MEASURING QUALITY

Assuming that by staff screening, preparation of prehearing memoranda, staff recommendations, and a draft of a per curiam opinion, followed by waiver of oral argument and circulation of the papers for approval, the court will save a considerable amount of time, there remains the question as to whether this procedure will affect materially the quality of the judicial process, either favorably or adversely.

One measure of the quality would be, of course, the extent to which cases disposed of after staff processing hold up on further review in the state supreme court. Unfortunately, the decision to examine the results of the year of staff operation immediately after the close of the period makes it impossible to gather figures on what happens to staff processed cases in which leave to appeal is granted. There are figures, however, on the grant of leave to appeal, though because of the short period between the end of the year and the submission

of this report they are not complete. The Reporter is informed that in 39 of the 233 cases processed by the staff during the year and decided during the same period, petitions for leave to appeal to the Supreme Court have been filed. Of these petitions, 12 have been denied, 4 allowed, and 10 are pending. None has been heard on the merits.

Another measure of the quality of the adjudication might be the number of petitions for rehearing made and granted by the court in staff processed cases decided on per curiam opinions compared with the rate of application for rehearing and the number of such motions granted in other cases. The Staff Director reports that he has been able to determine that application for rehearing was made and disposed of in 11 of the 233 cases processed and decided during the year of operation. Of these, 3 were granted. In one of those the court has handed down an opinion after rehearing. The other two cases are still pending. Nine petitions for rehearing were denied, but in one of those the court modified its opinion, and in four others wrote a supplemental opinion.

No statistics are available on petitions for rehearing in other cases handed down during the same period. If one looks at the statistics on rehearing during the calendar years 1971 and 1972, however, it becomes apparent that if the figures on staff processed cases are reasonably complete, these cases have not produced an unusual number of motions. In 1971, the court disposed of 1020 cases, 740 of these by opinion. There were 131 petitions for rehearing filed during

the same period. There is no way to break this figure down to show how many petitions were filed in cases disposed of by opinion and how many in other cases. Further, since a petition in a case decided at the end of the year may be made during the following year, there is a small overlap between the years. Setting aside these flaws in the figures, the number of petitions filed equals 12.8% of the number of cases disposed of and 17.7% of the cases disposed of by opinion. In 1972, the figures are similar. The court disposed of 1238 cases, 865 of them by opinion. Petitions for rehearing were filed in 154 cases, 12.4% of the cases disposed of and 17.8% of the figure for cases disposed of by opinion.

It is to be stressed that the figures on the staff processed cases disposed of during the period September 1, 1972, through August 31, 1973, may not be complete. With only 13 petitions for rehearing, a percentage of 5.5%, it seems quite likely that they are not. It does appear, however, that the staff processed cases have brought no flood of petitions, and there is no evidence that the litigants have been dissatisfied with the result in measurably more cases than litigants are always dissatisfied with the result.

In those cases in which petitions for rehearing have been filed, however, it does appear that the court has granted a much larger percentage. In 1971, the court disposed of 136 petitions for rehearing, denying 129 and granting only 7, or 5%. In 1972, it decided 143, granting 3, or 2%. In the case

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of the 233 cases processed by the staff in the year of the project and decided during that year, of the 13 petitions recorded, the court granted 3, a percentage of 23%. The numbers are so small, however, that they are probably without significance. It is also notable that in the 10 cases in which rehearing was denied the court wrote 4 supplemental opinions, and modified its opinion in a fifth case. This may bespeak a certain caution about the disposition of project cases. Certainly if any large percentage of staff processed cases would call for re-examination and supplemental opinions, the efficiency of the system would be greatly compromised. It should be noted, however, that when the number of cases in which rehearing has actually been granted is computed it turns out to be only 1.3%. So even if these small samples should be trusted, and it could be assumed that petitions for rehearing would be granted in a larger number of cases than they would be after adjudication in the ordinary fashion, the burden of reconsideration has not proved to be great.

No attempt has been made to do any appraisal of the substantive correctness of the decisions. It has already been pointed out that the results in such of them as have been accepted for review by the Illinois Supreme Court are not at present available. Nor, in most instances, is the result in cases accepted for rehearing by the Appellate Court. Any attempt at an independent appraisal of substantive result in staff processed decisions as compared with other decisions of the court would of course involve the project staff in a futile exercise at playing judge.

In tables O and P, the numbers and percentage of cases reversed and not reversed in cases processed by the staff are compared with the numbers and percentage of cases reversed and not reversed in other cases decided during the same period. The figures in these tables suggest that there are some differences between the average result in staff processed and other cases. In criminal cases, for example, it will be noted that the percentage of affirmances is somewhat higher in staff processed cases, despite the fact that in some cases in which the staff recommended affirmance the court reversed. Thus it appears that in staff processed criminal cases there has been an 84.5% recommendation against reversal. The court has reduced the percentage to 82.0% but it remains somewhat higher than the percentage of criminal cases handled directly by the court and not reversed (77.4). The comparison between staff recommendations and actual disposition of cases has already been discussed. If the difference between recommendation and ultimate disposition were great, which it is not, of course it would raise questions about the trust that the court could put in the work of the staff. It would have no significance however, in measuring the quality of the ultimate disposition of staff processed cases in comparison with the disposition of other cases inasmuch as in cases in which the court has disagreed with the staff recommendation and disposed of the case in a contrary fashion, the disposition was not influenced by the recommendation. The significant comparison is, then, the disposition of staff

TABLE O

No. of Cases Reversed and Not Reversed Staff Recommendation, Court Disposition of Staff Processed Cases, Other Cases, and Total Cases; Cases from Ready Lists September 1, 1972 through August 31, 1973, and Decided during the Same Period

	Staff Recommendation			Disposition by the Court-Staff Processed Cases			Disposition By the Court-Other Cases			Disposition By the Court-All Cases		
	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.
Not Reversed	38	142	180	39	138	177	153	144	297	192	282	474
Reversed (in whole or part)	27	26	53	26	30	56	39	42	81	65	72	137
Total	65	168	233	65	168	233	192	186	378	257	354	611

TABLE P

Percentage of Cases Reversed and Not Reversed Staff Recommendation, Court Disposition of Staff Processed Cases, Other Cases, and Total Cases; Cases from Ready Lists September 1, 1972, through August 31, 1973, and Decided during the Same Period.

	Staff Recommendation			Disposition By the Court-Staff Processed Cases			Disposition By the Court-Other Cases			Disposition By the Court-All Cases		
	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.	Civ.	Crim.	Tot.
Not Reversed	58.5	84.5	77.3	60.0	82.0	76.0	79.7	77.4	78.6	74.7	79.7	77.6
Reversed (in Whole or part)	41.5	15.5	22.7	40.0	17.9	24.0	20.3	22.6	21.4	25.3	20.3	22.4

processed cases by the court compared with the disposition of other cases. Of 168 staff processed criminal cases, 30 were reversed, a percentage of 17.9. In cases not handled by the staff, of 186 criminal cases 42 were reversed, a percentage of 22.6. If it could be assumed that these were similar cases, of course this would warrant further study. Since the staff processed cases were selected on the criterion of ease of disposition, however, it might be expected that the percentage of cases reversed would be smaller. It is interesting to note, however, that in civil cases the exact opposite relationship obtains. In staff processed cases the reversal rate was 40%, while in other cases it was 20.3%. The staff recommendations were even more heavily weighted toward reversal (41.5%). Thus it appears that in criminal cases the staff recommendations are somewhat more weighted to affirmance than other cases and the court has closed the gap slightly by reversing some of the cases recommended for affirmance, while in civil cases the recommendations have been noticeably more weighted toward reversal than other cases and the court has closed the gap slightly by affirming some cases in which the staff recommended reversal. While these relationships warrant further study, it appears probable that the difference lies in the screening process. In the criminal cases it seems that what has been identified as the "easiest" cases have been those in which the appeal is on the surface unmeritorious, while the "easiest" cases in the civil category have been those in

which there is plain error. In any event, the figures do not speak in terms of the quality of disposition.

The only other evidence available on the subject of quality is the impressions of the judges that have used the staff work. This matter is discussed at greater length in the section on judicial opinion. There it is pointed out that while there is some indication that opinions among the judges differ, most of those who have used the staff system believe that the use of the staff has not materially affected quality, either for better or for worse.

It is possible that it would be useful to investigate the percentage of affirmances and reversals in the Fourth Division, which did not use the staff work, compared with affirmances and reversals in the other four divisions in the year preceding the project and the year of the project. This would require the reconstruction of figures for the year preceding the project by division and a before and after comparison because inter-divisional comparisons might be affected by the rate of reversal by particular groups of judges. It is to be noted that we have no figures on this subject, but if we had them it would be easier to appraise the significance of differences between staff processed cases and others. If they were to show, for example, that there are significant differences in rate of reversal as between divisions, the relatively small differences in percentage of reversal of staff processed and other cases would appear in a different light.

In summary, there is no very easy way to measure the quality of the judicial process and the effect of staff work on it. If the staff operation is continued in Illinois, however, the question should be the subject of continued study.

#### G. THE COSTS OF THE PROJECT

The total cost of the project for the year September 1, 1972, through August 31, 1973, was \$183,177, broken down as follows:

Salaries	\$141,082
Fringe Benefits	21,868
Travel	64
Equipment	4,257
Equipment Rental	1,671
Office Rental	7,968
Other Office Expense	2,486
Overhead Charged to Project	3,781

At the time the project began the personal clerks to the judges were paid \$13,800 per year. Thus to increase the number of clerks from two to three per judge in the 20-judge court contemplated at the time would have cost \$276,000 in salaries, plus fringe benefits and the cost of housing an additional 20 clerks. The clerks do not have secretaries or other support personnel. At present they are housed two in an office. While the total cost would vary depending upon what physical arrangements could be made, a conservative estimate would exceed \$300,000.

A second alternative to be considered is the addition of new judges. At the time the project began Illinois Appellate Judges were paid \$40,000 a year, and the court sat in divisions of three judges. Each judge has a secretary, presently paid \$12,000, and two clerks whose salaries at the time were \$13,800. The chambers of a judge are estimated by the court's Administrative Assistant at \$900 at present rentals. This makes a total of \$80,500 per judge, or \$241,500 for a division of three. This figure does not include fringe benefits, or the fact that in the opinion of the Administrative Assistant the addition of a division would almost certainly require the addition of an employee in the Clerk's Office. Thus it appears that the total cost of adding a three judge division would be close to \$300,000. Since the start of the project the court has been organized into four judge divisions. The salaries of the clerks have been increased to \$15,000. Thus the present cost of adding another division would be \$310,000, plus fringe benefits, the cost of space for eight clerks, and the cost of equipment.

It has already been pointed out that the precise contribution of the staff work is not precisely measurable. If the gross improvement of 525 dispositions over the number for the previous year were all attributable to the staff operation, it would be the equivalent of two divisions of three judges each, which would have cost a minimum of \$500,000. Even if half the improvement is attributed to the project, the saving was in the neighborhood of \$60,000.

