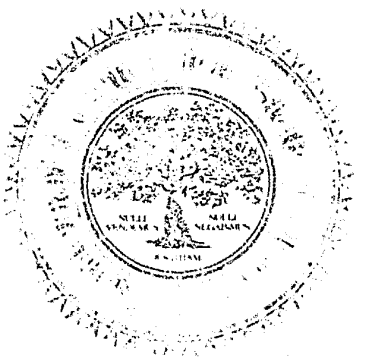

THE APPELLATE PROCESS AND STAFF RESEARCH ATTORNEYS IN THE APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT

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

by

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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 Illinois Appellate Court. The project at all four courts was funded by the Law Enforcement Assistance Administration.

The analysis and conclusions contained here are those of the reporter, Tom J. Farer, and the staff director, Cynthis M. Jacob (unless otherwise indicated) 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 the report. Thus appreciation is due to all of the New Jersey 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 New Jersey 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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CHAPTER I

OBJECTIVES

A. Introduction: The Appellate Avalanche

The Appellate Division of the Superior Court of New Jersey is an intermediate appellate court with state-wide jurisdiction, consisting of 18 judges organized into six parts.[1] The membership of each part changes annually. The Court serves a state with conditions for high-volume litigation: a large, densely-settled population with high per capita income.

During the past decade, the number of appeals filed has risen dramatically. Changes in procedure, increased output per judge, and periodic increases in the number of parts have prevented the growth of a substantial backlog of cases ready for consideration by the Court. The Court's ability to keep abreast of its docket, however, is threatened by the continuing increase in filings. Moreover, the judges believe that the number of dispositions they are forced to maintain in order to prevent further growth in the backlog may affect the quality of their work.

Motivated at least in part by hope of ameliorating these difficulties, the Appellate Division in the spring of 1972 accepted an invitation from the National Center for State Courts to participate in the Appellate Justice Project. The project was funded principally by a grant from the Law Fnforcement Assistance Administration (LEAA). The money was used to establish a centrally located group of attorneys who, under the supervision

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1. As of September 1974, the Appellate Division will consist of 21 judges organized into seven parts. During the project year, there were 15 judges organized into five parts.

of a lawyer with substantial appellate experience, would provide a variety of services for the court.

B. Increasing the Court's Productivity

1. The initial conception. As originally envisioned by the designers of the Project, Professor Daniel Meador, the Project Director, and Justice Winslow Christian, the then Director of the National Center for State Courts, the staff's primary function would be to screen all cases docketed for the purpose of identifying those "which appear susceptible to disposition without oral argument and on the basis of a short per curiam opinion."[2] Memoranda setting out procedural history, facts, relevent law, and suggested dispositions would be prepared for as many cases as staff size permitted. When appeals seemed susceptible to resolution without oral argument, a draft opinion also would be prepared and forwarded to the court. By thus reducing the time required to hear oral argument and to formulate opinions, the staff system, it was presumed, would enable the judges either to increase their dispositions or, in a court without a backlog, to allocate additional time for deliberation on more difficult appeals. In addition to this primary service, the staff was to draw upon its collective experience, experiments conducted in other courts, scholarly writings, and the various statistics it would collect to develop proposals for procedural reform particularly those which could be implemented by the staff.

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2. Undated press release of the National Center for State Courts containing a summary description of the Project.

2. A criterion for case selection. In New Jersey, the size of the budgeted staff relative to the volume of new appeals and the backlog of old ones precluded handling more than a fraction of the court's docket and therefore mandated application of some principle of selectivity. There were five patent alternatives: (1) selection on the basis of age, beginning with the oldest ready appeal; (2) random selection, for example, every fifth appeal filed; (3) selection by substantive categories--for example, criminal appeals and appeals from administrative agencies--determined by the Project designers, the staff, the court on an ad hoc basis or, most reasonably, by any existing priorities governing expedited handling; (4) selection of those cases perceived to be most difficult or novel, and (5) selection based upon projected ease of disposition, namely, cases calling for the application of firmly established doctrine to a fact pattern similar to decided cases.

The fifth alternative, clearly favored by the Project designers, was adopted. Its supposed virtues were several. First, since in easier cases staff attorneys and judges were more likely to agree on appropriate disposition and the reasons therefor, it could help the attorneys to foster confidence in their project. This was essential, for the Project could contribute to productivity only if the judges were willing to rely in some degree on staff opinions and memoranda.

This necessary reliance pointed up a second virtue of the criterion selected. Under it the more difficult cases would, of course, go directly to the court and hence receive that fuller measure of judicial attention which their factual complexity or

doctrinal novelty requires. This assumes that comprehensive perusal of the record and personal workup of a tentative opinion adds to a judge's "feel" for a case and thus facilitates doctrinally progressive and factually sensitive dispositions. A third virtue was administrative. Where most cases processed are of roughly the same difficulty, it is easier to equalize the burden of staff attorneys and to appraise the dispatch with which they carry out their functions.

3. Oral argument: New Jersey opts for preservation. As noted above, at the outset of the national Project screening was integrally related to the elimination of oral argument in appeals which are clearly governed by firmly established precedent. In New Jersey, however, the function of screening was limited to identification of cases appropriate for staff disposition because the Presiding Judges were uniformly opposed to elimination of the oral-argument option.

Until September 1971, oral argument was automatically docketed unless explicitly waived. A revision of New Jersey Court Rule 2:11-1(b) eliminated oral argument unless a specific request for it accompanied the filing of briefs.[3]

During the Project year, argument was requested in only 47 percent of appeals. It consumed no more than a few hours each court session.[4]

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3. Until the 1973-74 court term, however, the judges had been flexible in allowing counsel to change their minds.

4. See statistics at p. 16, infra, detailing the number of sessions each year. All statistics other than those derived from the Tables appended hereto have been drawn from the Annual Reports of the Administrative Director of the Courts or have been supplied by the Clerk of the Appellate Division, Elizabeth M. McLaughlin, for whose generous assistance and good advice we are deeply grateful. Also we wish to acknowledge the continuing flow of constructive criticism and the thoughtful comments from James Ciancia, Carl Crawford, Martha Kwitny and Ellen Wry, Central Appellate staff members, without whose help this monograph would not have been possible.

Oral argument is not merely tolerated by the Appellate Division as an inconsequential drain on judicial time. Rather it is warmly supported, first because the judges believe that parties are entitled to a face-to-face plea, though it may be extremely abbreviated, and secondly because in many instances the judges find oral argument of genuine assistance to their deliberations. Its peculiar efficacy flows in part from the ability of the judges to focus discussion on and thus often clarify the points which appear crucial to them. Whether these would be dispositive considerations if the court were not free to terminate an argument at any point it ceased to inform, cannot be ascertained.

C. Expediting Criminal Appeals

1. The objective quantified. Related to, yet distinct from, the goal of increased productivity was the goal of expediting criminal appeals, the goal which after all justified support of the Project by the Law Enforcement Assistance Administration. Expedited decision in criminal cases could be a mere incident of backlog reduction. Or, without any overall reduction, expedition could be effected by some system of priority handling organized around the staff. For instance, the staff might have been directed to handle criminal appeals exclusively. Staff-processed cases could have then been placed on a special track enabling them to bypass regular scheduling.

In the Appellate Division's request addressed to the State Law Enforcement Planning Agency (SLEPA) for funds to supplement the LEAA grant to be channeled through the National Center, a specific goal

of adjudication of criminal appeals "within 90 days after the trial court renders judgment" was announced. It was not clear, however, precisely how the staff system would achieve this.[5]

2. Obstacles and solutions. The three most evident obstacles to 90-day dispositions were: (1) the backlog and the continuing increase of appeals in civil as well as criminal cases; (2) the failure of court reporters to comply consistently with the rule requiring that transcripts be filed within 30 days following the judgment below coupled with the requirement that the transcript of the entire trial be part of the appellate record; and (3) the inability, springing from insufficient staff, of the Office of the Public Defender and the Appellate Section of the Division of Criminal Justice, the opposing litigants in the majority of criminal appeals, to meet briefing deadlines.

a. Priority for criminal appeals

The first obstacle could be overcome, if at all, only by giving all criminal appeals exclusive priority on the court's calendar. The result would be delayed disposition of civil appeals. Expedited criminal appeals represent a legitimate, indeed compelling, state interest (not to mention the intense personal interest of the 72 percent of appellants incarcerated pending disposition of their appeals) and almost any priority system would be a rational means for its promotion. Rather than creating a new priority system the

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5. Another of the goals announced in the request could have been understood as one of the techniques which the staff would employ to promote 90-day dispositions, namely, within the present court rules, the staff was to experiment with use of abbreviated records in criminal appeals.

court chose to support the existing arrangements which give criminal, as well as certain types of civil, cases a substantial though not exclusive priority.

b. Abbreviated records

The second obstacle might in theory have been reduced through the expedient of abbreviated records. But, given the emphatic resistence of the appellate judges and the staff to anything less than a full transcript, the theory could not be tested.

Opposition rested in part on the belief that, without examining the entire record, it is impossible to judge properly whether there has been manifest injustice within the meaning of the New Jersey precedents, since what might seem harmless as an isolated incident might assume a different cast in light of the whole record. Conversely, what might seem to be egregious as an isolated incident may fade into insignificance in the totality of a trial.

Without the entire record before them, not only the judges but also appellate counsel who had not handled the case in the trial court would be prevented from obtaining an adequate feel for the significance of particular errors. Like many other high-volume litigants, the Public Defenders's Office has separate trial and appellate units. The staff director, who had worked in the Public Defender's Appellate Section, stated that the standard operating procedure of appellate unit attorneys was to begin by reading the entire record. She thought that any change in the rule requiring full transcripts for criminal appeals would be undesirable and, moreover, would encounter strenuous opposition.

The Presiding Judges and the Administrative Director of the Courts agreed with this appraisal. They were also concerned with the amount of time which might be consumed in the preparation and review of initial statements designed to isolate the central issues and thereby to identify relevant parts of the trial record. If in the end virtually the entire record had to be ordered in a majority of cases, there would be a waste of time and energy. Finally, they remained unconvinced that record preparation was a major block to an expeditious appellate process. On the whole, they appeared satisfied with the work of the reporters and felt that the sanctions available through the Administrative Office of the Courts were sufficient to assure adequate compliance with the court's deadlines.[6]

c. Abbreviated briefs

The third obstacle was largely outside the direct influence of the court and the staff. At first, however, the Project reporter believed that the existence of the staff might permit implementation of a proposal calculated to reduce the briefing burden.

In a memorandum prepared before the beginning of the Project year, he suggested that

> * * * no briefs should be allowed in criminal cases prior to initial categorization by the staff attorney. Instead of a brief, the appellant would file a Statement of Issues.

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6. Presumably that optimism will not survive exposure to the data on delays in transcript preparation contained in Table 1, Appendix I. The sanctions available to insure timely completion of transcripts are discussed in Chapter III.