#### H. JUDICIAL OPINION OF THE PROJECT

As already mentioned, six months after the start of the project the Staff Director circulated to the court a questionnaire designed to poll the judges on their reactions to the way in which the project was operating. At the end of the year the same questionnaire was circulated again. Eleven judges responded to the first questionnaire, 13 to the second. One of the judges who answered the first did not answer the second. Two of the responses to the second were unidentified. Some of the judges did not answer all the questions. The questions and a tabulation of the responses is set out in the Appendix. It is apparent that because of the small numbers involved, the scattered responses, and the incomplete returns, elaborate statistical analysis of these questionnaires would be worthless. What we know of the judicial response to the year of the operation of the project, then, must be pieced together from the answers to some of the more general questions, impressions gathered from two meetings with the court, the last on March 2, 1973, and conversations the Staff Director and the Reporter have had with members of the court. All these impressions suggest that from the outset at least some of the judges were skeptical about the contribution that staff screening and recommendations can make to the decisional process without diluting the judicial function. This skepticism was shared by Justice Walter V. Schaefer of the Illinois Supreme Court. Speaking at the annual alumni dinner of the University of Chicago Law School in the Spring

of 1973, Justice Schaefer expressed his concern over the possibility that staff screening to identify "easy" cases, and placing these cases on a special track for more summary disposition, would have an untoward effect upon the growth function of the law. Only by forcing judges to go through the "agony of decision," he believed, does one get judges to keep reexamining their precedents. The answers of the judges of the First District to the questionnaires about their use and opinion of the staff work during the year of the project indicate that many members of the court have shared Justice Schaefer's concern. After a year of operation under the project, only 2 judges reported that they were able to save time in staff processed cases by not reading the briefs of the parties, and one of those qualified his answer. Only 2 found that they could save time by reading only portions of the briefs. Thus presumably two thirds of the judges believe that despite the staff memorandum they must read the briefs in their entirety. Half apparently feel that the staff work does not reduce the time consumed in recourse to the record.

The staff work has been looked upon by most of the members of the court, then, as properly something in addition to, rather than in substitution for, the briefs of the parties and the record. In the first questionnaire one judge suggested that if he were to read the staff memorandum carefully it would add to the time it takes to make a decision, rather than subtract from it. One judge noted that he personally reads the briefs and all staff work. Another, in response

to the question as to whether the staff work saved him time wrote in "uneven results."

A comparison of the responses to the first questionnaire with those to the second indicates, however, that despite this notable reluctance to accept the work of the staff in substitution for a full personal consideration of the papers in the case, there was a marked change in feeling about the overall contribution of staff work to the decisional process. Thus in response to item 5, the first questionnaire indicated that five judges thought that the staff work saved them time, one that it did not, and four were uncertain. One found the results "uneven." On the second questionnaire, 11 of the 12 judges answering the questionnaire found that there was a significant saving in time, with one uncertain.

The responses to item 7 have already been discussed in the section on treatment of the staff report by the court. There it is pointed out that the judges have found that the utility of the staff work lies largely in aiding the court in a quick grasp of the facts, issues, and arguments, and in the preparation of the initial draft of the opinion.

Item 11 of the questionnaire reads:

"Laying aside the question of time saved, it is my overall feeling that in the cases on which the staff has worked, the staff work

has made no significant difference in the quality of the treatment or adjudication received by such cases in this court

has made a significant difference in the quality of treatment or adjudication received by such cases in this court."

Item 12 goes on to request that if the answer to item 11 is to the effect that the staff work has made a significant difference in the quality of treatment or adjudication, the judge answering the questionnaire should state precisely how.

The responses to item 11 were as follows:

	After 6 Months No. of Judges	After 1 Year No. of Judges
has made no significant difference in quality	7	9
has made a significant difference in quality	1	4
wrote in "no opinion"	2	0
not responding	1	0

In the six months questionnaire the judge answering item 11 to the effect that the work of the staff had made a significant difference in quality made the following response to item 12: "I personally read the briefs on all staff work. I think there have been two instances where I disagreed with the conclusions." While this response is not altogether clear, it seems to reflect the opinion that (1) the judges should read the briefs in all cases and should not rely upon the staff work, and (2) that the extent of reliance by some of the judges on the staff work, either real or hypothetical, would make for a lower quality of disposition. In the one year questionnaire, two of the four judges who indicated in their response to item 11 that staff work had made a difference in quality responded to item 12. One wrote "a more searching analysis of the issues." Another responded "The staff, so far as I am concerned,

functions as a super-duper law clerk, with wider experience than our regular law clerks and hence more useful." The remaining two did not answer item 12, so it is impossible to say whether they consider the influence on quality salutary or baneful.

In individual conversations with several of the judges the Reporter has heard a number of observations that suggest a certain ambivalence toward the central staff concept. One of the judges expressed the opinion that he got better work from his law clerks than from the staff, not because the clerks were better trained or more competent, but because he could consult with them in the course of the preparation of the work rather than simply receiving it as a finished product. On the other hand, another judge said that the trouble with personal clerks is that they are employed only for a year, out of which they spend the first three months preparing for the bar examination and the last three looking for a job. Another, conceding that a person with some experience can be of more help than clerks just out of law school, observed that if the present system permitted the hiring of personal clerks at a higher salary and on a permanent basis, they would be of more service than the staff.

In summary, it seems clear that at the outset judicial opinion about the California pattern of staff screening to identify the "easy" cases, preparation of a memorandum, recommendation, and draft opinion in those cases, and the circulation of the papers for the initials of the judges,

followed by the filing of an unpublished per curiam opinion, was mixed. It still appears to be mixed. There appears to be a substantial majority, however, that believes that as operated the staff has made significant contributions to a more expeditious disposition of cases without affecting adversely the quality of the adjudication. The court has made application for funds to continue the project, and the assumption seems to be that organized research staff in some form will in all likelihood become a permanent feature of the Illinois appellate process. Just what form it is likely to take is not readily apparent. Proposals have been under discussion for a staff to serve the Illinois Appellate Court on a statewide basis. The creation of one staff in Cook County and another to serve the rest of the Districts has been suggested as an alternative. In the meanwhile the Fourth District in Springfield has created a central staff by pooling clerks, the function limited to the preparation of prehearing reports. There, as in Cook County, judicial opinion is mixed, one of the judges declining to participate.

#### IV. AN APPRAISAL OF THE ILLINOIS PROJECT

Any appraisal of the success of the Illinois project must be made in the light of its objectives. As noted earlier, the over-all objectives of the Appellate Justice Project were: (1) to assist the participating courts in accelerating the appellate process, (2) to demonstrate the utility of using a centrally organized and supervised staff in the handling of a high volume of appeals without affecting the quality of the adjudicatory process, and (3) to study other changes in appellate procedure that show promise in improving the process. In addition to these objectives, there was the hope that as a by-product the staff could assemble data on the cases it screened that might be useful in future study of the appellate process.

The aid aspects of the Illinois project appear to have been at least moderately successful. In terms of gross dispositions the court was able to handle 525 cases more than the total for the previous twelve months, and while this increase cannot be attributed entirely to the operation of the project, there appears to be virtual unanimity of opinion that the project played a significant role in accelerating the disposition of cases.

The importance of this improvement in the rate of dispositions can be seen by comparing the position in which the court found itself on the eve of the commencement of the project with the position in which it found itself after one year of project operation. On September 1, 1972, there were 1998 cases pending. During the previous twelve months the court had disposed of 1102 cases. Thus the number of cases pending was 1.8 times the annual rate of disposition. This means that if the same rate of disposition should continue, the court could reach the last case in 21.6 months. Further, since the previous twelve months had seen 1638 new cases filed, the dismal prospect was that if both the rate of disposition and the rate of new filings remained constant during the year, September 1, 1973 would find the court with 2,534 cases pending. This would be 2.3 times the rate of disposition, and to reach the last case would take over two years and three months. Instead, on September 1, 1973, there were 1889 cases pending, and the court had disposed of 1627 cases during the year. Thus the number pending was 1.16 times the disposition rate and the last case could be reached in less than one year and two months.

Figures that have become available since the end of the project year indicate that the four closing months of 1973 brought additional improvement in the position of the court. On January 1, 1974, there were 1689 cases pending and during the calendar year 1973 the court disposed of 1733 cases. Thus the number of cases pending was 97% of the annual disposition

rate, reducing the time it would take to reach the last case to less than a year.

Two factors unrelated to the project contributed to the improvement in the picture during the course of the year. First, after the project had been underway for seven months four new judges were assigned to the court's five divisions, raising the number of judges on each division to four, and the total number of judges to 20. The problem that this change in numbers creates in appraising the precise impact of the project has already been discussed. In terms of the year end picture, however, it is clear that the fact that the new judges were active during only a minor fraction of the project year means that there is an even greater potential for increase in the rate of disposition.

During the year 1973 the four new judges were active during the second, third, and fourth quarters. During the second quarter they produced a total of 31 majority opinions, during the third, a total of 39, and during the fourth, a total of 57, a figure within the range of the number of opinions produced by the veteran judges. If this figure were maintained for a full year the four new judges would account for an additional 101 majority opinions. If the relationship between majority opinions and total dispositions that has obtained through the last three years (roughly 1 to 1½) holds true, this would mean an additional 151 cases disposed of, indicating that the 20-judge court has a potential disposition rate of 1884 cases a year, and the 1689 cases pending on

January 1, 1974 represents a lapse of time of less than 11 months between docketing and disposition. This estimate is verified by the fact that during the fourth quarter of 1973, the quarter in which the new judges reached an average of 57 cases a year by majority opinion, the court did dispose of 473 cases, an annual rate of 1892. If it should maintain a rate of 1884 cases in 1974, and 1974 produced no more new cases than were filed in 1973, January 1, 1975 would see the number of pending cases reduced to 1259, and the time between docketing and decision reduced to eight months.

The second factor that contributed to the improvement in the picture is more difficult to appraise. In the year September 1, 1972, through August 31, 1973, the number of new cases filed dropped to 1518 from the figure 1638 for the previous twelve months. But for the drop in new filings, it will be noted, even with the aid of the project staff, and during part of the year the aid of four new judges, the court would have finished the year with an addition of 11 cases to its total number pending rather than reducing the number by 109. Whether the peak in filings has been reached, or whether the project will prove to be atypical is problematical. There has been local speculation that changes in Illinois procedure with regard to juvenile and mental health cases may be expected to produce substantial new sources of appeals, and that appeals in environmental proceedings can be expected to grow. Despite this skepticism, the last four months of 1973 saw a continued drop in the number of new cases filed. During this

period 401 new appeals were filed, a drop of nearly 14% from the number filed during the same months in 1972, and an annual rate of 1203, approximately the number filed in 1971.

In summary, it can hardly be doubted that the assistance grant for the hiring and maintenance of the staff has made some significant contribution to enabling the court to improve its position. It is clear, however, that had it not been for the addition of new judges and the drop in the number of new cases filed, the court would have ended the first project year with a deficit.

From the standpoint of the second objective, the demonstration of the utility of professional staff, the Reporter considers it to have been a qualified success. It has already been pointed out that the improvement in rate of disposition went up sharply during the year of operation of the project, and while it is impossible to quantify precisely the contribution of staff work to this improvement, the judges who have worked with the staff are of the opinion, by a margin of 12 to 1, that the staff procedures resulted in substantial savings in their time. Eleven of 13 believe that the quality of disposition was unchanged or improved. The court has made application for a grant to continue the project and the topic of creation of a permanent staff is currently under discussion.