> 'This shall be a brief typewritten document normally not exceeding three legal size pages, double spaced. This statement shall list the issues appellant desires to present on appeal, that is, the points on which he contends the conviction should be reversed. Each point may be accompanied by a brief indication of the facts essential to the consideration of the issues, if these are not revealed by the Statement of the Issues itself. Citations to statutes and decisions (no more than three decisions per issue) deemed to directly support appellant's contentions should be included.'
>
> A copy of the Statement of Issues would be served on the appropriate prosecutorial authority. Within a short time he would respond with an Appellee's Statement which would contain a brief statement of the Prosecution's position on each of appellant's issues; 'supporting facts and citations should be included, subject to the restrictions as to brevity which applied to the Appellant's Statement.' The clerk of the Appellate Division would thereupon transmit the two statements and all papers and exhibits filed in the lower court proceedings and the transcript of those proceedings to a staff attorney.
>
> Staff attorneys might be given authority to select a limited number of issues for briefing, and rather sharp limits could be imposed on the size of the briefs that could be submitted with respect to those issues. The advocates would not, however, be limited on oral argument to those issues. Therefore, it will be necessary for staff attorneys to prepare memoranda on all of the issues identified in the appellant's initial statement.[7]

Neither the judges nor the staff director found that proposal engaging. As in the matter of abbreviated records, they feared that the combination of initial statements, discussions with staff

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7. The quoted material in the body of the memorandum is from a memorandum prepared by Professor Meador.

attorneys, and subsequent briefing might actually aggravate the time problems of appellate counsel. The suggested procedure would in addition reduce staff time available for the main job of case workups. A negative judicial response was also attributable to the conviction that briefs were often insufficient, coupled with the suspicion that shortened briefs might be even less helpful than many of those currently submitted.

3. The objective subordinated. In the initial discussions among the Project reporters, Professor Meador, and Justice Christian, the special problem of the delayed criminal appeal tended to be subsumed under the heading of "frivolous appeals." As noted above, there was an early decision that since the large volume of business clearly precluded staff handling of more than a fraction of the appeals filed, the staff would concentrate its efforts on those in which the proper result seemed most immediately evident. It was tacitly assumed that a disproportionate number of the cases satisfying that standard would be criminal appeals.

A persuasive a priori justification for that assumption is availability of free counsel for the large number of indigent defendants. They have nothing to lose. The assumption about the relative simplicity of criminal appeals rests on the further assumption that they possess a greater commonality of fact patterns. Whatever the intrinsic force of these assumptions, the fact is that in the procedures finally adopted, criminal appeals as such were not accorded any special status beyond that provided by the court's established system of priorities. Thus the staff would contribute directly to their expedited resolution only in the event criminal

appeals did satisfy disproportionately the standard of relative simplicity.

D. Promoting Doctrinal Consistency

A proliferation of decisional units increases the risk that not all like cases will be treated alike. In 1972, with five existing parts and the prospect of additional ones, the Appellate Division was sensitive to this risk.

The staff could promote doctrinal consistency among the parts by identifying cases with fact patterns effectively equivalent to those in previously decided appeals and recommending their assignment to the parts that had decided the earlier cases. It could also promote consistency by channeling companion cases to the same part. Doctrinal consistency between the Appellate Division and the Supreme Court could be facilitated by using the staff to isolate cases involving issues pending before the Supreme Court and putting them in a"hold" category so that they would be disposed of only after issuance of the relevant Supreme Court opinion.

E. A Proposed Objective Rejected: Promoting Expedition by Policing Requests of Counsel for Extensions of Time

Another possible staff function considered was policing requests of counsel for extensions of time. Presumably the grant of successive extensions occurs most frequently when requests are unopposed. There are at least two reasons why unopposed extensions may be objectionable. First, extensions may be responsive to the personal or pecuniary interests of counsel rather than those of their clients. A second possible justification for rejecting unopposed extensions rests on the assumption that prompt finality of litigation is desirable.

Under the existing New Jersey system, described in detail below, responsibility for policing compliance with deadlines is delegated to the Office of the Clerk of the Appellate Division, but it lacks the time, resources, and, more importantly, the jurisdiction to appraise justifications for delay.[8] The idea of policing compliance was rejected principally because it would involve a substantial portion of staff time in a largely administrative effort without clearly commensurate rewards. More importantly, the staff lacked authority to enforce adherence to the rules. Without authority, policing attempts would tend to be empty gestures. And even if they were marginally effective, time expended in this manner would not further the immediate and primary goals of the Project.

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8. As long as the court is backlogged, efforts to supplement the policing activities of the Clerk's Office would, of course, have no impact on the speed of disposition. They might help, however, to prepare counsel for the day cases can be heard as soon as they are ready.

CHAPTER II

THE COURT

A. Jurisdiction and Composition

The New Jersey Court system contemplates one appeal as of right to a court of general appellate jurisdiction.[1] This appeal is usually to the Appellate Division of Superior Court, which is the intermediate appellate court[2] having jurisdiction to review final judgments of the trial division of the Superior Court and, with limited exceptions, of the county, juvenile, and domestic relations courts, and final decisions or actions of almost all state administrative agencies or officers and rules promulgated by them.[3] The rules also provide for appeal by leave

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1. Midler v. Heinowitz, 10 N.J. 123 (1952).

2. Art. VI, § V, par. 2 of the New Jersey Constitution.

3. New Jersey Court Rule 2:2-3 (henceforward R.). The actual text is as follows:

> "Appeals to the Appellate Division form Final Judgments, Decisions, Actions and from Rules
>
> (a) As of Right. Except as otherwise provided by R.2:2-1(a) (3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right (1) from final judgments of the Superior Court trial divisions, the county court or the judges thereof sitting as statutory agents; the juvenile and domestic relations courts except in bastardy and paternity proceedings; the county district courts in civil actions except bastardy and paternity proceedings; and in summary contempt proceedings in all trial courts except municipal courts; (2) to review final decisions or actions of any state administrative agency or officer except those governed by R.4:74-8 (Wage Collection Section appeals), or to review the validity of any rule promulgated by such agency or officer; (3) in such cases as are provided by law. Unless the interest of justice requires otherwise, review pursuant to R.2:2-3 (a) (2) shall not be maintainable so long as there is available a right of review before any administrative agency or officer."

of the court:

> * * * in extraordinary cases and in the interest of justice, from final judgments of a court of limited jurisdiction or from actions or decisions of an administrative agency or officer if the matter is appealable or reviewable as of right in the Superior Court, Law Division, or in a county court, as where the jurisdiction of the court, agency or officer is questioned on substantial grounds.[4]

The judges now serving in the Appellate Division have chambers throughout the state, although they hear arguments as three-judge parts in either Newark or Trenton. The office of the Clerk, located in Trenton, dockets, processes, calendars, and distributes the cases which the judges decide. This office also compiles the relevant statistics on the court's work.

One of the Presiding Judges (the senior judge in each part is its Presiding Judge) is designated by the Chief Justice of the Supreme Court as the Presiding Judge for Administration. He exercises general administrative superintendence over the Appellate Division.[5]

B. Volume and Productivity

Quantitative production standards in the Appellate Division are established by the Chief Justice of the Supreme Court acting in his administrative capacity. These standards are implemented by the Presiding Judge for Administration through the Office of the Clerk of the Appellate Division. Production is expressed primarily in terms of the number of sittings per year per part and the number of cases heard per sitting.

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4. R.2:2-3(b).

5. R.2:13-1(b).

In 1950 just over 800 appeals were filed. During the next 15 years the figure increased gradually but erratically. For example, roughly 1,000 appeals were filed in 1960. In 1961 the figure dropped to about 950. It rose to just short of 1,200 in 1962, dropped slightly in 1963, increased to more than 1,200 in 1964, then again dropped below this figure in 1965. This pattern of two forward, one back has not recurred since the year 1965-66 when there began a consistent pattern of growth in the number of appeals filed. From 1965 to 1969 appeals increased at a rate of roughly 200 per year. Since 1969 the annual increment has been approximately 300, with the exception of 1971-1972 during which almost 900 more cases were filed than during the previous court year. There has also been a steady growth in petitions and motions, which in 1972-1973 totalled 2219.

The profusion of appeals has evoked three types of remedial response: An increase in the number of appellate parts, changes in procedure, and administrative directives increasing the number of cases heard per sitting.

In 1948 the Appellate Division began with two parts of fixed membership one of which did not sit full time on appeals. By 1958 a third part had been added and all three parts had become full time. The practice of fixed membership was replaced by annual rotation of the appellate judges. A fourth part was added in 1965, a fifth part at the beginning of the 1970-71 court year, and a sixth just two years later.

The court's production capability may have been enhanced by

two procedural innovations which occurred in 1971: allowance of oral argument only in those cases where it is specifically requested by counsel or required by the court[6] and a dramatic abbreviation of judicial opinions.

Prior to the change in procedure, civil appeals were almost never submitted for decision without oral argument. In criminal cases, argument was mandatory. As a result of the rule change, during the last court year roughly 53 percent of all docketed cases (both civil and criminal) were submitted on the briefs alone. That the apparent multiplication of "submits", as these cases are called, has effected some conservation of judicial time seems incontestable: out of 32 regular sittings for each of the five parts in 1972-73, eight were composed entirely of submits for a total of 40 submit calendars.[7] On those occasions, the members of each part were able to deliberate by telephone rather than travelling to Newark or Trenton. The extent to which submits save time in those weeks when they represent only a fraction of the part's docket is more uncertain.

Of apparently greater significance than the new rule is increasingly liberal use by the judges of their power to end argument when it ceases to inform. During the 1960's the number