The hope that figures could be obtained that would quantify the contribution of staff operation, for the purposes of comparing its efficiency with other modes of operation, has proved largely illusory. There are several ways in which comparisons

might be drawn. One is, of course, to compare periods of time under one mode of operation with periods under another. This is what has had to be done in the project report. The problem with such comparisons is, however, that they presuppose the existence of comparable statistics for the periods. In Illinois, prior to January 1, 1973, while the figure for the gross number of dispositions by the entire court was available on a monthly basis, other figures were recorded for the calendar year. Thus it is impossible to say how many cases a particular division, or particular judge, disposed of during half of one year and half of another. On January 1, 1973, the Clerk of the Court began to record opinions filed by each judge during the quarter. The project was originally scheduled to begin operation on July 1, 1972; had that been possible, it would have corresponded with the quarters for which information would be available, at least during the second half of its operation. Because of delays in the financing and inability to proceed with commitments, however, the project actually began on September 1, 1972. Thus even in the second half of the operation, the Clerk's quarterly statistics for the first three quarters of the year run through one month not within the year of the study. This becomes a problem because of the addition of four judges to the court in the course of the project. Thus it is impossible to say with precision what effect the work of these additional judges had during the portion of the project during which they were members of the court. Comparisons of dispositions by

dismissal, withdrawal, and other dispositions without opinion are also kept only for the calendar year. Thus any comparison must be made either between 1971 and 1972 (the year before the start of the project and the year during which it started but during which it was in operation only four months), or between 1972 and 1973 (a year during which the project was in operation only four months and during which only 35 decisions were handed down in staff processed cases, and one in which the staff operated during the complete year). There was no way to make a comparison between years beginning on September 1 and ending on August 31. -

Furthermore, time series comparisons suffer from the fact that a comparison between two years does not answer the question of what caused the differences. To take an example, in Table N it is shown that the average number of majority opinions produced by the judges receiving staff assistance during 1973 increased by 12.5 cases. It appears, however, that the average number produced during 1972, in which the project was in operation only four months, showed an increase of 11.4 cases over the figure for 1971. While it might be supposed that improvement in the number of cases disposed of by opinion is necessarily limited, and there was some local expression of opinion to the effect that the 1972 level was approaching the limit absent some change in the method of proceeding, it must be recognized that the range of the number of opinions produced by the judges was 40 to 54 in 1971, and 46 to 65 in 1972. In 1973, the range was 41 to 78. One judge,

operating with the assistance of the staff, and disposing of 16 staff processed cases, also produced more signed opinions than he had produced the previous year. Given such variations between years and within each year, it cannot be said with any finality what the effect of the project has been by comparing available figures for previous years.

The other method employed was a comparison between the number of dispositions in the Fourth Division, which did not receive staff assistance, and the number disposed of in the First, Second, Third, and Fifth, which did. There are no comparable figures for total dispositions. This means that the comparison is limited to the figures for production of majority opinions, and it has been assumed that the relationship between opinions and total dispositions is constant. While this relationship has remained almost constant during the three years 1971-1973, in terms of total opinions and total dispositions, there is no way to check its reliability as a guide to the work of a particular division, or particular judge.

In summary, it appears to the Reporter that there is evidence that the project was responsible in large measure at least for the sharp increase in the number of cases disposed of by opinion; but there is no very precise way to measure the contribution. Further, it should be noted that the project was designed to put into simultaneous operation a screening and memorandum system. Thus there is nothing but the opinions expressed by the judges to cast light on the

question of exactly where the major time saving comes. It is obvious, for example, that a good deal of time is saved because of the larger percentage of waivers of oral argument in staff processed cases. Yet if the rules were changed to make oral argument permissive, an equal reduction in oral argument might be achieved without the use of staff. Similarly the project leaves it problematical whether, assuming that staff is to be used, it is better to have staff concentrate on screening and disposing of the easiest cases, or for the court to screen the cases itself and use the staff to aid in the disposition of the most difficult cases. This possibility was not tested during the year. Since that time, however, the staff has taken a pilot case with a large number of issues and is investigating methods of handling memoranda in such cases. It is experimenting, for example, with a check of the statements of facts in the briefs and of the adequacy of the abstracts or excerpts from record, as a possible substitute for the making of a new statement of facts directly from the record.

As noted earlier, the third objective of the project, the experimentation with procedural innovations, had to be abandoned in the Illinois part of the project. It is to be hoped, however, that as the court gets current with its business it will expand its inquiry into ways of making appeals approximate the Illinois Constitutional description, "expeditious and inexpensive."

The fourth, and relatively minor objective, or expected by-product, of the project was the collection of data on cases screened by the staff and the tabulation of such data as a source for future study. This data is found in Tables 1 through 7 in the Appendix. During the year September 1, 1972, through August 31, 1973, the staff screened 903 cases from the ready lists as they appeared during the period. This number includes all cases assigned to the First, Second, Third, and Fifth Divisions and appearing on those ready lists, and 56 cases assigned to the Fourth Division, screened during the brief period during which the Fourth Division participated in the project. Since cases are assigned to divisions in rotation, the elimination of the roughly 150 cases assigned to the Fourth and not appearing in the figures does not affect the representative character of the 903 cases.

The 903 screened cases included 303 that had been selected for staff processing, and 600 other cases. At the end of the project year, August 31, 1973, 611 of the 903 screened cases had been decided. The 611 decided cases break down as follows:

	Staff Processed	Not Staff Processed	Total
Criminal	168	186	354
Civil	65	192	257
Total	233	378	611

Tables 1 through 7 are constructed on the basis of this universe of 611 cases, both screened and decided during the project year. It must be inquired, therefore, whether it

could be expected that the 611 cases decided might be atypical of the 903 screened. Had the 903 been submitted at the same time, undoubtedly the 611 selected for earlier decision would be a biased sample. For several reasons it is probable that any bias is very small. In the first place, they were not transmitted to the court at the same time. First, as to the staff processed cases: from the 903 screened cases the Staff Director selected 303 cases for staff processing. At the close of the year, 287 of the 303 had been transmitted to the court. Thus 16 of the staff processed cases had not been received by the court and could not have been decided. Another 50 were submitted to the court during July and August. Since the time lag between submission and decision by the court during the year was in excess of 60 days, it would be expected that more than 66 staff processed cases would be pending at the end of August. Only 70 were pending, suggesting that these were cases awaiting decision in their turn, rather than cases in some way different from the 233 staff processed cases decided during the year. As to the remaining 600 cases, those not processed by the staff, the figures in Table 1 indicate that the time lapse between the filing of the reply brief (the point at which the cases are ready) and decision in the 378 cases that were decided by August 31, averaged 6½ months. If 30 days is allowed between the filing of the reply brief and appearance on the ready list, it appears that at the end of the year, the court would have disposed of cases that were screened before the middle of March. By that time approximately

336 cases not selected for staff processing had been screened. Since the court disposed of 378 such cases during the year, it does not appear that the cases remaining at the end of the year were difficult or atypical cases, but as in the case of the staff processed cases, were in all probability simply cases awaiting decision in normal course. Thus in all likelihood the 611 cases are fairly representative of cases screened in the first six to eight months of the project year. Even so the possibility of bias exists and should be borne in mind in examining the figures in each table, since the possibility of bias varies in importance depending upon the subject matter.

Table 1 records the elapsed time between the steps in the appeal from the filing of the notice of appeal to the date of decision. It has been noted that the 611 cases in the universe are probably typical of cases screened during the first six to eight months of the project year. There remains the possibility that cases appearing on the ready lists during the earlier months would show a longer span of time between steps in the appeal since during the year the rate of disposition was increasing and therefore the court was reaching more recent cases. While it was not possible to reconstruct Table 1 to reflect figures on all 903 cases, it was possible to check the figures against a sample of 259 cases decided during the five months after the end of the project year. Included in the 259 cases were 119 staff processed cases (105 criminal and 14 civil) and 140 cases not processed by the staff (39 criminal and 101 civil). The mean times for

the post-project cases compare with the mean times in cases decided during the project year as follows:

	Mean Number of Days From Judgment	
	611 Cases Decided During the First Year of the Project	259 Cases Decided Between the End of the Project Year and Feb. 15, 1974
1. Appeal Taken	26	22
2. Transcript of Testimony Filed in Appellate Court	139	113
3. Trial Papers Filed in Appellate Court	139	113
4. Appellant's Brief Filed	351	308
5. Appellee's Brief Filed	477	439
6. Reply Brief Filed	520	479
7. Oral Argument	564	570
Appellate Decision	717	667

These figures suggest that as the court has become more current in its work the cases show a slightly shorter period between steps in the process. Thus the figures in Table 1 appear to be a high water mark in elapsed time, but probably representative of the period.

What has been said of the figures in Table 1 appears applicable to the figures in Table 2, dealing with the grant of extensions of time. The figures on the 259 cases examined since the end of the project year show that the elapsed time between the filing of the notice of appeal and the filing of the appellee's brief is on the average 34 days less than it

was in the 611 cases that form the basis for the figures in Table 2. It appears, then, that in these cases somewhat fewer, or somewhat shorter, extensions of time were granted.

Table 3 deals with the number of pretrial motions and the time consumed in disposing of them. Since this table deals with trial court procedure that would appear to have no relationship with any bias the 611 cases screened and decided during the project year might be expected to show, there appears to be no reason to suppose that the figures are not representative.

Table 4 deals with the distribution of cases between civil and criminal categories, and among nine categories of civil cases, the percentage of reversal of criminal cases by category of the issue considered, and the percentage of reversal of civil cases by subject matter category.

First, as to the figures distributing cases into subject matter categories, the percentage of criminal cases in the 611 cases screened and decided during the project year is 57.9. This figure may reflect a slight bias imposed by the priority given criminal cases. In the 259 cases decided after the end of the project year and used as a check on the figures in Tables 1-7, criminal cases were 55.6% of all cases, and the Clerk's figures for 1972 and 1973, adjusted to account for decisions under Anders v. California, suggest that criminal cases comprise about 55% of the total.

The distribution of cases among the subcategories of criminal cases suffers from the necessity to classify cases

that may include several different issues. In the 144 criminal cases examined after the end of the project year, 38, or 26.3% were identified as guilty plea cases. This compares with 31 of 354, or 8.8% shown in Table 4. Further, in Table 7, where the issues raised in the 611 cases decided before the end of the project year are tabulated without an effort to classify the cases by type, it appears that the issue of the propriety of a guilty plea was raised in 70 cases, which would be 19.8% of the criminal cases. The same observation is applicable to the category "Excessive Sentence" in Table 4. There it is indicated that such cases totaled 77, or 21.8% of the 354 criminal cases. In the post-project sample of 144, 115, or 80% were so identified, and in Table 7 it appears that the issue of excessive sentence was raised in 217 of the 354 cases, or 61.3%. These differences cast considerable suspicion on the accuracy of the distribution of criminal cases among subcategories.