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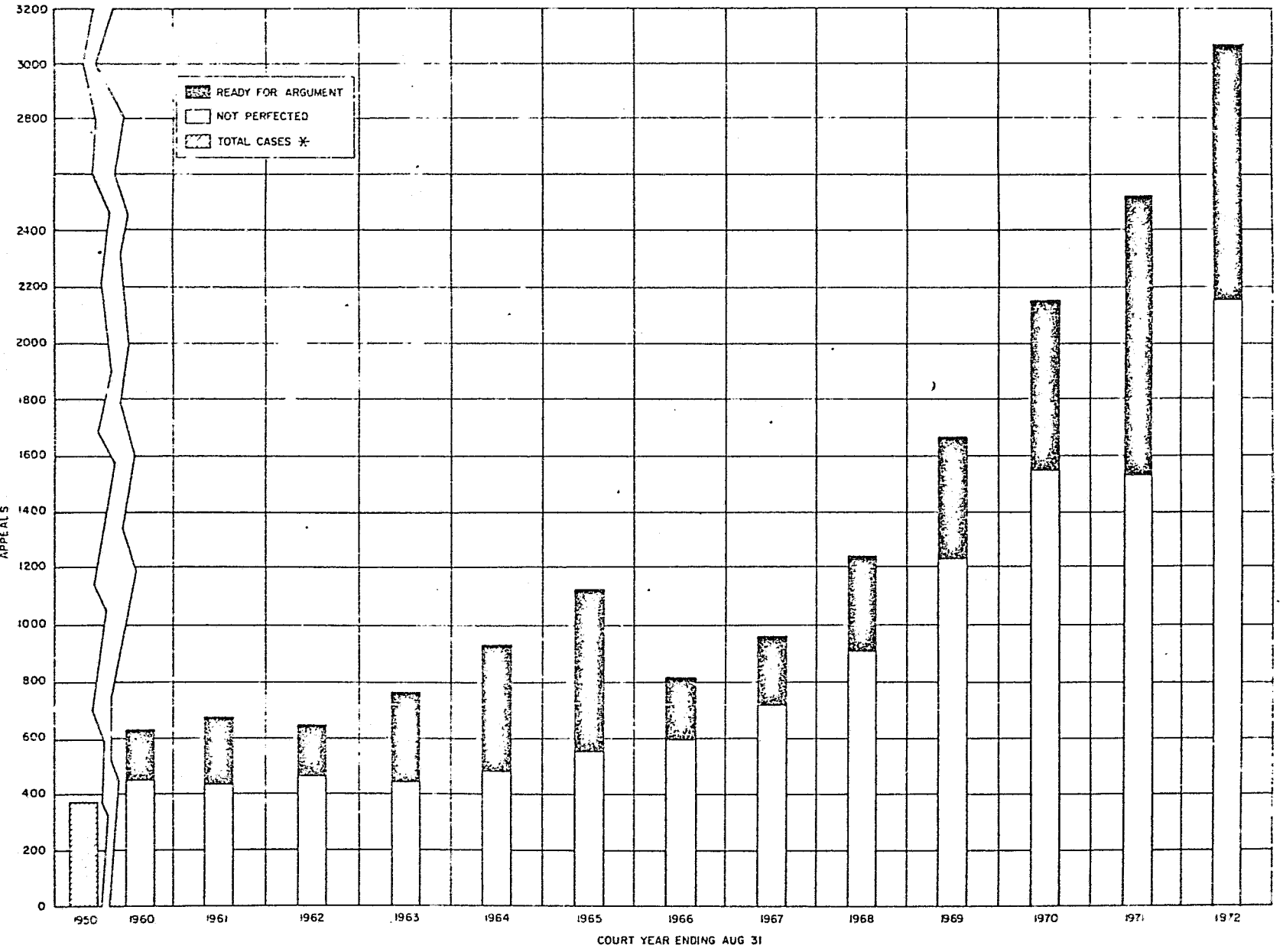
6. See p. 4, supra.

7. In addition to the 32 regular sittings from September to June, there are a variable number of emergency sittings at which normally only a single case is considered. During the summer each part, sitting for one two-week period, handles all motions and petitions and hears ten appeals.

CHART NO B-1
SUPERIOR COURT-APPELLATE DIVISION
APPEALS PENDING ARGUMENT AT END OF COURT YEAR

COURT YEARS ENDING AUGUST 31
1960 TO DATE COMPARED WITH 1950

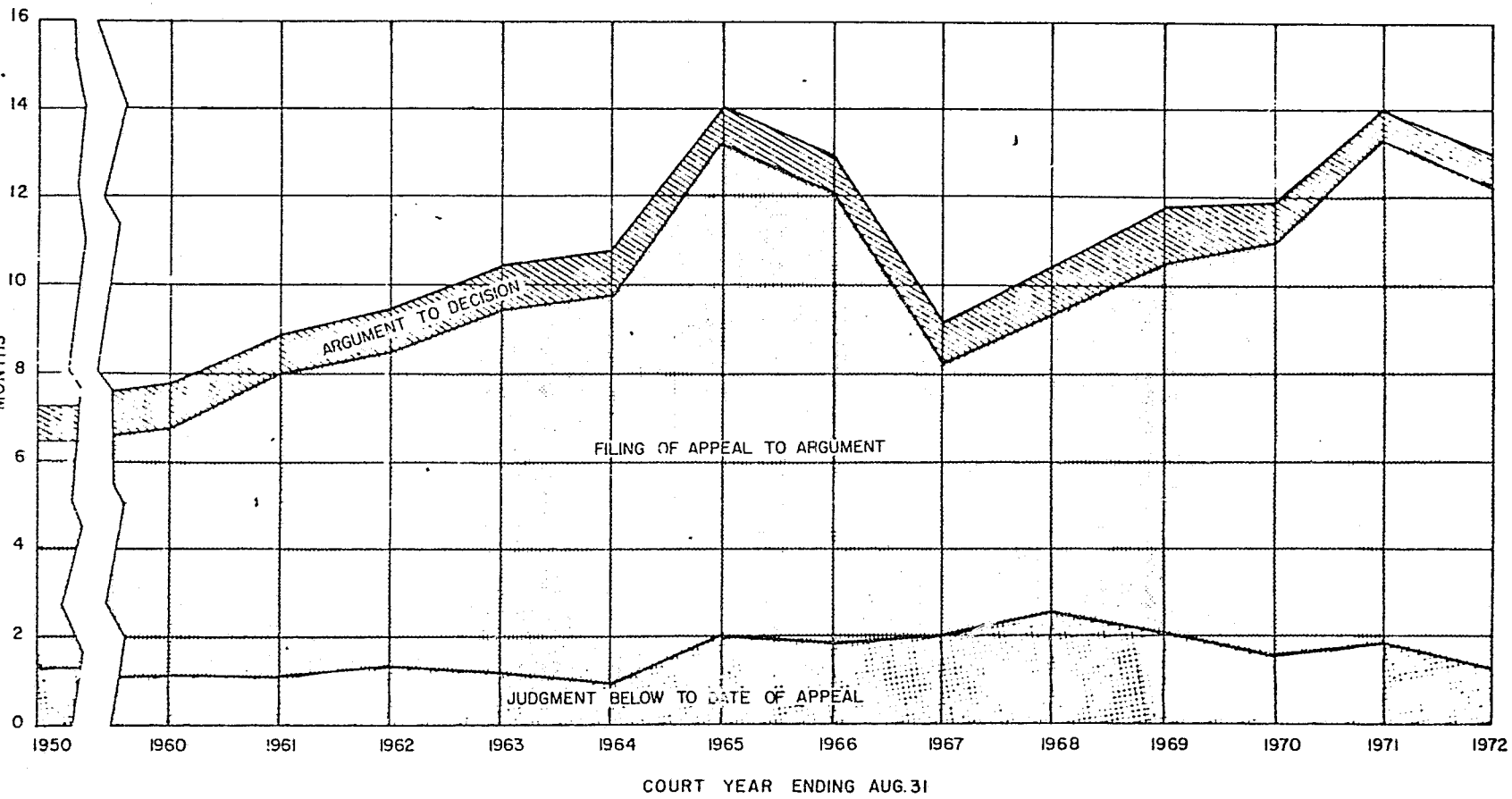


*NOTE BREAKDOWN NOT AVAILABLE PRIOR TO 1955
SOURCE TABLE B-1, p 1

Annual Report of the Administrative Director of the Courts: 1971-72, p. 17

CHART NO. B-2
SUPERIOR COURT-APPELLATE DIVISION
AVERAGE TIME INTERVALS FOR DISPOSITION OF APPEALS

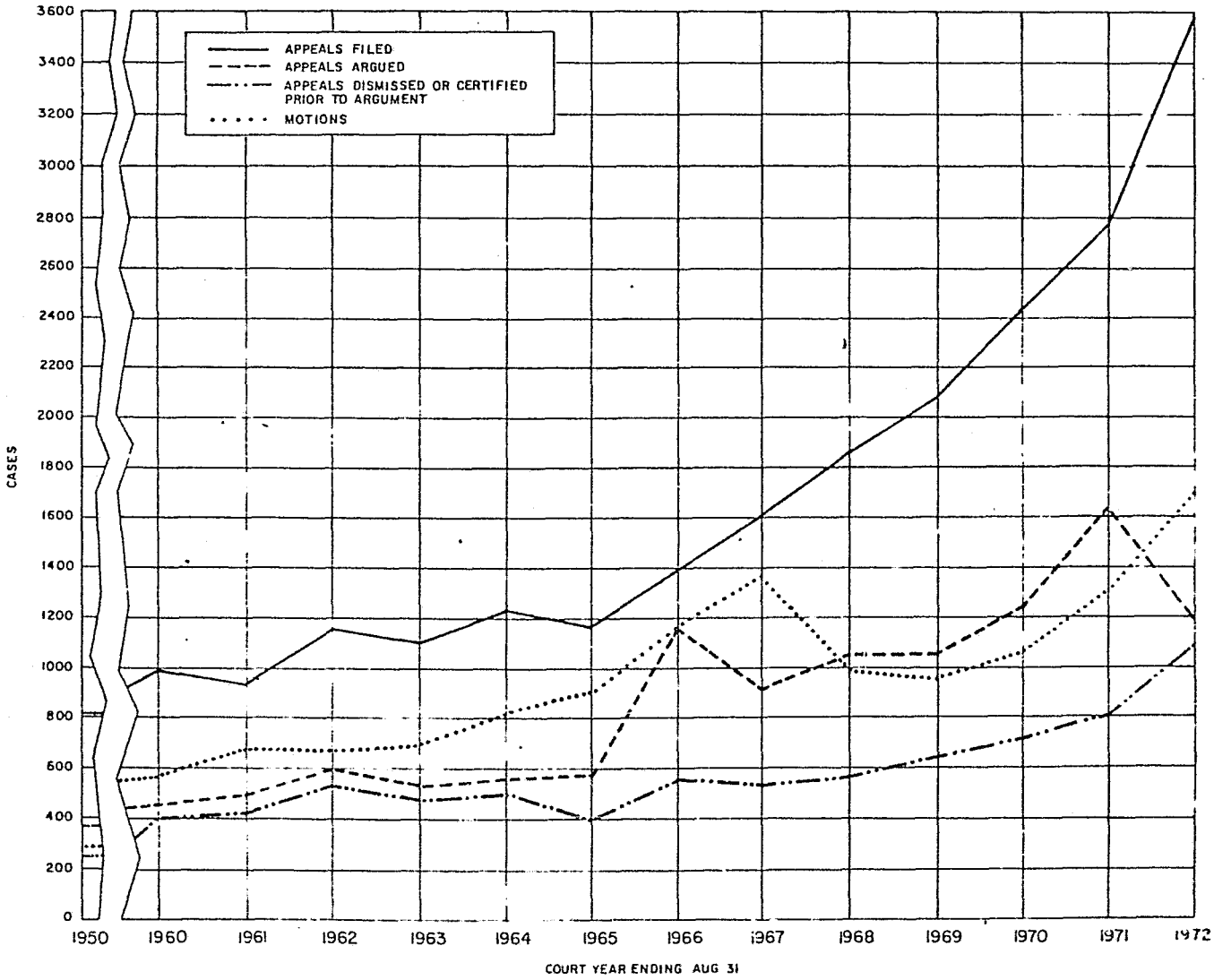
COURT YEARS ENDING AUGUST 31,
1960 TO DATE COMPARED WITH 1950



SOURCE: TABLE B-1, p 4

CHART NO. B-3
SUPERIOR COURT - APPELLATE DIVISION
APPEALS AND MOTIONS

COURT YEARS ENDING AUGUST 31,
1960 TO DATE COMPARED WITH 1950



SOURCE. TABLES B-1 AND B-2

of cases heard per part per sitting increased from six in 1960-61 to eight in 1969-70. Today, eight to nine cases are orally argued at each sitting with the exception of submit calendars. Although the number of cases heard has thus increased slightly, the time consumed by oral argument has been sharply reduced.[8]

A tendency toward compression has become increasingly characteristic of judicial opinions as well as the oral arguments of counsel. Ninety-three percent of all opinions delivered by the Division in the last court year were relatively brief per curiams; the 1960 figure was 26 percent.