The distribution of cases among categories of civil litigation has already been discussed in Section I-D of the report. There it is pointed out that the 115 post-project cases appear to be reasonably close to the figures in Table 4, and that perhaps the best measure would be a composite figure.

The figures on the percentage of decisions reversed that appear in Table 4 must be viewed with some caution. They show that in all civil cases 25.3% were reversed, and in all criminal cases, 20.3%. An examination of the 115 post-project cases used as a check on the original figures shows a reversal

rate of 38.3%. The Clerk's reports show that the reversal rate in civil cases during 1972 was 28.3%, and the quarterly rates during 1973 vary between 25.3% to 28.2% (for the fourth quarter). This suggests that the figure of 25.3% appearing in Table 4 is somewhat low as an estimate for the year. The 38.3% shown in the 115 post-project cases appears atypical. It includes a reversal rate of 44% in 41 tort cases, 43% in 35 contract cases, and 42% in 19 administrative law cases. In appraising these figures it must be borne in mind that the total numbers are small and that the reversal percentages show considerable variation quarter to quarter.

As to the 20.3% reversal rate in criminal cases, it should be noted that in the 144 criminal cases examined since the end of the project year the rate of reversal was 10.4% (15 of 144 cases). The Clerk's figures show a reversal rate of 17.6% in criminal cases in 1972, and the last quarter of 1973 shows a rate of 15.2%. In the first and third quarters of 1973, however, reversals in criminal cases exceeded 27%. This suggests that the figure in Table 4 is probably accurate for the period it covers, but suggests that the period may not be typical. The high figure apparently stems from the fact that in the first quarter of 1973, the court reversed 23 criminal cases on confession of error, and in the third quarter another 17. It is probable, then, that the annual rate of reversal of criminal cases is typically closer to 15 than to 20 percent.

The figures in Table 5, dealing with the distribution of criminal cases among appeals from verdict after trial by jury

and appeals from judgments after pleas of guilty or after non-jury trials, are probably unaffected by any likely bias in the 354 cases from which the figures are taken, except to the extent that the figures in item.4 may be affected by any priority that might be given to cases in which the appellant is in custody.

Table 6 deals with the effect of having the same counsel at trial and on appeal, as opposed to having a different counsel on appeal, on the length of time consumed in the appeal. There appears no reason to consider these figures unrepresentative, though, as pointed out in the discussion of Table 1, the time lapse-figures can be expected to be smaller in the later cases as the court reaches a larger number of the cases pending.

Table 7 shows the number and percentage of cases in which various assertions are made by the appellant and the appellee and the percentage of reversals on each assertion. There appears to be no reason to suppose that these figures would be biased by the fact that they were taken from the 611 cases decided during the project year.

In summary, the hope that the project year would make possible the collection and publication of a body of data on the cases passing through the hands of the staff in the four courts participating in the project for later comparative study was frustrated to a certain extent by the inability to collect data on all screened cases in time to include it in the report. Given the long delays that characterized the

appellate process in Illinois at the time the project began, this was perhaps foreseeable. The system for collection of the data has been set in operation, however, and at a later time it will be possible to assemble more complete and meaningful figures.

## APPENDIX

Containing:

1. Tables 1 through 8
2. Judges' Questionnaire
3. Specimen Memoranda, Proposed Opinions,  
and Opinions Adopted by the Court.

TABLE 1  
ELAPSED TIME IN THE APPELLATE PROCESS  
(from Card 1, Items 1-9)

611 Cases\*      September 5, 1972 to August 31, 1973  
(Total no.)      (beginning date)      (closing date)

Days from Appealable Trial Court Judgment to:	A. Civil	B. Criminal <sup>1</sup>	C. All Cases
1. Appeal Taken			
Mean	24	27	26
Median	26	23	24
Range	0 - 81	0 - 294	0 - 294
90th Percentile	28	25	27
2. Transcript of Testimony filed in Appellate Court			
Mean	121	154	139
Median	112	140	126
Range	10 - 398	33 - 434	10 - 434
90th Percentile	134	171	159
3. Trial Court Papers filed in Appellate Court			
Mean	121	154	139
Median	112	140	126
Range	10 - 398	33 - 434	10 - 434
90th Percentile	134	171	159
4. Appellant's Brief filed			
Mean	292	376	351
Median	278	361	343
Range	32 - 777	51 - 894	32 - 894
90th Percentile	305	416	362

5. Appellee's Brief filed						
Mean	440		525		477	
Median	421		496		461	
Range	51 - 1286		68 - 1104		51 - 1286	
90th Percentile	458		542		527	
6. Reply Brief filed <sup>2</sup>						
Mean	459		548		520	
Median	440		531		508	
Range	60 - 1428		77 - 1321		60 - 1428	
90th Percentile	477		563		542	
7. Oral Argument <sup>3</sup>	Staff Process.	Not Staff	Staff	Not Staff	Staff	Not Staff
Mean	503	518	597	609	563	565
Median	491	499	582	592	496	542
Range	71-1502	40-1581	91-1401	85-1541	71-1502	40-1581
90th Percentile	519	537	626	643	562	589
8. Appellate Decision						
Mean	666	685	722	744	694	731
Median	651	659	688	726	666	699
Range	88-1616	52-1721	102-1642	94-1686	88-1642	52-1721
90th Percentile	692	717	761	784	744	765

\*These appeared on ready lists compiled by the Appellate Court Clerk's office and were disposed of by opinion.

1. Includes appeals in habeas corpus or other collateral attacks on convictions.
2. Does not occur in all cases. An appeal is mature when a reply brief is filed or, if none is filed, when the 14 days allowed for filing it have passed. The latter figure is used in line 6 for cases in which no reply brief is filed.
3. Does not occur in all cases. The times shown here are based on those cases in which argument was heard.

TABLE 2

EXTENSIONS OF TIME ON APPEAL  
(from Card 1, Item 10)

	A. Number of cases in which Extension Granted		B. Number of Extensions in Cases where 1 or more Extensions Granted			C. Number of Days for Which Exten- sions Granted		
	[number]	[% of total appeals]	<u>Mean</u>	<u>Median</u>	<u>Range</u>	<u>Mean</u>	<u>Median</u>	<u>Range</u>
1. For Prepara- tion of Transcript	73	11.9%	1.4	1.1	1-5	33	27	2-111
			90th percentile: 1.7			90th percentile: 47		
2. For Filing Appellant's Brief	591	96.7%	3.6	2.8	1-12	190	177	8-657
			90th percentile: 3.9			90th percentile: 212		
3. For Filing Appellee's Brief	555	90.8%	3.2	2.1	1-9	179	162	12-427
			90th percentile: 3.4			90th percentile: 191		
4. Totals for All Purposes in All Cases	602	98.5%	3.4	2.5	1-12	372	359	21-1222
			90th percentile: 3.7			90th percentile: 431		

TABLE 3

## NEW TRIAL MOTIONS

A.	B. Cases in Which New Trial Motion Filed *	C. Days Elapsed From Filing of New Trial Motion Until Denial by Trial Court *
Civil Cases  257 (total)	[no.] [% of total]  54 21.0%	Mean 16  Median 12  Range 0 - 51 90th percentile: 24
Criminal Cases  354 (total)	[no.] [% of total]  43 12.1%	Mean 12  Median 10  Range 0 - 44 90th percentile: 18

\* Includes post-trial motions for judgment notwithstanding the verdict. An appeal in the circuit court of Cook County, Illinois, cannot move forward until a new trial motion (if filed) is disposed of. Since the determination of a new trial motion is the first review accorded to a completed trial court proceeding, the time consumed by the trial court in disposing of such motions is part of the delay in the overall review process. Accordingly, to ascertain the total time consumed in review proceedings the figures in this table must be added to those appearing in Table 1. In Table 1 the time is shown for the steps following the trial court's disposition of the new trial motion, if any.

TABLE 4

TYPES OF CASES AND REVERSAL RATE  
(from Card 1, Item 12)

A. Type of Case	B.		C. Reversed <sup>1</sup>		D. Not Reversed <sup>2</sup>
	No. of Cases	% of Total	[no.] cases in this category	[% of all]	
1. Administrative Law	22	3.6	5	22.7	17
2. Contracts	43	7.0	13	30.2	30
3. Criminal Law:	354	57.9	72	20.3	282
a. Appeal from conviction after trial <sup>3</sup>	268	43.9	51	19.0	217
b. Guilty Plea <sup>3</sup>	31	5.1	7	22.6	24
c. Excessive Sentence <sup>3</sup>	77	12.6	3	3.9	74
d. Post Conviction-Collateral	102	16.7	22	21.6	80
4. Domestic Relations	15	2.5	2	13.3	13
5. Property	25	4.1	4	16.1	21
6. Taxation	11	1.8	1	9.1	10
7. Tort	96	15.7	31	29.4	65
8. Trusts and Estates	12	2.0	2	16.7	10
9. Workmen's Compensation	19	3.1	1	5.3	18
10. Other (attempt to break into several categories)	14	2.3	6	42.9	8
Totals	611		137	22.4%	474

SUMMARY OF TABLE 4

	Reversed <sup>1</sup>	Not Reversed <sup>2</sup>	Total
All Civil Cases	[no.] [%] 65 25.3	192	257
All Criminal Cases	72 20.3	282	354

1. Includes cases reversed as a whole or in part.
2. Includes cases affirmed and also modified but not reversed.
3. There is some duplication of statistics among these three types of criminal appeals. E.g., a single appeal may involve a guilty plea and a sentence or an attack on conviction after trial and on sentence. But in the summary of "All Criminal Cases" such an appeal is counted as a single case.

TABLE 5

CRIMINAL APPEALS (EXCLUDING POST CONVICTION)  
(from Card 2)

	Total No. of Cases	% of all Criminal Appeals
1. Jury Trial	26	10.3%
2. Guilty Plea or Non- Jury Trial	226	89.7%
3. Counsel:		
a. Court Appointed	32	12.7%
b. Public Defender or Legal Aid	193	76.6%
c. Privately retained	27	10.7%
d. Same Firm as at Trial	235	92.9%
e. Same Individual as at Trial	25	9.9%
4. Pending Appeal Defendant		
a. In Custody	201	79.8%
b. Not in Custody	51	20.2%

TABLE 6

CRIMINAL APPEALS (EXCLUDING POST CONVICTION):  
RELATION BETWEEN COUNSEL AND TIME CONSUMED IN APPELLATE PROCESS

Counsel on Appeal	A. Time lapse from trial court judgment to appellate decision	B. Reversal Rate
1. Same individual as trial counsel [25 cases]	Mean 618 Median 588 Range 94-833 90th Percentile: 663	24% [of cases reversed] [6 out of 25]
2. Different individual from trial counsel  a. in same firm or office as trial counsel [216 cases]  b. not in same firm or office as trial counsel [11 cases]	  Mean 748 Median 731 Range 99-1686 90th Percentile: 795  Mean 731 Median 698 Range 188-954 90th Percentile: 752	  % 17.6% [38 out of 216]  % 27.3% [3 out of 11]

TABLE 7

GROUND ASSERTED ON APPEAL  
(from Card 2 - listed in  
descending order of  
frequency of assertion  
by appellant.)