In December 1971, as a short term emergency measure,[10] diminution in the number of signed opinions was directed by Chief Justice Joseph Weintraub; at roughly the same time, the number of cases to be decided per sitting was increased for each part from 10 to 12. His directive was summarized as follows:

> Chief Justice Weintraub has announced that due to the large backlog of pending appeals in the Appellate Division, opinions by the Appellate Division will be greatly shortened hereafter. The opinions, he said, would in many cases be confined to one paragraph, and in cases in which a lower court ruling is affirmed will be as short as one sentence wherever possible.

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8. The presiding judges estimate that during the past judicial year, the average length of a sitting for oral arguments was approximately three hours, from 10 a.m. to 1 p.m., while only a few years ago each sitting tended to run on into the late afternoon. It is therefore apparent that oral argument frequently terminates before the 30-minute limit which the rules impose on counsel for appellant and respondent respectively.

9. In New Jersey, all cases are disposed of by written opinion. No oral opinions are given, except in rare emergent matters.

10. Five years before, the same measure had been introduced for half a court year.

> The new procedure, to be effective shortly and to continue until June, will be similar to that employed several years ago when the backlog of appeals became unmanageable. The system proved advantageous in reducing the backlog.
>
> The Chief Justice said that opinions of the Appellate Division would be per curiam; that for the most part citations of previous cases relied on would be eliminated; that there would be a brief explanation of why a case is reversed, with cases affirmed receiving the shortest possible opinion; and that only in unusual cases, and with the prior approval of the Presiding Judge, would there be full opinions.[11]

This directive extended only to June 1972, but thereafter the Appellate Division judges felt a continuing pressure to shorten opinions, although lengthy signed opinions did appear in exceptional cases. Hence it is not surprising that the second most common modification of staff-authored per curiams was simple abbreviation,[12] even though the staff-authored opinions submitted to the court rarely exceeded three pages, and in most instances were shorter.

The combination of these remedial measures has not prevented continuing growth in the number of pending cases from 991 at the outset of the 1967-68 court year to 3,514 at the outset of the 1972-73 court year. The number of cases perfected and ready for calendaring has, however, remained relatively constant during the past three court years. It dropped from 969 on August 31, 1971[13] to 910 a year later,[14] then rose to 1018 as of August 31, 1973.[15]

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11. 94 N.J.L.J. 1181 (1971).
12. The more frequent modification was restatement.
13. Annual Report: 1971-72, p. 12.
14. Id. at 14.
15. Preliminary Annual Report; 1972-73, p. 7.

The median time interval from the perfection of appeals to decision fell from 161 days in 1971-72[16] to 147 days in 1972-73.[17]

In the category of motions and petitions, the court's work has increased roughly two-and-one half times since 1967-68, the year in which the advent of the Office of the Public Defender did away with the need to petition in forma pauperis for assignment of counsel in criminal appeals. During that year 983 motions and petitions were decided.[18] This figure remained relatively constant in 1968-69, when 975 motions and petitions were decided,[19] and in 1969-70 when 1082 such matters were decided.[20] In 1970-71 the escalation began, with 1286 being disposed of.[21] By 1971-72, 1641 motions and petitions were decided;[22] this number leaped to 2142 in 1972-73.[23] Motions and petitions are handled entirely by the judges themselves without aid of law clerks or staff.

Altogether the court's statistical profile shows a consistent increase in all matters before it, with concomitant collective efforts and ingenuity being exercised to keep abreast of the avalanche.

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16. Annual Report: 1971-72, p. 18.
17. Table 1, Appendix I.
18. Annual Report: 1967-68, p. 21.
19. Annual Report: 1968-69, p. 20.
20. Annual Report: 1969-70, p. 20.
21. Annual Report: 1970-71, p. 18.
22. Annual Report: 1971-72, p. 20.
23. Preliminary Annual Report: 1972-73, p. 7.

CHAPTER III

THE COURT'S PROCEDURE

A. The Official Perception

1. Channeling cases to the court: The Office of the Clerk

An appeal is initiated by serving a notice of appeal upon all parties who have appeared in the action and by filing the original and a copy with the court from which the appeal is taken. In criminal matters, the original and the copy are filed with the sentencing judge. The original is then forwarded to the Appellate Division.[1] Contained in the notice of appeal is a certificate of counsel for appellant stating that counsel has ordered the transcript from the court reporter and has paid the required deposit. Upon receipt of the notice of appeal, an employee of the Clerk's Office prepares a card for the case and then places the card in what is called the "new appeal file."

Under the Regulations of the Administrative Office of the Courts, the reporter has 30 days to deliver the transcript to counsel for appellant. If the transcript has not been delivered within 30 days the Clerk so informs the Administrative Office which then initiates an inquiry as to the cause of the reporter's failure to meet his deadline. The Director of that Office, through his delegates, has the authority to relieve the reporter of his courtroom duties or to reduce his caseload until he completes the transcript. The reporter may also be fined. The Clerk monitors the reporter informally until the transcript has been delivered.

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1. R.2:5-1.

Counsel for appellant has a maximum of 45 days from receipt of the transcript (or if there is no transcript, from filing of the notice of appeal) to file with the Clerk his brief, the transcript and an appendix containing all relevant parts of the record.[2] Once filing is completed, the case card is then moved from the "new appeal file" to the "first brief file."[3]

Following the filing of appellant's brief, respondent has 30 days to answer.[4] In the meantime, appellant's brief is examined by the Clerk to determine whether it complies with all formal requirements. The most common formal deficiencies in briefs are found in their appendices. Where a deficiency of any kind is found, a notice of deficiency is sent by the Clerk to counsel. He has 14 days to respond and failure to do so can lead to the placement of the case on the biweekly dismissal list.

Respondent's briefs are treated differently in civil and criminal cases. In a civil case, where there is an unexplained

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2. R.2:6-11(a).

3. In order to monitor the passage of time from the notice of appeal, each month the new appeal file is checked and cards which have been in it for more than 75 days are withdrawn. The case folder is examined to see if there is any reason for the delay. The Clerk can ascertain if and when the transcript was delivered to counsel because each reporter must send to the Clerk a copy of the covering letter sent to appellant counsel with the transcript. Moreover, following a recent change in R.2:5-3(a) the Clerk's Office will also have received a copy of the transcript. If the transcript is to counsel within the 30-day period but the brief, appendix and counsel's copy of the transcript have not been filed within 45 days thereafter, the Clerk checks the case folder to see if it contains an extension order from the Court. If not, the case will be placed by the Clerk on the biweekly dismissal list and notice to that effect will be sent to appellant.

4. R.2:6-11(a).

failure to respond within the obligatory 30-day period, the Clerk prepares a peremptory order and sends it to one of the six Presiding Judges, who are assigned to take all such orders for a month on a rotating basis. The Judge will normally grant respondent about 30 additional days to file his answer, possibly more.[5] If respondent fails to act within that time, the case will be moved for decision without benefit of respondent's brief.

The peremptory order is also used in criminal cases, but where there is a failure to respond the case does not go to decision. Rather, the Clerk's Office maintains informal contact with the respondent, usually the Appellate Section of the Division of Criminal Justice, encouraging it to complete its answer. If and when a respondent's brief is received, it too is checked for formal deficiencies and is subject to the 14-day deficiency letter.

When all brief have been received and all deficiencies cured[6] ten additional days (the time within which a reply brief must be filed[7]) must pass before the case is moved to the "ready shelf" for subsequent argument or submission. Cases on that shelf are divided into three categories: "accelerated cases" (for example, election cases), "priority cases" (all criminal cases, custody cases, cases involving a public body, etc.), and "regular cases." Within each category cases are scheduled in order of the filing date of appellant's brief.

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5. See Table 2, Appendix I.

6. In the event minor deficiencies are not cured, the case is sent to the court upon expiration of the period during which cure is allowed. If a major deficiency in appellant's brief is not cured, the case is placed on the dismissal list.

7. R.2:6-11(a).

Once the cases have been moved to the ready shelf, they are calendared, in order of priority, for submission to the court without regard to whether argument has been requested. The time lapse between the date the case becomes ready and its ultimate submission to the court depends on the time of year and the type of case involved.[8] In calendaring cases, the Clerk's Office makes every effort to schedule eight to nine oral arguments for each sitting of each part, with the remainder being "submits." An effort is also made to assure substantive diversity. The average caseload is six to eight criminal cases, two to three agency cases, two to three other priority cases, and three to four regular cases per session. Each part receives the briefs and records for the cases on its respective weekly calendars between one to two months in advance of the hearing or submission date.

Excluding the summer months, in four out of every five weeks, each part is assigned the same number of cases for disposition. As noted above, in the normal week, approximately half of the 14 to 16 cases per week involve oral arguments, all of which are heard during the first two days of the week. Some parts sit on Monday and others on Tuesday. By the end of the week all of the assigned appeals will have been tentatively decided and opinion responsibility allocated. The "off week" (every fifth week) allows each part to complete opinions, to prepare "pre-hearing" conference memoranda and generally to tie up loose ends before the next round of sittings.

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8. If the case becomes ready during the summer when the court sits on reduced basis, it will probably be scheduled in July or early August for sometime in the first six weeks of the fall. If it becomes ready in the middle of the court year it may be scheduled for submission within four to six weeks of the time it becomes ready.

2. Procedures within the parts. Once a case has been sent to the court, its progress thereafter is dictated by the internal procedures of the parts. The creation of a central staff has not significantly altered established procedures.

Of the 13 to 14 cases assigned per sitting in the year preceding initiation of the central staff, from one to two were criminal appeals in which the sole issue was the severity of the sentence. They were decided largely on the basis of an abbreviated record, including the pre-sentence report, without the aid of law clerks or elaborately detailed briefs.[9] Opinions were summary. As noted above, the staff's establishment coincided with an increase in the caseload to 14 to 16 per sitting. The Clerk has tried to include in the mix three staff-processed or excessive-sentence cases. Generally two of the three are staff processed.

With the exception of excessive-sentence cases, the first step in the decisional process is the preparation of a memorandum. In most parts, each law clerk[10] is asked to prepare a relatively detailed memorandum for one third of the cases left after the excision of the excessive-sentence and staff-processed appeals, an average of about four cases per clerk per sitting. The two central staff attorneys who clerked for the Appellate Division in 1971-72 stated that these memoranda average about ten pages. Each judge prepares

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9. Although not internally elaborate, briefs in excessive-sentence cases had to comply with the format imposed on briefs in regular cases.

10. In New Jersey the official title is "law secretary." To avoid confusion among readers from other jurisdictions we have used the more common designation "law clerk."

coincidently a summary memorandum of one to two pages on the cases being worked up by the clerks of his two colleagues. In addition, after reviewing the work of his own clerk, he indicates on the face of the memorandum whether he agrees or disagrees with the conclusion and, in case of the latter, his reasons for disagreement. In sum, one law clerk's memorandum and three different sets of judges' comments are prepared for each appeal, and circulated to all the judges prior to the argument or submission date. With staff-processed cases the staff memorandum replaces the clerk's memorandum; in excessive-sentence cases only the judge's comments are circulated.

Early on the day of submission, and before any oral arguments are heard, the judges meet to discuss each case on the calendar that week. After oral arguments are concluded there is further discussion the same day and tentative decisions are reached. Following the part's tentative decision, the Presiding Judge assigns responsibility for writing an opinion. While opinions may sometimes rely on a law clerk's memorandum, they are invariably prepared by the judge himself. Once the opinions are written, they are cleared with the other judges, and forwarded to the Clerk's Office for distribution to the parties. Except in the rare case of a rehearing or when supplemental argument is requested by the court, the court's involvement is ended at this point.

B. Deviations from formal procedural standards

1. Transcripts and briefs. The statistics collected during the Project year demonstrate that before the median appeal is "ready" for staff processing or assignment to the parts, there are significant deviations from the model inherent in the rules of the court.

The regulation requiring filing of the transcript within 30 days of its being ordered is more honored in the breach than in the observance. In civil cases the median for the filing of transcripts is 108 days after the judgment below. The median for filing a notice of appeal -- which, as noted above, must certify that the transcript has been ordered -- is 36 days. Since the reporter has 30 days to deliver the transcript, if that deadline were being met, the median filing would be 66 days. There is, however, a mean deviation of 61 days from the ideal. In criminal cases, where the median filing for transcripts is 200 days and the median filing for notices of appeal is 43 days, the mean deviation is 137 days from the ideal.[11] This dramatic gap between model and reality in the filing of transcripts in all appeals is inconsistent with the assurances received from the Administrative Office of the Courts and the Presiding Judges that the preparation of transcripts is not a serious obstacle to more expeditious disposition of appeals.

The figures show the median filing of appellant's brief as 126 days in civil and 210 in criminal cases. The mean filing in both civil and criminal cases is 15 days after the mean filing of the transcript. It is difficult to rationalize these figures on time elapse from filing of transcript to filing of brief with Table 2, Extensions of Time on Appeal, showing that a median of one extension for 30 days was granted in 835 of the 2300 cases decided by opinion during the court year 1972-73. Figures indicating

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11. The discrepancy between civil and criminal appeals may be deceptive because in the case of the former the rules do not require a full transcript, while in the latter a full transcript is required, except in excessive sentence cases. See R.2:5-3. The parties to a civil appeal on occasion stipulate to an abbreviated transcript, although no figures are kept on this. This may facilitate its timely preparation. Since the statistics lump together all civil appeals, as far as the timeliness of transcript filings is concerned, no meaningful comparison with criminal appeals can be made.

that in criminal cases appellant's briefs follow hard on the heels of the transcript filings are also inconsistent both with the experience of the Staff Director during the Project year and during the immediately preceding years when she served in the Office of the Public Defender, and with the impressions of the staff attorneys, the Presiding Judges, and the former Administrative Director of the Courts.

The statistics pertaining to respondent's brief, showing a 53-day gap from the mean filing of appellant's brief for civil appeals and a 46-day gap for criminal ones, are more credible.

If the rules of court were followed precisely, 150 days would elapse between final judgment and filing of the respondent's brief, if any.[12] At this point the case would be ready for consideration by the court. The median civil case is ready 178 days from final judgment and the median criminal case is ready 259 days from judgment. Delay in filing the transcript emerges as the single biggest culprit in preventing timely submission of cases to the court.

2. Impact of staff processing on time required for disposition. The data indicates that civil cases which are staff processed will be heard or submitted and decided more quickly than appeals which follow the traditional route. The mean number of days for oral argument and decision or submission without argument and decision in staff-processed cases are, respectively,

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12. The filing of respondent's brief has been selected as the cutoff point for comparative statistical purposes rather than the filing of the reply brief, since a reply brief is seldom filed. Thus, item 6 in Table 1 is not as statistically meaningful because it embraces only a limited number of cases.

285 and 313, and 312 and 331. The comparable figures for non-staff-processed cases are 327 and 358 for argued cases and 322 and 344 for submitted cases. Since in civil cases the median time for filing the respondent's brief -- at which point the appeal would normally be "ready" -- is 178 days, it is evident that in cases clustering around the median, a litigant can anticipate decision 20 percent more quickly where his appeal is staff processed.

With respect to criminal appeals, if cases argued and those submitted are aggregated, the mean time from appeal to decision is 21 days greater where an appeal is staff processed: 396 compared to 417 days. There is a simple explanation for the apparent lag in processed cases. In 225 out of a total of 1093 criminal cases, excessive sentence was the sole issue raised. When that is the only issue the entire transcript is not required and the briefs have perforce been succinct.[13] These cases, which are never staff processed, therefore become ready comparatively soon after judgment. Since one or two are assigned to each part for every sitting, calendaring and hence disposition also are accelerated. As shown in Table 1A, the mean time for an excessive sentence case to go through the appellate process is 317 days. When these cases are segregated from the non-staff-processed cases, both the median and the mean become greater than that for staff-processed cases.[14]

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13. Additionally, in March of 1973, responding to staff suggestion, the court eliminated the requirement of formal briefing. See text at pages 55 and 65, infra.

14. See Table 1A, Appendix I.

Altogether, it takes approximately one year for an average case to go from final judgment at the trial level to final judgment on appeal. The greatest gaps are between notice of appeal and filing of transcripts and filing of the final brief and submission to oral argument before the court. The first gap is correctable; the second is unavoidable if the court is to have any time to study the case before the date of submission or argument.[15]

15. The seeming delay in submission to the court is also affected by the reduced calendar in the summer.

CHAPTER IV

THE CENTRAL STAFF

A. Start-up Problems

Although the New Jersey Project officially began on July 10, 1972, the Project on a national level was not actually approved and federal funds allocated until September. In the interim, the director, who began work in July, relied on what was in effect a loan from the State and matching funds from the State Law Enforcement Planning Agency. The money from these sources made it possible to recruit one attorney and two secretaries. The chance availability of the large office and related library of a retiring judge allowed the initial phase of the staff operation to proceed unhampered. Without the strong support of the Administrative Director of the New Jersey Court System, start-up would have been delayed until well into the Fall of 1972. By October 1 the full budgeted complement of four attorneys, in addition to the staff director, was on board.

The court required that all attorneys on the central staff be admitted to the New Jersey Bar and have at least one year appellate experience. The supposition underlying these requirements was clear: with such an experiential base, central staff attorneys would be able to work independently without direction by any of the judges at the same time, exercise a degree of judgment which a less experienced attorney would not have.[1] While these requirements

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1. As it turned out, all four of the staff attorneys had graduated from law school within the past five years. Two had just completed Appellate Division clerkships; one had three years appellate experience with legal services; a fourth had been in general practice for five years. During the first year, one attorney resigned in December to move to California; she rejoined the staff in September 1973 replacing a staff member who resigned to enter private practice. The position she originally vacated was filled after about two months by an attorney with three years' appellate experience in the Office of the Public Defender.

made recruitment more difficult, their utility became apparent when the staff began its work.

B. Staff Operations

The staff operations described below were worked out by the staff director before the staff was complete and continued unchanged throughout the project year.

1. Screening. As cases become ready for judicial consideration they are transmitted by the Clerk's Office to the staff director for provisional categorization. Until the latter part of the project year, each case was designated either "one," "two," or "no." These designations reflected an ascending order of doctrinal indeterminacy or factual complexity as revealed by the briefs. Cases which on their facts appeared to be governed by firmly established precedent were rated "one." Uncertainty about the appropriate disposition would push a case into either of the other two categories. There was no sharp distinction between categories "one" and "two" or, for that matter, between "two" and "no." There was rather a continuum of complexity along which cases were arranged on the basis of a necessarily brief assessment. An average of about forty cases were screened each week within a period estimated by the staff director not to exceed two hours.

Under the procedure established the functional difference between categories "two" and "no" was that cases placed in the former category were returned to the Clerk's Office subject to recall by the staff, if the processing of all available "one" cases were completed before the "two" cases had been assigned to the parts.

Recall actually worked in the opposite direction. Before the staff could reach them, more than 325 cases were recalled[2] over the course of the year by the Clerk's Office for assignment to the parts.[3] In light of the staff's inability to process all the cases in category "one," the distinction between "two" and "no," that is, recallability, became irrelevant, so the "two" category was discarded. All other features of the initial screening procedure have been retained.

2. Preparing the case. Cases marked "one" are placed in a central pool in the staff office from which they are drawn by staff members according to filing date of appellant's brief, with the earliest filing being first in priority. There is a certain amount of case shopping, often stimulated by desire to apply an existing expertise or to develop expertise in some new area of the law.

After selecting a case, examining the entire record and the briefs, and completing necessary independent research, the staff attorney prepares a detailed memorandum which sets out the procedural history and facts of the case, and explores the relevant legal issues, whether or not they are raised by counsel. Every effort is made to be concise and even-handed. Preparation of memoranda has been facilitated by the sharing of ideas, experience and expertise among members of the staff. If, in the course of preparing a memorandum, the staff attorney discovers serious formal defects

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2. Statistics on recall were not kept until October of the project year. Thereafter, 325 recalls were counted.

3. The recall system as it was eventually worked out insured that no case would take longer because it was staff processed.

in the briefs or gaps in the record, he contacts the Clerk's Office which is responsible for policing the relevant court rules. Whenever possible, the missing materials are obtained by that office.

Finally, the attorney drafts a proposed per curiam opinion, giving a reasoned response, supported by citation, to each issue raised by the parties. Discourse on the broader implications of the case, if any, is discouraged. The function of the opinions is to inform the parties, not posterity. Once the memorandum and opinion have been reviewed and approved by the staff director, together with the briefs and records they are returned to the Clerk's Office for assignment to the parts.

C. Integration of Staff Operations with the Court

The case is now ready to be considered by the Court. Among staff-processed cases access to a position on the calendar is determined by the same rules of priority which govern cases moving along the traditional track. Because approximately two staff cases are included in each calendar, staff processing to this extent defeats the regular priority system, since by moving along the special track designated only for staff-processed cases, those without priority may theoretically reach the judges and be resolved before non-processed priority appeals which became ready at the same time. The Clerk of the Court can avoid this contingency by exercising her discretion with respect to the scheduling of staff cases.

The memoranda and draft opinions are forwarded directly to the three judges who will decide the case. Only in rare

instances will they be reviewed by a judge's clerk. The judges use a staff memorandum in the same manner as they would one prepared by a clerk.