<u>By Appellant</u>				<u>By Appellee (on cross appeal)</u>	
<u>No. of Appeals</u>	<u>% of Appeals</u>	<u>% rev'sd on this ground</u>		<u>No. of Appeals</u>	<u>% of Appeals</u>
581	95.1	7.0	Trial judge's or agency's findings of fact erroneous or not supported by evidence.	398	65.1
217	35.5	2.0	Excessive sentence.		
210	34.4	2.1	Erroneous ruling on admissibility of evidence.	121	19.8
163	26.7	3.3	Illegal search and seizure.		
142	23.2	.8	Inadequate representation by counsel.		
129	21.1	2.1	Erroneous ruling on sufficiency of pleading.		
126	20.6	3.1	Entry of directed verdict or judgment as a matter of law against appellant.	43	7.0
118	19.3	2.0	Refusal of trial judge to direct verdict or enter judgment as a matter of law.	39	6.4

113	18.5	.3	Prejudicial argument by counsel to jury.	35	5.7
109	17.8	.8	Improper trial conduct of prosecuting attorney.		
73	11.9	.0	Error or defect in jury selection or jury composition.		
70	11.5	1.1	Plea of guilty improper.		
65	10.6	1.6	Erroneous instructions to jury.		
63	10.3	1.0	Evidence insufficient to support verdict.	21	3.4
62	10.1	2.1	Verdict against weight of evidence.	24	4.0
24	3.9	2.5	Abuse of discretion under §72 of Civil Practice Act.		
19	3.1	.0	Statute or ordinance unconstitutional.		
18	2.9	1.3	Improper service of process.	16	2.6
16	2.6	.2	Confession wrongly admitted.		
12	2.0	.0	Appellate procedural rules not followed.	23	3.8
10	1.6	.0	Prevailing rule of law erroneous.		

TABLE 8

## CASES PROCESSED BY STAFF

Month	A. Total Number of Cases Processed by Staff		B. With Memorandum	C. With Draft of Recommended Opinion
	Civil	Criminal		
September 1972	3	8	11	9
October 1972	5	13	18	18
November 1972	9	15	24	24
December 1972	12	17	29	28
January 1973	8	18	26	26
February 1973	6	16	22	22
March 1973	10	14	24	21
April 1972	4	22	26	26
May 1973	8	24	32	32
June 1973	1	24	25	24
July 1973	3	21	24	24
August 1973	3	23	26	26
Totals	72	215	287	280

## JUDICIAL RESPONSE TO STAFF OPERATION

Answers to Questionnaire Submitted to Judges on the Court  
After Six Months of Staff Operation, and After One Year

	No. of Judges After 6 Months	No. of Judges After 1 Year
1. The staff prepared memoranda (not including the drafts of opinions) generally seem		
too long	6	1
too brief		
about the right length	5	12
2. The part of the memorandum which is most helpful is		
the statement of facts	5	4
the discussion of the issues and the legal analysis	7	4
the recommendations	0	0
all of the above are about equally helpful	3	8
none of the above is especially helpful	0	0
3. The memoranda have appeared to me to be (check as many as express your view)		
always accurate on the facts	7	4
always accurate on the law	4	2
sometimes or occasionally inaccurate or misleading on the facts	3	8
sometimes or occasionally inaccurate or misleading on the law	5	7
sometimes faulty in the recommendations	6	7
4. The draft of staff recommended opinions are generally		
too long	8	3
too brief	0	0
about the right length	4	10

Judges Questionnaire (continued)

	No. of Judges After 6 Months	No. of Judges After 1 Year
5. Have the staff memoranda or draft opinions enabled you to save significant time in deciding and disposing of cases?		
yes	5	12
no	1	0
uncertain	4	1
6. Does a staff memorandum generally cause you to invest more time on a case than you normally would without a staff memorandum?		
yes	*	*
no	10	13
7. If your answer to <u>5</u> was "Yes," mark each of the ways in which you think you have been able to save time as a result of staff work.		
by not reading the transcript or the record	4	2
by not reading the briefs of the parties	1	2
by reading shorter portions of the transcript or the record than it would be necessary to read if it were not for the staff work	5	4
by reading only portions of the briefs of the parties	2	2
by being able to grasp the facts more quickly	6	8
by being able to grasp the issues more quickly	5	9
by being able to grasp the arguments more quickly	6	10
by not having to prepare the initial drafts of per curiam opinions	3	8
8. Do you think that a staff memorandum enables the judges participating in a case to reach a collective decision		

Judges Questionnaire (continued)

	No. of Judges After 6 Months	No. of Judges After 1 Year
8. (continued)		
more quickly than they normally do in cases without a staff memorandum?		
yes	9	11
no	2	2
9. My personal law clerk reads the memoranda		
in every staff processed case	2	1
in no staff processed case	4	7
in some staff processed cases	4	4
10. If your law clerk reads the staff memorandum in some or all staff processed cases, check each of the reasons why he does so:		
to verify the accuracy of the memorandum	6	3
to assist him in preparing his own memoranda on the cases	0	0
to assist him in discussing the case with me	3	4
other	1	0
11. Laying aside the question of time saved, it is my overall feeling that in the cases on which the staff has worked, the staff work		
has made no significant difference in the quality of the treatment or adjudication received by such cases in this court	7	9
has made a significant difference in the quality of treatment or adjudication received by such cases in this court	1	4
12. If you think the staff work has made a significant difference in this connection, state precisely how:	**	**

Judges Questionnaire (continued)

	No. of Judges After 6 Months	No. of Judges After 1 Year
13. In preparing memoranda for me my personal law clerk:		
relies exclusively on the statements of fact and law which appear in the briefs	0	0
occasionally checks the accuracy of statements of fact or law by references to the transcript or record and by cite checks	1	2
usually checks the accuracy of statements of fact or law by references to the transcript and by cite checks	9	8
14. The memoranda prepared by my personal law clerk:		
involve little or no independent research of the legal issues presented	0	0
sometimes involve independent research of the legal issues presented	2	3
usually involve independent research of the legal issues presented	8	7

GENERAL NUMBER 00000

PELAGIUS DISTRIBUTING COMPANY,  
Plaintiff-Appellee,

vs.

Albert P. Palmer and Joe Grenfell,  
individually and d/b/a "The Aragon"  
Defendants,

Albert P. Palmer  
Defendant-Appellant.

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PREHEARING REPORT

Prepared by:	William Parrish
Date:	July 25, 1973
Trial Judge:	Blaise Pascal
Trial Counsel:	Bascom and Bascom, for Appellant Palmer Abraham P. Schulz, for Appellee Pelagius Distributing Company

NATURE OF THE CASE:

An amended petition in the nature of a petition under section 72 of the Civil Practice Act was filed by Albert P. Palmer (hereinafter "petitioner") to vacate a default judgment entered in a contract action in favor of Pelagius Distributing Co. (hereinafter "plaintiff") and against petitioner and Joe Grenfell (hereinafter "Grenfell") in the amount of \$743.02 for goods and merchandise allegedly sold by plaintiff to petitioner and Grenfell (C. 33-35). (Ill. Rev. Stat. 1971, ch. 110, par. 72.) The amended petition was denied (C. 42) and petitioner appeals (C. 44). (This case has not been noted for oral argument.)

ISSUES PRESENTED:

I. Whether petitioner was properly served with plaintiff's notice of motion to vacate a dismissal of the contract action for want of prosecution, in light of the difference between petitioner's address as shown on his appearance in that action and the address where the notice of that motion stated he could be served?

II. Whether the plaintiff's failure to answer the section 72 petition admitted all facts well pleaded?

III. Whether the court should be liberal in allowing the defendant his day in court?

STATEMENT OF FACTS:

The complaint in contract was filed by plaintiff on May 26, 1971, claiming that it had sold merchandise to petitioner and Grenfell in the amount of \$743.02 (C.3) and an exhibit to the complaint shows the invoice dates for sums totaling that amount to have been September 18 and 29, 1970 (C. 4). Summons showed that the petitioner and Grenfell could be served at "21075 West Street, Suburb, Illinois" and the sheriff's return shows that both men were served personally on June 2, 1971 (C. 7). A pro se appearance was filed by petitioner on June 23, 1971, which was the return date set forth in the complaint, the petitioner listing his address as "222 West 100th Street, Riverview, Illinois." (C. 8).

On November 5, 1971 the contract action was dismissed for want of prosecution (C. 10) and on November 10, 1971 plaintiff

filed a "motion of course" to vacate that dismissal and to set the matter for trial (C. 11a, 12). The notice of the plaintiff's motion to vacate the dismissal was addressed to petitioner at the Suburb, Illinois address (C. 12). The order dismissing the cause was vacated and the matter was set for trial on December 14, 1971, on which date judgment by default was entered for plaintiff and against the petitioner and Grenfell in the above stated amount (C. 14).

On August 8, 1972 plaintiff filed an affidavit for garnishment in the amount of \$802.82 against the First National Bank (hereinafter "garnishee") wherein petitioner was alleged to have had an account; petitioner's "last known address" was listed on affidavit at the Riverview location (C. 16). The garnishee answered on August 29, 1972, that it held sufficient funds in a checking account belonging to petitioner (C. 20); judgment was entered for plaintiff and against the garnishee in the amount of \$802.82 (C. 21); the judgment was satisfied by the garnishee in that amount on September 5, 1972; and the satisfaction of judgment filed with the court on September 11, 1972 (C. 22).

On October 11, 1972, petitioner filed the instant sworn original petition to vacate the December 14, 1971 judgment, alleging, inter alia, that his pro se appearance in the contract action was filed listing his address at the Riverview location; that he was advised that the cause was set for trial on July 7, 1971; that date the matter was continued to November 5, 1971; that on November 5, 1971, he appeared in

court and was advised by the court that the suit was being dismissed as to him, the order of dismissal reading "Order of Court Suit dismissed Want of Prosecution. P.C."; that on November 10, 1971, the dismissal order was vacated and the cause set for trial on December 14, 1971; that the notice of the motion to vacate the dismissal was sent to petitioner at the Suburb, rather than the Riverview address and the notice was never received by him; that an ex parte judgment was ultimately entered against him in the contract action; that "the first notice (petitioner) had of said judgment was when he was notified by his Bank that this account had been garnished; that he contacted his attorney, Abraham P. Schulz, who took the necessary steps to present this Petition"; and that the garnishment action was not filed by the same attorney who represented plaintiff in the contract matter (C. 26-28). The petition requested that the December 14, 1971 judgment against him be vacated and that the matter be set for trial (C. 27).

On October 18, 1972 petitioner was granted leave to file an amended petition; the matter was continued to November 10, 1972; and on the latter date the petitioner filed his sworn amended petition under Section 72 (C. 30-32). The amended petition realleged all of the matters alleged in the original petition and alleged in addition thereto that petitioner had a good and meritorious defense to the contract action, namely, he denied the allegations of the contract complaint and affirmatively stated that he neither purchased nor authorized

the purchase of the merchandise involved, that he was not the partner of Grenfell, that on or about June 3, 1970 he sold the tavern to Grenfell and had nothing further to do with him, that at the time of the sale he was not indebted to plaintiff, and that he did not owe plaintiff the stated amount nor any other amount (C. 33-35). The amended petition also requested that the December 14, 1971 judgment against him be vacated and that the matter be set for trial (C. 35).

Hearing on the section 72 petition was set for January 19, 1973 (C. 41), on which date an order was entered simply denying the petition and setting an appeal bond (C. 42). The record does not disclose whether or not a hearing on the petition was in fact held.

\* \* \* \* \*

I. Whether petitioner was properly served with plaintiff's notice of motion to vacate a dismissal of the contract action for want of prosecution, in light of the difference between petitioner's address as shown on his appearance in that action and the address where the notice of that motion stated he could be served?

DISCUSSION AND ANALYSIS:

Petitioner argues that he was initially served with summons in the contract action at the Suburb, Illinois address, but that when he filed his pro se appearance in the matter, the Riverview address became the address where he was entitled to be served with future notices in the action. He further argues

that the court will not hold him to a strict compliance with the rules since the appearance was filed pro se.

However, at the time when petitioner filed his pro se appearance in the trial court Rule 1.2 of the Circuit Court of Cook County was in effect, pertaining to the filing of written appearances. That Rule reads:

"1.2. Appearances

"(a) Written appearances - If a written appearance, general or special, is filed, copies of the appearance shall be served in the manner required for the service of copies of pleadings."  
(Cir. Ct. R. 1.2.)

Supreme Court Rule 12 (Ill. Rev. Stat. 1971, ch. 110A, par. 12) provides for the service of papers. It states that proof of service must be filed with the clerk of the court and sets out the methods by which service may be proved: (a) by written acknowledgment of the person served; (b) by certificate of attorney or affidavit of one other than an attorney who made deliver, where service is personal; and (c) by certificate of attorney or affidavit of one other than an attorney, where service is by mail. No proof of service of petitioner's appearance upon plaintiff appears of record, and petitioner, in his reply brief on appeal, admits that he did not serve a copy of the appearance upon plaintiff when he argues that his failure to send a copy of the appearance to plaintiff was not fatal because courts will not foreclose pro se parties from a trial on the merits under such circumstances. It cannot be seriously contended that if petitioner had filed an answer to the contract complaint that answer would not have to have

been served upon the plaintiff; the Circuit Court Rule requiring the service of an appearance upon the other parties is therefore reasonable. To contend, as petitioner does, that because he filed his appearance pro se he should not be required to strict compliance with the rules of court finds no support in this record. Petitioner knew enough to file an appearance, he filed it on the last day on which return could have been made to the complaint, and the appearance form also contains printed language relating to the certification of proof of service.

Further, plaintiff initially served petitioner at the Suburb address. While the trial file jacket shows that plaintiff was advised by the court that petitioner had filed an appearance (C. 57), there is nothing in the record to show that plaintiff had actual knowledge that petitioner wished to be served with notice in the future at an address other than where he was originally served with summons and from which service he responded. It thus appears that petitioner may not employ the plaintiff's failure to notify him at the Riverview address of the motion to vacate the dismissal of the contract cause, for which situation petitioner is alone responsible, as a ground for arguing that all subsequent actions taken by plaintiff and the court are invalid.

Petitioner's contention that the motion to vacate the dismissal of the action should have been "formally made" is without merit. The record discloses that a "motion of course" was filed with the court to vacate the dismissal and that

petitioner was mailed a notice that said motion would be presented to the court. Section 68.3 of the Civil Practice Act provides for the making of such motions and does not require adherence to the strict formality for which petitioner contends. (Ill. Rev. Stat. 1971, ch. 110, par. 68.3.) (Supreme Court Rule 183 cited by petitioner has no bearing on the question of the form or contents of such a motion, as petitioner argues. (Ill. Rev. Stat. 1971, ch. 110A, par. 183.))

\* \* \* \* \*

II. Whether the plaintiff's failure to answer the section 72 petition admitted all facts well pleaded?

DISCUSSION AND ANALYSIS:

Petitioner argues that because plaintiff failed to file an answer or to otherwise reply to his sworn petition under section 72, such constitutes an admission of the matters contained in that pleading.

A petition filed under section 72 of the Civil Practice Act to vacate a judgment or decree must set forth sufficient facts to show both a meritorious defense and due diligence on the part of the petitioner. Union Oil Co. of California v. Lang, 132 Ill. App. 2d 658, 662, 270 N. E. 2d 609. While it is generally true that a failure to challenge a petition filed under section 72 admits as true facts properly alleged in the petition, the petition must be sufficient in and of itself to warrant such a holding. Elliot Construction Corp. v. Zahn, 99 Ill. App. 2d 112, 116, 241 N. E. 2d 129.

The instant amended petition is not only not "supported by affidavit or other appropriate showing as to matters not of record" as required by subsection (2) of section 72, but it fails to allege sufficient facts to show that petitioner had exercised due diligence in presenting his petition for vacature of the contract judgment. It should also be noted that the failure of petitioner to receive plaintiff's notice of the motion to vacate the dismissal of the contract cause was due to his own neglect in failing to send a notice of the desired change of his address for service to plaintiff.

The original petition filed on October 11, 1972, over two months after plaintiff instituted garnishment proceedings against petitioner's bank, failed to allege that petitioner had a meritorious defense or that he was diligent in presenting that petition. The amended petition, filed a month thereafter, did allege that petitioner had a meritorious defense to the contract action but it too failed to allege facts showing that the petition was diligently presented to the court. While both the original petition and the amended petition did allege that the first notice that petitioner received of the contract judgment was when he was notified by his bank that his account had been garnished, he does not allege at what point in time, in relation to the filing of the garnishment proceeding by plaintiff, he was so notified. The petition was patently deficient, it did not allege matters sufficient to allow petitioner the relief requested, and the trial court properly denied relief thereunder.

\* \* \* \* \*

III. Whether the court should be liberal in allowing the petitioner his day in court?

DISCUSSION AND ANALYSIS:

Under this final contention petitioner argues that the trial judge apparently thought that since the money had in fact been paid by the garnishee the matter was moot; that the petition set out that petitioner had a meritorious defense; and that to permit "the grabbing of his bank account without a trial is incredible."

However, the foregoing analysis of this case clearly shows that the section 72 petition was faulty in several respects and that, further, the failure of petitioner to receive notice of the motion which precipitated his dilemma was the result of his own neglect. Under the circumstances section 72 is not available to relieve petitioner of his own neglect.

Esczuk v. Chicago Transit Authority, 39 Ill. 2d 464, 467, 236 N. E. 2d 719.

RECOMMENDATION:

It is recommended that the judgment of the circuit court of Cook County be affirmed.

PROPOSED OPINION

00000

PELAGIUS DISTRIBUTING CO.,	)	
Plaintiff-Appellee,	)	
vs.	)	Appeal from the
	)	Circuit Court of
Albert P. Palmer and Joe Grenfell,	)	Cook County,
individually and d/b/a "The Aragon"	)	
Defendants,	)	Honorable
	)	Blaise Pascal,
Albert P. Palmer,	)	Presiding.
Defendant-Appellant.	)	

PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

A petition under section 72 of the Civil Practice Act was filed by Albert P. Palmer (petitioner) to vacate a default judgment entered in a contract action in favor of Pelagius Distributing Co. (plaintiff) and against petitioner and Joe Grenfell (Grenfell) in the amount of \$743.02 for merchandise allegedly sold by plaintiff to petitioner and Grenfell. The relief sought by the petition, as amended, was denied and petitioner appeals.

The complaint in contract was filed by plaintiff on May 26, 1971. Service of summons was had personally on both petitioner and Grenfell on June 2, 1971, the summons reflecting that they were to be served at "21075 West Street, Suburb, Illinois." Petitioner filed a pro se appearance on June 23, 1971, which was the return date set forth in the complaint, the appearance noting petitioner's address as "222 West 100th Street, River-view, Illinois."

On November 5, 1971, the contract action was dismissed for want of prosecution and on November 10, 1971, plaintiff filed a "motion of course" to vacate that dismissal and to have the matter set down for trial. The notice of the motion to vacate the dismissal was addressed to petitioner at the Suburb address. The order dismissing the contract action was vacated and the matter was set for trial on December 14, 1971, on which date judgment by default was entered for plaintiff and against petitioner and Grenfell in the above stated amount.

On August 8, 1972, plaintiff filed an affidavit for garnishment in the amount of \$802.82 against the First National Bank (garnishee) wherein petitioner was alleged to have had an account; petitioner's "last known address" was listed on the affidavit at the Riverview location. The garnishee answered on August 29, 1972, that it held sufficient funds in a checking account belonging to petitioner; judgment was entered for plaintiff and against the garnishee in the requested amount; the judgment was satisfied by the garnishee on September 5, 1972; and the satisfaction of judgment was filed with the court on September 11, 1972.

On October 11, 1972, petitioner filed a sworn petition to vacate the December 14, 1971 judgment alleging in essence that he was advised personally by the court on November 5, 1971, that the contract action was being dismissed as to him; that the action was in fact so dismissed; that the dismissal was vacated and an ex parte judgment thereafter entered against him; that he received no notice that plaintiff intended to

have the dismissal order vacated, because the notice of the motion to vacate the dismissal order was sent to the petitioner at the Suburb address rather than at the Riverview address; and that the first notice that petitioner received of the December 14, 1971 judgment was "when he was notified by his Bank that his account had been garnished," whereupon he contacted his attorney who "took the necessary steps to present this Petition." The petition requested that the December 14, 1971, judgment be vacated and that the matter be set for trial.

Petitioner was granted leave to file an amended sworn petition under section 72, which was filed on November 10, 1972. The amended petition re-alleged the matters contained in the original petition and alleged in addition thereto that petitioner had a good and meritorious defense to the contract action, namely, he denied the allegations of the contract complaint and affirmatively stated that he neither purchased nor authorized the purchase of the merchandise in question, that he was not the partner of Grenfell, that prior to the invoice dates regarding the merchandise in question he sold the tavern business to Grenfell and had nothing further to do with him, that at the time of the sale of the business he was not indebted to the plaintiff, and that he did not owe the plaintiff the amount demanded in the contract complaint nor any other amount.

Hearing on the section 72 petition, as amended, was set for January 19, 1973, on which date the order appealed from

was entered simply denying the petition and setting an appeal bond. The record does not disclose whether or not a hearing on the petition was in fact held.

Petitioner's initial contention is that service upon him of the notice of plaintiff's motion to vacate the dismissal of the contract action was improper since his address was listed on his appearance filed in the action at the Riverview location whereas the notice of the motion was mailed to him at the Suburb location, thereby rendering all subsequent proceedings in the matter invalid. We disagree.

The failure of petitioner to receive the notice of the motion to vacate the dismissal was due to petitioner's own negligence. At the time petitioner's appearance was filed in the contract action, Circuit Court Rule 1.2 provided that where a written appearance is filed in a case, a copy of that appearance must be served in the manner required for the service of copies of pleadings. (Cir. Ct. R. 1.2.) Supreme Court Rule 12 provides that proof of service must be filed with the clerk of the court and sets out the methods by which service may be proved. (Ill. Rev. Stat. 1971, ch. 110A, par. 12.)