The main difference between the work of the staff and the law clerk is to be found in the regular writing of proposed per curiam opinions by the staff. Of the 394 cases in which the staff prepared memoranda from July 10, 1972 to June 30, 1973, dispositions were rendered by the Court in 304. In 277 of these, the Appellate Division reached the same result as the staff recommended. In nine of them it reached a different result. The remaining 18 cases fell in various other categories such as cases which became moot or were dismissed before submission to the court.

During the project year, staff attorneys rated each per curiam opinion prepared by them against the opinion ultimately handed down by the court. Initially, three rating categories were employed: (1) "Acceptance of staff result," which indicated adoption of the staff per curiam either verbatim or with only a few changes in language; (2) "Adoption of staff result with modification," which indicated that the court had reached the same result but expressed it in different form, and (3) "Rejection of staff result." It quickly became apparent, however, that the second category lumped significantly different reactions to the staff per curiams. Five sub-categories were therefore adopted: (1) cases in which the opinion was drastically shortened, that is, from two or more pages to one page or less; (2) cases in which it was clear that the staff per curiam was used as a draft but was sufficiently changed so that it could not be considered an outright adoption; (3) cases in which the reasoning but not the language of the court's opinion

coincided with the draft;(4) cases in which the court used a different reason to reach the same result; (5) cases in which there was a minor change in the proposed result.

At the conclusion of the first year of the project, out of 304 opinions the court had adopted the staff per curiam in 116. They had adopted the central staff result with modification in 161. Of these 161 cases, 38 fell into the first sub-category, 27 into the second, 76 into the third, 8 into the fourth, and 12 into the fifth. Usage of opinions varied from part to part. One part, for example, consistently used the staff opinion; it had 47 outright adoptions and only 12 modifications. At the other extreme was the part with only five "acceptances" and 53 "modifications."

CHAPTER V

EVALUATION OF STAFF WORK

A. Staff Output

During the first year of its existence, the Central Research Staff director screened 1,666 appeals and selected 957 of them for staff treatment. The staff ultimately worked on 517 of them.

After varying degrees of research and analysis by a staff lawyer, 123 out of 517 were found not to satisfy the criteria for staff handling and were returned to the Clerk's Office for handling in accordance with the regular system of priorities. Memoranda were prepared for the remaining 394 appeals[1] and, with respect to 368 of them, a draft per curiam opinion was also completed.

On the basis of central staff performance in Michigan, which has used a central staff for several years, and discussions among Project personnel, Professor Meador and Justice Christian recommended initially a production standard of two memoranda and draft opinions per attorney per week in all the participating courts. In the case of New Jersey's four-lawyer staff, this translated into a goal of slightly in excess of 32 per month. It was assumed that the staff director, in addition to screening cases, handling administration and reviewing the work of her attorneys, would assume original processing responsibility for a certain number of

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1. This figure includes a small number of cases that should have been classified as "two" or "no" but, because of the time invested prior to the discovery of misclassification, were fully processed. This occurred in ten cases which were ultimately submitted to the court with a complete memorandum. The remainder of the memoranda in which there was no opinion supplied either recommended that the court should rely on the opinion below or were prepared with the request of the court that no opinion be drafted.

appeals, but because the time required for performance of her screening, administrative and review functions was uncertain, no definite output standard was recommended.

An average of 39 memoranda were prepared each month from October 1972, the first month in which all four staff positions were filled, through June 1973. This equalled roughly ten memoranda per attorney per month. If the start-up month of October, when only 30 memoranda were completed, is excluded, the figure rises to 40. Presumably these figures would have been slightly higher were it not for the temporary reduction in staff size during the two months required to replace the attorney who resigned in December.

In comparing these results with those achieved in Michigan, it is necessary to note that New Jersey staff lawyers expended time on appeals inappropriate for staff handling.[2] On the other hand, the Michigan staff prepares memoranda for all appeals which come before its court though it writes recommended opinions only for those appeals satisfying criteria used in New Jersey to identify appeals appropriate for staff handling.[3] The average appeal handled by the Michigan staff probably is somewhat more difficult either factually or doctrinally than the average appeal handled by its New Jersey counterpart.

B. Impact on Productivity

During the court year which concluded on August 31, 1973,

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2. Approximately 24 percent of all the cases processed were ultimately found inappropriate and returned.

3. In Michigan, opinions consisting solely of the word "Affirmed" are utilized. This is not the case in New Jersey.

the Appellate Division decided 2,300 appeals and 2,142 motions, an increase respectively of 369 and 478 over the 1971-72 figures which in turn represented increases of 316 and 355 over the output figures of the Appellate Division in 1970-71. Increased dispositions in 1971-72 were achieved with the same number of parts that functioned in 1970-71 and without a central staff. On its face the 1972-73 increment was not, therefore, unprecendented.[4]

By increasing its output, the court managed to prevent any substantial growth in its backlog of ready appeals. On August 31, 1972, 910 appeals were ready for judicial consideration. One year later, despite 1971-72's dramatic escalation in appeals filed and the more normal increment of 296 appeals filed in 1972-73, the backlog of ready appeals had increased by 108 to 1018 which was only 49 more than the comparable figure for August 31, 1971.

There is a statistically verifiable link between staff processing and growth in the court's rate of production. The Appellate Division's annual output is the product of the number of sittings times the number of cases calendared per sitting times the number of parts. From January to June 1972 the average number of appeals assigned to each part for each regular sitting was 13 to 14, including one or two cases in which the only issue was the alleged

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4. It should be noted that the increases in 1972-73 occurred even though the Appellate Division experienced an unprecedented change in judicial personnel during the court year. The two most senior appellate judges temporarily filled vacancies on the Supreme Court during the court year; for a short period the three most senior judges sat on the Supreme Court. Vacancies thus left on the Appellate Division were filled by 29 different judges, only two of whom had prior experience on the Appellate Division. Additionally, of the normal complement of 15 judges, two retired and one was named to the Supreme Court, thus requiring three permanent replacements.

severity of a criminal sentence. In September, the beginning of the 1972-73 court year, the average number per sitting was raised from 14 to 16, including generally, two staff-processed cases and one excessive-sentence appeal. The rough coincidence between increased annual production and staff-processed cases can be seen as the result of decisions on the size and composition of the calendar, unless it can be demonstrated that without central staff assistance the judges would not have been able to raise once again their production figures.

More broadly, the evaluative problem is as follows: Any central research staff's merit is a function of its relative capacity to contribute to the quality and quantity of decisions. Hence, in order to make a definitive assessment of the staff, it would be necessary to have answers to the following questions:

1. How much time did the judges allocate to the resolution of the staff-processed appeals?

2. How much time would they have allocated to those same appeals if they had not been accompanied by a staff memorandum and, normally, a draft opinion?

3. If staff assistance had been unavailable, could the production rate for the year of staff operations have been sustained without a decline in the quality of decision?

4. Assuming a negative answer to three above, could quantity and quality have been sustained more economically by other means?

In an effort to develop data relevant to questions one and two, the Project Director and the New Jersey reporter proposed an experiment in which over a period of several months the judges would maintain time records for staff-processed cases and for a control group of unprocessed cases determined by the staff director

to be category "one" appeals. The proposal was rejected by the judges on three grounds: First, they felt that given the intensity of their production schedule, the additional burden of preparing time sheets was unacceptable. Secondly, they concluded that because they were compelled to shift rapidly back and forth from one activity to another, efforts to estimate and categorize time expenditure would result in very rough and possibly misleading approximations. Finally, the judges objected to what they perceived as an intrusion on the confidentiality of the deliberative process.[5]

Even though there exists no precise measure of the staff's contribution to the court's output, the fact of some contribution is incontestable. The adoption of draft opinions in 116 appeals, and the use of an additional 27 as drafts must be presumed to have saved some judicial time. It is likely, though less certain, that the availability of staff-authored opinions also conserved time in connection with the remaining 76 appeals in which the analysis and conclusions of the staff draft were essentially unchanged, although the opinion was rewritten. Even in the 20 cases where the

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5. The force of the second and third objections may be questioned. Practicing lawyers handle many cases simultaneously yet maintain time sheets which serve as the basis for billing and hence must often survive critical scrutiny. The judges of the United States Court of Appeals for the Third Circuit had enough confidence in the accuracy of their time estimates to participate in a detailed time study conducted recently by the Federal Judicial Center.

As for the third objection, although the sensitivity of the judges is understandable, it is by no means clear that the Bar and, for that matter, the public generally have no right to know how much time judges are actually able to allocate to the deliberative process. Such knowledge might help to obtain additional funds for the judiciary.

The New Jersey staff director questioned what time keeping would demonstrate, since the judges had not kept time sheets for the previous year in which there had been no central staff. The one obvious control was thus eliminated.

court used different reasoning to reach the recommended result or reached a conclusion that differed slightly from the one proposed by the staff it would not be unreasonable to assume that by structuring and clarifying the central issues of the appeal, the staff draft shortened the time required to decide the case.

That some judicial time was saved does not itself demonstrate the staff's value as that term has been defined above. We must also know whether the time conserved was reallocated within the deliberative process. If judges responded to staff assistance simply by working less, there would be no net gain to the state unless it could be demonstrated that any increased leisure time ultimately, albeit indirectly, strengthened the judicial system, for example, by facilitating recruitment or increasing intellectual energy available during working hours.

The unanimous opinion of the staff is that the judges are now working at the extreme outer limit of their physical capacity. This impressionistic conclusion is reenforced by a comparison of judicial productivity in the New Jersey Appellate Division and in another high-volume intermediate appellate court, the Michigan Court of Appeals. During its 1971 calendar year, the Michigan court used 14 judges[6] organized in three-judge panels[7] and assisted by a central research staff which prepared for each appeal a "prehearing report," comparable to the memoranda now prepared by

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6. Report on Activity of the Court of Appeals for 1971, prepared by Ronald L. Dzierbicki, Clerk of the Court, p. 9.

7. Michigan Court of Appeals Manual for Law Clerks and Prehearing Attorneys (1972) p. 1.

the central staff in New Jersey, to dispose by written opinion of 1,239 appeals.[8] The average production of opinions per judge was 89.4. In 1968, the last year prior to Michigan's establishment of a research staff, the average was 61.3.[9] In his Report on Activity of the Court of Appeals for 1971, the Clerk of the Michigan Court implied that the net gain in opinion productivity was primarily attributable to the staff's establishment.

> "The institution of the prehearing division was not introduced for a full year until 1969. Consequently, we may measure its impact on opinion production for three full years of operation * * *. The net gain in opinion productivity for the period is 46% per judge, with a prehearing division (i.e. the staff attorneys) as the only variable. If in response to the constant increase in volume, we had relied on the perennial answer of an increase in judges, it would require 20.4 judges to bring about the increased opinion production since 1968. We firmly believe the answer is in techniques for increased productivity -- not in an increase of judges."[10]

Michigan's 1971 disposition figure of 1239 is 376 below that of the New Jersey Appellate Division in 1970-71, 692 below New Jersey's dispositions in 1971-72, and 1,061 below the 2,300 dispositions effected by opinion during the 1972-73 court year, only about 15 percent of which had been staff-processed. The average number of opinions produced by each Appellate Division Judge in those three years respectively 106, 125, and 153.

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8. Dzierbicki, supra, at p. 8.