No proof of service of the appearance upon plaintiff appears of record, and petitioner admits in his brief on appeal that no such service was made. The fact that petitioner filed his appearance pro se cannot aid him in this regard, since the record discloses that he in fact knew enough to file an appearance, that the appearance was filed on the last day for filing same, and that the appearance form filed contains printed

language relative to the certification of service of the document upon other parties in the action. Although the trial file jacket shows that the court notified the plaintiff that petitioner had filed an appearance, there is nothing in the record to show that plaintiff had actual notice of what that appearance contained. Plaintiff initially served petitioner with summons of suit at the Suburb address, petitioner affirmatively responded to that service by filing his appearance, and the record does not disclose any fact which would have put plaintiff on notice that petitioner desired to be served with future notices in the action at an address other than where he was originally served.

Petitioner's contention that the motion to vacate the dismissal order should have been "formally made" is without merit. The record discloses that a "motion of course" was filed with the court to vacate the dismissal order and that petitioner was mailed a notice that said motion would be presented to the court. Section 68.3 of the Civil Practice Act provides for the making of such motions and does not require adherence to the strict formality for which petitioner contends. (Ill. Rev. Stat. 1971, ch. 110, par. 68.3) Supreme Court Rule 183, cited by petitioner, has no bearing on the question of the form or contents of such a motion, as petitioner argues. (Ill. Rev. Stat. 1971, ch. 110A, par. 18.3)

Petitioner also contends that his requested relief should have been granted since his amended petition was verified and since no response was filed thereto by plaintiff, thereby admitting all facts well pleaded in the petition.

Both the original and the amended petitions are defective on their faces. Neither was supported "by affidavit or other appropriate showing as to matters not of record" as required by subsection (2) of section 72.. Further, neither petition recited facts showing that petitioner acted with due diligence in presenting the petition to the court. They do allege that petitioner first received notice of the December 14, 1971 judgment against him when the garnishee notified him that his account had been garnisheed, and that he turned the matter over to his counsel for the presentation of the petition to the court, but neither alleges the date on which the information was conveyed to petitioner from the garnishee. Two months elapsed between the institution of the garnishment proceedings by plaintiff and the filing of the original section 72 petition, and the petitions do not account for this delay.

It is well settled that a petition filed under section 72 of the Civil Practice Act must set forth sufficient facts to show both a meritorious defense and due diligence on the part of the petitioner. Union Oil Co. of California v. Lang, 132 Ill. App. 2d 658, 662, 270 N. E. 2d 609. While it is generally held that the failure to challenge a section 72 petition admits as true all facts properly pleaded therein, the petition must be sufficient in and of itself to warrant such a holding. Elliot Construction Corp. v. Zahn, 99 Ill. App. 2d 112, 116, 241 N.E. 2d 129. The instant petition was patently deficient, it did not allege matters sufficient to permit petitioner the relief requested, and the trial court properly denied relief thereunder.

Petitioner's final contention is that the court should be liberal in allowing him his day in court. However, petitioner's dilemma was the result of his own neglect to serve plaintiff with a copy of his appearance showing the new address at which he desired to be served; further, the section 72 petition, as noted, was deficient in several material respects. Under the circumstances, section 72 is not available to relieve petitioner of the results of his own mistakes and neglect. *Esczuk v. Chicago Transit Authority*, 39 Ill. 2d 464, 467, 236 N. E. 2d 719.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

PER CURIAM.

GENERAL NUMBER 00000

PEOPLE OF THE STATE OF ILLINOIS,  
Plaintiff-Appellee,

vs.

JOE LINCOLN, a/k/a JOE LINCOLN  
JOHNSON,  
Defendant-Appellant.

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PREHEARING REPORT

Prepared by: Ambrose P. Tucker  
Date: October 16, 1973  
Trial Judge: Honorable Bernard P. Smythe  
Trial Counsel: William Jackson, for Defendant  
Edward V. Hanrahan, State's attorney  
of Cook County, for People

NATURE OF THE CASE:

Joe Lincoln, hereinafter called defendant, was charged by indictment with the crime of murder in violation of section 9-1 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 9-1). After a bench trial, he was found guilty and sentenced to a term of 14 to 20 years.

ISSUE:

Was the representation afforded the defendant at trial of such low caliber as to amount to no representation at all?

STATEMENT OF FACTS:

At trial, the following evidence was adduced: Frances A.

Caldwell testified that on August 3, 1970, in the early evening hours she had occasion to be in the playground area of Metropole High School located at 1200 South Western, Chicago, Illinois, with Richard Smith, also known as Tough Smith (T. 3-4). The defendant, Joe Lincoln, walked up carrying a sawed-off shotgun and ordered Smith to get up against the wall (T. 6-7). Smith put his hands against the wall (T. 7). Defendant then said, "Man, I'm tired of you fucking with me." (T. 7). The defendant fired one shot and Smith fell (T. 8). Miss Caldwell ran and heard two more shots (T. 8). Miss Caldwell ran to the corner of 19th and Western and telephoned the police department (T. 9). A short time later, Miss Caldwell saw the defendant, Joe Lincoln, on the 1900 block of Western (T. 9). The defendant asked why she ran and she replied that she was scared (T. 10-11). Miss Caldwell and defendant proceeded to Western Ave. Hospital where defendant took his trench coat and hat out of the bushes in front of the hospital and took two shotgun shells out of the pocket of the trench coat, which shells he handed to Miss Caldwell (T. 11-12). Miss Caldwell and the defendant then went to a lounge located on 65th Street between Carolina and Lakeview where they stayed for five to ten minutes (T. 14). They then proceeded to a liquor store on 62nd Street between Washington and Jefferson where the defendant purchased some liquor and made several telephone calls (T. 14-15). Defendant then walked Miss Caldwell home (T. 15).

Miss Caldwell testified that prior to the shooting the last time she had seen the sawed-off shotgun was approximately three weeks to a month earlier (T. 16-17). At that time, she, the defendant, Maryanne Elsworth and Herschel (last name unknown) went to the area of 82nd and Williamson (T. 17). Herschel got out of the car and a short time later returned with the sawed-off shotgun (T. 18). She testified that at that time they went back to the project at 6100 Johnson, Chicago, Illinois (T. 19). They went up to the 14th floor with the defendant carrying a shotgun (T. 19). They then returned down to the ground floor and observed Smith coming out of the building (T. 20). Herschel had possession of the shotgun at this time (T. 21). Approximately 15 minutes later, Smith was coming back into the building (T. 21). At that time, Miss Caldwell said, "This is the best time to get him because we never have a chance like this." (T. 22). Maryanne said, "Yes, that's right." and Herschel said, "No, it has to be planned." (T. 22). Defendant did not say anything at this time. (T. 22)

It was stipulated that if Officer O'Kelly were called to testify, he would state that in response to a call on August 3, 1970, he proceeded to the playground behind Metropole High School, located at 1200 South Western, Chicago, Illinois. (T. 44) He found the body of Richard Smith lying face up at the rear of the building with three shotgun wounds in his body (T. 44). Richard Smith was transported to the hospital at which time he was pronounced dead by Dr. Kildare (T. 44).

It was also stipulated that if Officer Madison were called to testify, he would state that in examining the scene of the crime he discovered a Volunteer sawed-off shotgun, serial number 800153, containing one spent shell. He found the shell inside the weapon which was found in a rain gutter behind the school building at approximately 90 21st Street (T. 44). He also found two other spent twelve gauge shotgun cartridges, one with the word "Tough" scratched in the shell (T. 44-45).

It was also stipulated that if Dr. Learned were called to testify, he would state that on August 4, 1970, he performed an autopsy on the body of Richard Smith. The body had three shotgun wounds and, in Dr. Learned's opinion, the cause of the death of Richard Smith was a shotgun wound to the neck and spinal cord (T. 45-46).

It was also stipulated that if James Brown were called to testify, he would state that he was the uncle of the deceased. He had occasion to see the deceased prior to the shooting, at which time the deceased was alive and well. He subsequently identified the deceased's body at the Cook County Morgue (T. 45).

It was also stipulated that if Thomas P. McNamara and Elbert Lee Williams were called to testify, they would testify that they were special agents for the F.B.I. assigned to Kansas City, Missouri. On September 22, 1971, they arrested the defendant. The defendant subsequently gave them a written statement which was introduced into evidence (T. 46-47).

In his written statement, the defendant stated that on August 3, 1970, he was drinking gin and noticed Richard Smith talking to his girlfriend on the school playground. Defendant proceeded to his house to get his twelve gauge sawed-off shotgun, stopping to clean his gun, and then proceeded back to the playground. Defendant stated that he then went up to Richard Smith and told him to get up against the wall. He stated that he pulled the trigger, but the gun failed to fire because he had forgotten to load it. He quickly loaded the gun, aimed the shotgun at Smith and fired. Defendant stated that at this time he came to lose all control of any type of rational behavior. Defendant stated that due to previous incidents with Richard Smith, he believed that Smith was going to kill him (R. 76).

Joe Lincoln, defendant, testified that after the incident in question, he went to St. Paul, Minnesota, then to Bemidji, Minnesota, then to New York, then to Los Angeles and finally to Kansas City, Missouri (T. 49-50). He knew Richard Smith, also known as "Tough" Smith and knew that he was a member of the Spotted Leopard Gang (T. 50). Prior to August 3, 1970, Richard Smith had threatened to kill the defendant on several occasions (T. 50-51). Defendant admitted that on August 3, 1970, he shot and killed Richard Smith (T. 51-54). Defendant testified that on August 3rd, he had been drinking all day and consumed three to four fifths of wine, whiskey and beer (T. 55). He approached Tough and told him to get up against the wall (T. 57-58). He then shot him (T. 58). Defendant

stated that after the first shot, he did not remember anything (T. 59).

DEFENDANT'S CONTENTIONS:

The defendant contends that the representation of counsel at trial was of such low caliber as to amount to no representation at all in violation of due process.

PEOPLE'S CONTENTIONS:

The People contend that the defendant was given highly competent representation.

DISCUSSION AND ANALYSIS:

Defendant's only argument on appeal is that his trial counsel did not give him adequate representation. In order to sustain such a position, defendant must establish actual incompetency of counsel as reflected in the manner of carrying out his duties and substantial prejudice resulting from such incompetency without which the outcome would probably have been different. People v. Goerger, 52 Ill. 2d 403, 288 N. E. 2d 416; People v. Dudley, 46 Ill. 2d 305, 263 N. E. 2d 1; People v. Morris, 3 Ill. 2d 437, 278 N. E. 2d 10.

Defendant urges three instances that demonstrate his trial counsel's incompetency: (1) when counsel failed to object to prejudicial hearsay testimony, (2) when counsel cursorily stipulated to defendant's confession, and (3) when counsel failed to raise the readily available defense of insanity.

Defendant's first argument is that evidence of his trial counsel's incompetency was demonstrated when counsel failed to object to the testimony of Frances Caldwell when she testified to a conversation occurring three weeks prior to the incident. Miss Caldwell's testimony regarding that conversation indicated that she suggested that it would be a good time to kill Smith. Maryanne agreed, but Herschel stated that it had to be planned. During the conversation, the defendant did not say anything. In view of the fact that this was a bench trial where the trial judge is presumed to recognize incompetent evidence and to disregard it, this testimony, even if considered improper, did not result in any substantial prejudice to defendant without which the outcome of the trial would have been different.