9. Id. at p. 9.

10. Ibid.

Further support for the staff's assessment of the level of effort presently sustained by Appellate Division judges can be grounded in a comparison of their rate of production with standards proposed by Judge George Edwards of the Sixth Circuit Court of Appeals. Writing in the American Bar Association Journal Judge Edwards on the basis of his experience stated that sitting in 300 to 350 cases a year is "intolerably high and destructive of the possibility of effective and concerned review of every case* * *."[11] Presumably Judge Edwards is referring to all cases concluded by opinion. In the 1972-73 court year the average number of opinions for each Appellate Division part was 460.

C. Impact on Quality

Despite the project designers' commanding emphasis on quantitative gains, there were expressions of hope that the quality of the judicial product also could be enhanced. This is paradoxical because the primary articulated hypothesis relating the project to qualitative change stressed increased judicial time for research and deliberation; hence, quality and quantity appeared as competitors for the finite judicial energies which were hopefully to be released by the labors of the central staff attorneys. While the Project designers assumed -- and apparently preferred -- application of this released time to the crusade for backlog elimination, nothing in the State-National Center agreements commanded adoption of the quantitative option. In Nebraska, which had a sister project, there was no backlog of any note. So the extended discussion of means for measuring qualitative change which marked

11. "Exorcising the Devil of Appellate Court Delay," 58 ABAJ 149, (1972).

several early meetings of the Project staff, as well as one gathering of the Advisory Council on Appellate Justice, did not seem entirely academic. No one who participated in these discussions expressed doubt that opinions could be ranked on the basis of criteria enjoying broad acceptance within the legal fraternity. There also appeared to be rough though implicit agreement that in many cases application of these criteria by members of the profession would produce reasonably uniform results.

But it is one thing to compare the quality of two opinions in a given case, quite another to compare either the total product of two judges over some determinate period or one judge at different phases of his career. Serious doubts were expressed about the possibility that such comparisons, by whomever made, would command widespread agreement. The doubts extended a fortiori to a comparison of two courts. Except in unusual cases the criteria of excellence were too imprecise to allow a consensus to form. Moreover, even if there were a consensus about quality of opinions, it would not necessarily promise a companion agreement about the relative wisdom of the actual results, even assuming there was any way in which results in factually different cases could be compared.

All of the above represent intimidating obstacles to any effort at qualitative comparison. Yet they are almost trivialized by one central difficulty; namely, the extremely modest change in the circumstances of judicial decision which the Project could achieve.

Only two factors could be altered: (1) the judges could have more time per case, unless the anticipated increase in appeals sopped up all the time which the staff would liberate; and (2) the judges would have the assistance of a memorandum and draft opinion prepared by an attorney with more experience than the average law clerk. Since the staff in New Jersey's heavy-volume court was too small to handle anything but a small fraction of the appeals filed and since even in staff-processed cases only modest time saving could be anticipated, no dramatic increase in time expended per case was envisioned under any circumstances. Being unable to influence the time factor to a substantial degree, it could not be anticipated that there would be a perceptible enhancement in the quality of either opinions or results. Equally discouraging was the suspicion that under the law of diminishing returns there might be thresholds beyond which additional time was essentially unrelated to quality. Nor did it appear likely that the staff memoranda and draft opinions would have a discernible impact on the quality of decision, since the attorneys would be processing only those appeals which the Project designers assumed could be disposed of readily by reference to firmly established precedent.

For combinations of these reasons which may have varied for different Project personnel, by the fall of 1972 proposals to assay a qualitative comparison of product before and after the Project's commencement had been quietly interred.

D. The Judges' Appraisal of Staff Research Issue Analysis and Draft Opinions

The judges' appraisal of the staff was solicited on three separate occasions. A questionnaire[12] prepared by Professor Meador, after consultation with the reporters and staff directors in the four project courts, was circulated in March 1973 and again in early September. A questionnaire prepared by the staff director was circulated in February. The common purpose of these questionnaires was to measure judicial reaction to the following questions:

1. Did staff work effect a net saving of time for both the judges and their law clerks?
2. Assuming a net saving of time, to which features of the staff's operations could it be attributed?
3. How did the judges rate the quality of staff work?
4. How, if at all, might the staff's input be modified to enhance its utility?
5. How did the scope of its work compare with that of the law clerks?
6. And finally, given a choice between an enlarged staff and an additional law secretary, which would they prefer?

Thirteen judges answered the questionnaire circulated in March. Eleven answered each of the other two.

Response to the question "Have the staff memoranda or draft opinions enabled you to save significant time in deciding and disposing of cases?" was overwhelmingly affirmative. In March,

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12. All questionnaires and the responses to them are collected in Appendix II.

eleven said "Yes" while two were "Uncertain." In September, ten said "Yes" and one was "Uncertain." A finding of time saved for law clerks could be deduced from the response of a majority of the judges that their law clerks never read the memoranda in staff-processed cases coupled with the assurance received from the presiding judges that the clerks were not being asked to do original research in those cases.

Surprisingly, less than half of the judges (four in March and five in September) agreed with the proposition that they had been able to save time "by not having to prepare the initial drafts of per curiam opinions." Yet, in addition to the two judges who found them helpful "if adopted," eight others who responded to the February questionnaire said the proposed opinions were "helpful" even if not adopted. The draft opinions could have been helpful, yet could have failed to save judicial time only if they helped qualitatively by suggesting complexities which might otherwise have eluded judicial notice, thereby possibly increasing the time required for resolution of all relevant issues. Given the relative simplicity of the processed cases, that assumption is at best shaky.

The judges' assessment of staff work was favorable though by no means uncritical. The February questionnaire asked:

> "How would you rate the memoranda prepared by the C.A.S.[13] in terms of covering both issues presented and issues present, although not raised?"

Of the eight judges who responded to this particular question three rated them "Excellent," four checked "Good," and one agreed

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13. "C.A.S." is an abbreviation for "Central Appellate Staff."

that the memoranda "vary between excellent, good, fair."

The questionnaire distributed in March and September asked the judges to check as many of the following propositions as expressed their views about the staff memoranda:

Propositions	Results	
	March (11 Judges)	September (11 Judges)
a. Always accurate on the facts	7	7
b. Always accurate on the law	2	1
c. Sometimes or occasionally inaccurate or misleading on the facts	0	3
d. Sometimes or occasionally inaccurate or misleading on the law	10	8
e. Sometimes faulty in the recommendations	9	5

With respect to the existing format of staff work, most of the judges indicated their satisfaction. Ten out of eleven September respondents found the memoranda to be "about the right length"; only one thought they were too long. Four found the draft opinions too long, but seven found them also to be about the right length. Eight out of eleven February respondents felt that the staff was "choosing the correct cases for* * * treatment."

The questionnaires failed to uncover anything more than slight differences between the modus operandi of law clerks and staff attorneys in preparing memoranda for the court. Ten of eleven judicial respondents said that their clerks "usually (check) the accuracy of statements of fact or law by references to the transcript and by cite checks." One said he does it always. For the staff attorneys this is standard operating procedure. With respect to independent research of the legal issues presented,

an almost invariable feature of staff operations, seven judges said their clerks did it "usually," three said "sometimes," and one said "always." The difference in comprehensiveness and intensity of approach suggested by these answers may be attributable to the workload of the clerks: They must, in four out of every five weeks, process at least three cases each week, a large majority of which are more complicated factually or raise more novel doctrinal issues than those handled by the staff. On the other hand, they do not draft opinions.

Do these differences have any impact on the deliberative process? In her February questionnaire, the staff director asked:

> "Is the combination of C.A.S. memoranda and proposed opinions (more helpful, equally helpful, less helpful) than the memoranda prepared by the law clerks?"

Of the seven judges answering this question, six found them "Equally helpful," while one found them "More helpful." The judges also were asked whether

> "In comparison to those cases prepared by the law clerks, are you reading the transcripts (more often, same as, less frequently)?"

Four judges checked "Same as"; the four other respondents checked "Less frequently."

From the standpoint of judicial administration, the ultimate issue is the efficacy of the staff relative to other means for enhancing the quantity, and hopefully the quality, of judicial output. In February, just beyond the mid-point of the Project year, seven out of 11 judges stated their preference for an extra law clerk "in chambers" as opposed to comparable enlargement of the central staff, despite being assured by the Staff Director

that in Michigan the Central Staff system had been found more efficient. Only one indicated he would prefer enlargement of the staff to another clerk. Of the three other respondents, one checked "Neither," another wanted "Both," while the third merely expressed concern about the ability of his secretary to handle an additional clerk.

The basis of this seeming preference for an additional law clerk notwithstanding a generally favorable response to the product of the Central Staff has not been determined.[14] Perhaps the judges miss the ease of communication which they enjoy with law clerks in chambers. If that were its principal basis, the preference might not occur in states where the judges' chambers are located in the same building as the central staff. In New

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14. The staff director disagrees that the court indicated a preference for an additional clerk in chambers rather than an enlargement of the central staff by adding experienced, admitted attorneys. She feels that the question asked of the judges did not embrace this possibility. The question said:

> The State of Michigan tried adding an additional law clerk for each judge for one year. The court found it more efficient the following year to pool the extra law clerks in a central staff operation. If given this option of having an extra law clerk per judge, would you prefer to:
> ( ) have the law clerk in chambers;
> ( ) have the extra law clerk assigned to C.A.S.

In other words, the option given to the judges was "an additional law clerk ," not a choice between a law clerk and an experienced attorney. Given only a choice of where they would want an extra law clerk, the differentiating factors between law clerks and central staff attorneys in no way came into play. Since the judges emphasized that the staff was to be composed of admitted lawyers who were experienced in appellate matters, and who, inferentially were of proven reliability, the staff director finds it is not surprising that the judges did not wish to put an unadmitted attorney with little experience on the staff.

Jersey the communications problem is aggravated by the geographic dispersion of the judges on days when they are not sitting.

E. Other Staff Functions

The questionnaires emphasized those features of central staff work which correspond closely to the functions of law clerks. Therefore, particularly since other actual or potential functions of the staff were never explored with the entire court, the arguably distinctive contributions of the staff may not have been taken into account by the judges who expressed their preference for an additional clerk. These distinctive functions, as suggested earlier, are collection and evaluation of ideas for and experiments in procedural and administrative reform, various coordinating activities including principally promotion of doctrinal consistency and identification of cases meriting expedited resolution, and policing the briefs and the record in order to insure substantive and procedural compliance with the rules of the court.

1. Innovation. Even before the full staff had been recruited, the authors, their counterparts in Nebraska, Virginia, and Illinois, and Professor Meador, undertook a review and appraisal of innovations recommended by scholars in the field of appellate procedure or initiated by other courts. The relevance and potential utility of the more prevalent ideas were explored in early meetings with the Administrative Director of the Courts, Edward B. McConnell, and the Presiding Judges. As noted above, two widely discussed ideas, the use of abbreviated records in criminal appeals and elimination of oral argument as of right, were rejected on their merits. It was apparent, however, that the judges were open to new ideas.

The staff director continued to regard review of the court's procedures and the development of potentially useful alternatives as an important staff function.