Defendant next argues that evidence of his trial counsel's incompetency was demonstrated when his trial counsel stipulated to the defendant's confession given to the Federal Bureau of Investigation agents. A stipulation of evidence does not indicate incompetency of counsel. People v. Bush, 29 Ill. 2d 367, 194 N. E. 2d 308. Further, defense counsel's stipulation to defendant's written statement did not in any way harm defendant's case, since defendant's testimony at trial was substantially the same as his written statement. In the context of this case, defense counsel's stipulation to defendant's written statement might well represent a tactical decision in the interests of candor and consistency. It cannot be said that defense counsel's stipulation resulted in any

substantial prejudice to defendant without which the outcome of the trial would probably have been different. People v. Bliss, 44 Ill. 2d 363, 256 N. E. 2d 343.

Defendant next argues that evidence of his trial counsel's incompetency was demonstrated when counsel failed to present the possible defense of insanity. In People v. Hinton, 132 Ill. App. 2d 409, 270 N. E. 2d 93, the defendant on appeal argued that his appointed trial attorney was incompetent in that he failed to raise an insanity defense. In rejecting this argument this court quoted from People v. Heirens, 4 Ill. 2d 131, 143, 122 N. E. 2d 231, where the court said:

"Insanity is a defense to be asserted at the trial as any other defense; and the decision not to advise such a defense, even if it were a mistake, does not of itself show that defendant was inadequately represented. Mistakes of counsel will not amount to a denial of due process unless on the whole the representation is of such low caliber as to be equivalent of no representation at all. ..."

In the case at bar, the failure of trial counsel to raise the defense of insanity does not demonstrate incompetency of counsel. Further, there has been no showing that the defense of insanity could have been successfully raised at trial. Defendant's own trial testimony, as well as his written statement given to F.B.I. agents, established that he at all times knew what he was doing prior to and at the time of the shooting, until after he fired the first shot. It was only at that point in time that defendant testified that he seemed to lose control.

In the last paragraph of his brief, defendant concedes that each of the three cited instances of alleging incompetency,

standing alone, do not amount to incompetency of counsel. Defendant argues that when all three instances are considered together, they are sufficient to render the proceedings a sham and demonstrate a representation of such low caliber so as to have deprived the defendant of due process of law. We have carefully examined the entire trial record and find that the defendant was adequately represented at all stages of the proceedings. Defense counsel was obviously prepared, had filed pre-trial discovery motions, effectively cross-examined each witness at trial and presented the evidence on behalf of his client as best he could in view of the facts of the case. Counsel did succeed in getting a minimum sentence on behalf of defendant, despite the fact that the facts as adduced at trial demonstrated premeditated murder. Defendant did not at any time deny that he shot and killed Richard Smith, but felt that his actions were justified by Smith's prior threats to kill him. Under all of the facts and circumstances of this case, it cannot be said that defense counsel's representation of defendant was of such low caliber as to have deprived defendant of a fair trial.

RECOMMENDATION:

It is recommended that the judgment of the circuit court of Cook County be affirmed.

PROPOSED OPINION

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County,
vs.	)	
	)	
JOE LINCOLN, a/k/a JOE LINCOLN	)	Honorable
JOHNSON,	)	Bernard P. Smythe,
Defendant-Appellant.	)	Presiding.

PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Joe Lincoln, defendant, was charged by indictment with the crime of murder, in violation of section 9-1 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 9-1). After a bench trial, he was found guilty and sentenced to a term of 14 to 20 years. On appeal, defendant argues that the representation afforded him by appointed counsel at trial was of such low caliber as to violate due process requirements.

At trial, the following evidence was adduced: Frances A. Caldwell testified that on August 3, 1970, in the early evening hours, she was in the playground area of Metropole High School with Richard Smith, also known as Tough Smith. The defendant walked up carrying a sawed-off shotgun and ordered Smith to put his hands up against the wall. Defendant then said, "Man, I'm tired of you fucking with me." Defendant fired one shot and Smith fell. Caldwell ran and heard two more shots fired. She immediately telephoned the police. A short time later,

Caldwell saw the defendant in the 1900 block of Western. The defendant asked why she ran and she replied that she was scared. Caldwell and defendant proceeded to Western Ave. Hospital where defendant took a trench coat and hat he was wearing at the time of the shooting out of the bushes in front of the hospital. Defendant took two shotgun shells out of the pocket of the trench coat and handed them to Caldwell. Caldwell and the defendant then went to a lounge located at 65th Street, between Carolina and Lakeview where they stayed for five or ten minutes. They then proceeded to a liquor store between Washington and Jefferson on 62nd Street where the defendant purchased some liquor and made several telephone calls. Defendant then walked Miss Caldwell home..

Caldwell testified that she had seen the sawed-off shotgun approximately three weeks earlier. At that time, she, the defendant, Maryanne Elsworth and Herschel (last name unknown) went to the area of 82nd and Williamson where Herschel picked up the sawed-off shotgun. She testified that they then went back to the project where they saw Richard Smith, also known as Tough Smith, entering the building. At that time, Miss Caldwell said, "This is the best time to get him because we never have a chance like this." Maryanne said, "Yes, that's right." and Herschel said, "No, it has to be planned." The defendant did not say anything at this time.

It was stipulated that if Chicago Police Officer O'Kelly were called to testify, he would state that on August 3, 1970, in response to a call, he proceeded to the playground of

Metropole High School. There he found the body of Richard Smith at the rear of the building with three shotgun wounds in his body.

It was also stipulated that if Chicago Police Officer Madison were called to testify, he would state that in examining the scene of the crime, he discovered a sawed-off shotgun containing one spent shell. He also found two other spent twelve gauge shotgun shells, one having the word "Tough" scratched in the casing.

It was also stipulated that if Dr. Harry Learned were called to testify, he would state that on August 4, 1970, he performed an autopsy on the body of Richard Smith. The body had three shotgun wounds. In Dr. Learned's opinion, the cause of the death of Richard Smith was a shotgun wound to the neck and spinal cord.

It was also stipulated that if Thomas P. McNamara and Elbert Lee Williams were called to testify, they would state that they are special agents for the Federal Bureau of Investigation assigned to Kansas City, Missouri. On September 22, 1971, they arrested the defendant who subsequently gave them a written statement.

In his written statement, which was introduced into evidence defendant stated that on August 3, 1970, he was drinking gin and noticed Richard Smith talking to his girlfriend on the school playground. Defendant proceeded to his home where he got his twelve gauge sawed-off shotgun. The gun had not been fired in some time and defendant stopped to clean the gun.

Defendant then proceeded back to the playground where he ordered Smith up against the wall. Defendant stated that he pulled the trigger, but the gun failed to fire because he had forgotten to load it. Defendant stated that he quickly loaded the gun, aimed it at Smith and fired. At this time, he seemed to lose all control of any type of rational behavior. Defendant stated that the motive for the shooting was that Richard Smith had, on several previous occasions, threatened to kill him.

Joe Lincoln, defendant, testified that prior to August 3, 1970, Richard Smith, who was a member of the Spotted Leopard Gang, had threatened to kill him on several occasions. Defendant stated that on August 3, 1970, he had been drinking all day and had consumed three to four fifths of wine, whiskey and beer. He approached Smith in the school yard and ordered him up against the wall. Defendant then shot Smith. Defendant stated that after the first shot, he did not remember anything that had occurred. Defendant testified that after the incident in question, he went to St. Paul, Minnesota, then to Bemidji, Minnesota, then to New York, then to Los Angeles and finally to Kansas City, Missouri.

Defendant's only argument on appeal is that the representation afforded him at trial by appointed counsel was of such low caliber as to violate due process requirements. In order to sustain such a position, defendant must establish actual incompetency of counsel as reflected in the manner of carrying out his duties and substantial prejudice resulting from such incompetency without which the outcome would probably

have been different. People v. Goerger, 52 Ill. 2d 403, 288 N. E. 2d 416; People v. Dudley, 46 Ill. 2d 305, 263 N. E. 2d 1.

Defendant argues that there are three instances which demonstrate incompetency of counsel: (1) When counsel failed to object to prejudicial hearsay testimony; (2) when counsel cursorily stipulated to defendant's confession; and (3) when counsel failed to raise the readily available defense of insanity.

Defendant first argues that evidence of his trial counsel's incompetency was demonstrated when his counsel failed to object to the testimony of Frances Caldwell when she testified to a conversation occurring three weeks prior to the shooting of Smith. Caldwell's testimony regarding that conversation indicated that, although the defendant was present, he did not say anything. Caldwell testified that she suggested it would be a good time to kill Smith. Maryanne agreed but Herschel stated that it had to be planned. In view of the fact that this was a bench trial where the trial judge is presumed to recognize incompetent evidence and disregard it, this testimony, even if considered improper, did not result in any substantial prejudice without which the outcome of the trial would have probably been different. The evidence of defendant's guilt was overwhelming.

Defendant next argues that evidence of his trial counsel's incompetency was demonstrated when his trial counsel stipulated to the defendant's confession given to the Federal Bureau of Investigation agents. A stipulation of evidence does not

indicate incompetency of counsel. People v. Bush, 29 Ill. 2d 367, 194 N. E. 2d 308. Further, defense counsel's stipulation to defendant's written statement did not in any way harm defendant's case, since defendant's testimony at trial was substantially the same as his written statement. In the context of this case, defense counsel's stipulation to defendant's written statement might well represent a tactical decision in the interests of candor and consistency. It cannot be said that defense counsel's stipulation resulted in any prejudice to defendant. People v. Bliss, 44 Ill. 2d 363, 256 N. E. 2d 343.

Defendant next argues that evidence of his trial counsel's incompetency is demonstrated by the fact that trial counsel failed to raise the defense of insanity. The failure to raise an insanity defense, even if it were a mistake, does not, of itself, show that the defendant was inadequately represented. People v. Heirens, 4 Ill. 2d 131, 122 N. E. 2d 231; People v. Hinton, 132 Ill. App. 2d 409, 270 N. E. 2d 93. Further, there is no showing that the defense of insanity could have been successfully raised in the case at bar. Defendant's own trial testimony, as well as his written statement, established that at all times he knew what he was doing until he fired the first shot. Defendant testified that it was only after that point that he seemed to lose all control.

Defendant, in his brief, concedes that each of the alleged instances of appointed counsel's misconduct, standing alone, does not demonstrate incompetency. Defendant argues that when

taken together, these instances rendered the proceedings a sham and denied him due process of law. After a careful examination of the entire record, we cannot agree with defendant's conclusion. Defense counsel was obviously prepared, had filed pre-trial motions, effectively cross-examined each witness at trial and presented evidence on behalf of his client as best he could in view of the facts of the case. Defendant did not at any time deny that he shot and killed Richard Smith, but felt that his actions were justified in view of Smith's prior threats against him. Counsel did succeed in getting a minimum sentence on behalf of his client. After an examination of the totality of appointed counsel's conduct, we hold that defendant has failed to establish incompetency.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

**END**

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