To date the one concrete achievement of this ongoing process of review is the court's adoption of a more informal procedure for reviewing criminal appeals in which the only issue is the alleged severity of the sentence. Allowing both parties to present their positions by letter rather than brief saves lawyers' time. Where the parties are represented by institutional counsel with limited manpower, the time saved will necessarily be allocated to other kinds of appeals and should therefore facilitate adherence to the schedule laid down in the rules of the Appellate Division for the completion of briefs. The ultimate effect should be some expedition of criminal appeals.

2. Coordination. Doctrinal consistency was promoted in two ways. Appeals raising an issue identical to one in a case then before the New Jersey Supreme Court were singled out and it was recommended that they be held pending the Supreme Court decision.[15] In addition, whenever the staff noted that a case raised issues substantially similar to those in an appeal then pending or recently decided by a particular part, a recommendation for assignment to that part was forwarded to the Clerk's Office.

A second distinctive aspect of the coordinating function was identification of cases appropriate for accelerated disposition.

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15. Normally the attorneys for the parties or the Clerk's Office would initiate such a hold. Twice during the year, however, the request was not made and the staff had to "catch" those cases.

Acceleration was recommended either on grounds of compelling public interest or grave personal hardship, criteria which are implicit in the court's formal acceleration categories. Although most cases falling into these categories are flagged in the Clerk's Office, some slip through. There may also be exceptional cases which although they do not fit neatly into the established molds, satisfy the underlying rationale for acceleration. Finally, the staff can suggest discrimination among accelerated cases on the basis of degrees of public interest or personal hardship which might otherwise elude recognition. During the project year, the staff recommended acceleration in 19 cases.

3. Quality control over lawyers' work. In addition to its coordinating and system-review functions, the staff could be utilized to promote expedition and quality in the appellate process by policing the performance of appellate counsel. On the basis of a year's experience, staff members concluded that the average brief prepared by private counsel was susceptible to substantial improvement. The general level of briefs filed by institutional litigants, primarily the offices of the Attorney General and the Public Defender,[16] which comprise a considerable percentage of the briefs filed with the court, was considered distinctly superior to the general level of briefs filed by private counsel. One staff attorney felt that even many of the more inferior briefs from the private sector managed to lay out facts in a reasonably

16. As mentioned above, in New Jersey there is a central appellate section in the Office of the Public Defender which handles the appeals of all indigent defendants. There is also a centralized appellate section in the Attorney General's Office, which handles the majority of the respondents' briefs in criminal appeals. The civil section of the Attorney General's Office is heavily involved in state agency cases and cases in which the constitutionality of state legislation is challenged.

coherent form and to identify the main legal issues. But other staff members indicated that it was not extraordinary to encounter briefs which were almost useless as aids in the resolution of appeals.

Staff members were inclined to hope that the problem was remediable. Several suggested that a policy of returning briefs with glaring substantive inadequacies might gradually enhance the overall performance of the appellate bar. The court has this power presently[17]; however, according to the staff it is rarely exercised. One Presiding Judge told us that on those occasions when rebriefing had been required, there was no perceptible qualitative improvement on the second round.

To the staff the phenomenon of inadequate briefing seemed attributable both to fiscal considerations on the part of appellate counsel and failure to grasp the essentials of good briefing. It is by no means clear that fiscal disincentives can be satisfactorily overcome if the court refused to consider cases which are inadequately briefed. The cost of time spent re-briefing may be passed on to the client. Alternatively, counsel may attempt, by one means or another, to disengage himself. In either event the client will be penalized for the delinquencies of his lawyer.

A suggestion by the reporter that in cases where the brief is egregious and the author a prior offender, counsel should be publicly reprimanded and fined was criticized by the staff as too severe, too time consuming for the judges, and of doubtful effectiveness. While a public reprimand might be efficacious where poor

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17. R.2:6-9; R.2:9-9.

performance is a function of profit motivation, where the problem is one of incompetence, it would be effective, if at all, only to the extent it discouraged potential clients of the attorney in question. In any event, the perceived severity of a public reprimand might inhibit its use. The same difficulty might attend another potential sanction, temporary suspension of the right to appear before the Appellate Division. As one alternative, the staff suggested that a letter from the court to offending counsel describing deficiencies might prove beneficial.

At the present time the staff can police briefs only by referring technical deficiencies to the Clerk's Office which will then request the missing material. The court's attention is often directed by the staff memorandum to substantive deficiencies in the briefs.

F. Costs and Alternatives

The central staff cannot rest any claim to an inherent distinctiveness of function on its research, analysis and draft opinions. The clerk in chambers is capable of providing the same kind of assistance. Nor can the staff claim a unique competence with respect to innovation, coordination, and quality control.

By its nature, coordination requires a centrally-placed operator. The job probably could be handled by one skilled attorney and a secretary. Under the existing arrangements, the staff director screens every ready case primarily to identify appeals appropriate for staff handling. Given her other functions, screening must be accomplished with great rapidity. Yet, necessarily hasty categorizations have turned out to be reasonably accurate.

The attorney performing the coordinating functions described above could also characterize cases in terms of their relative difficulty, and prepare, with the law clerks' help, a "pending issue digest" such as the one distributed to all judges, law clerks and pre-hearing attorneys in the Michigan Court of Appeals. The staff thinks, however, that this would be wasteful, since judges read all published opinions and since it would be counterproductive to digest opinions which are only one or two pages long and often as short as one paragraph.

Research with an eye to procedural and administrative innovation is not the necessary office of the central staff; it is properly a major concern of the Administrative Director of the Courts and his assistants. As long as the courts are struggling to keep abreast of the continuing growth in appeals, staffs established primarily to prepare appeals for judicial consideration may have little time for non-case related research and analysis. If staffs become institutionalized, the momentum of their primary activity will probably carry them progressively further away from the contemplation of reform. Because of the openly provisional nature of the staff operation here in New Jersey and the emphasis on reform and experimentation conveyed by the funding requests and reenforced by the project director, this first year may not be an accurate index of a sustained staff interest in innovation.

The staff attorneys believe, nevertheless, that as a consequence of their direct participation in the judicial process, they are peculiarly well situated to identify needed procedural reforms. If the staff were enlarged, it might then be practicable to assign primary responsibility for collecting and appraising reform proposals

to one staff attorney who would be partially relieved of normal case-processing responsibilities.

The quality-control function, still largely hypothetical in New Jersey, also is susceptible to performance outside the staff. The most likely alternative is the clerk in chambers. Formal delegation to the staff of quality control over lawyers' work probably would excite intense hostility within the Bar. A confidential reprimand sent out under the signature of a judge who, following the suggestion of his clerk or of a staff attorney, has reviewed the delinquent brief can be effected without any change in the rules of the appellate process and is unlikely to be resisted openly. Hence, at least in the short run, that would seem to be the preferable procedure.

From the preceding discussion, it is clear that the actual and potential functions of the staff could be carried out by other means. Whether they could be carried out as well is a question whose resolution requires further consideration and experimentation.

Actually, by putting the issue so dichotomously, one tends to reenforce the seemingly prevalent notion that a central research staff, additional law clerks, and even additional judges represent competing means to the achievement of a court with a current calendar, making carefully reasoned and articulated decisions. Yet, at least with respect to personal law clerks and a central staff, the preceding discussion suggests ways in which elements of the two types of operations can be combined. Once a court accepts the need for a degree of central coordination of supporting legal staff, the initially perceived dichotomy between the clustering and the diffusion of personnel is revealed as a continuum.

Near the mid-point of that continuum is the idea of assigning each central staff attorney to service a particular part. Closer to the pole of wholly decentralized law clerks would be an arrangement whereby a "coordinator of legal research" would be delegated authority to select and assign personal law clerks and to develop a common format for their memoranda, as well as to carry out the screening and digesting functions described above.

Cost comparisons which assume a dichotomy are misleading. The staff's total funding in the first year of its existence was $174,493. Without the burden of start-up costs, funding for the second year was pruned to $140,378. This is less than the cost of providing an additional law clerk for each of the now eighteen judges. Salaries alone- the current salary of an Appellate Division clerk is $14,008 per year -would require $252,144. But if one additional clerk is assigned to each part, that figure drops to $84,048, which is less than the cost of a central staff of comparable size, because staff attorneys, being more experienced, command higher salaries.

This salary differential suggests another way in which cost comparisons based on the prevailing organization of supporting legal staff can be misleading: operations with different personnel and different structures are being compared. If the judges want more experience and less turnover among their clerks, if, in other words they want to professionalize the position, they must pay more. In California, salaries for law clerks run as high as $26,500. Clerks in New Jersey cost less because traditionally they are recent graduates commanding less on the open market. The personnel issue is whether, given the functions to be performed,

stability and experience sufficiently enhance the contribution of supporting staff, however organized, to justify the additional expense.

Is this question entirely severable from that of the relative merits of the two means for organizing whatever personnel is obtained? Perhaps not. As N.O. Stockmeyer, Jr., the Research Director of the Michigan Court of Appeals, has noted,

> The position of law clerk evolved, at the United States Supreme Court level, from the earlier practice of employing male stenographic clerks who often doubled as messangers, errand clerks and chauffeurs for the justices. Due perhaps to its humble origins--and despite the prestige and professional-level salaries the position of law clerk still retains vestigial 'errand boy' aspects.[18]

Assuming the accuracy of that observation, it may be easier to professionalize a central staff since, being differently named and conceived as an innovation, it would not be burdened by the history which colors perceptions of the clerk's position.

The reaction of one staff attorney to the proposal to divide the staff along lines which parallel the parts demonstrates that the residue of this perception has not yet disappeared. He expressed concern that if a staff attorney were assigned to a particular part, judges might feel free to call on the attorney for the performance of peripheral or relatively trivial functions on top of his regular work. This in turn might reduce the prestige of the staff in the eyes of its members and also of the court. Only further study can establish whether this concern is exaggerated or largely inapplicable where staff or, for that matter, personal

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18. Remarks prepared for the 1972-73 Regional Appellate Judges' Conference, pp. 5-6.

clerks are paid the salary appropriate to an experienced professional and embellished with a more impressive title.[19] In the meantime, the subjective reality of status concerns might possibly inhibit recruitment if the staff-clerk distinction were blurred.

In commenting on the appellate avalanche some authorities have suggested that the central staff is a superior alternative not only to additional clerks but also to additional judges. The last sentence of the earlier quotation from Mr. Dzierbicki,[20] the Clerk of the Michigan Court of Appeals, is illustrative: "We firmly believe the answer is in techniques for increased productivity -- not an increase of judges." Presumably, this is a simple case of hyperbole. There may indeed be courts where, for lack of adequate staff, judges dissipate time on functions which could be performed as well by other personnel. But surely judicial time does not correspond to an accordion of infinite dimension. At some point staff work either ceases or it begins to impinge on the judicial function. At some point a judge either relies on his own intellectual faculties or he relinquishes the judicial prerogative.

Additional assistance in the areas of research, analysis and drafting, whether provided by law clerks or staff attorneys, would seem to be a desirable alternative to additional judges only where two conditions are satisfied: (1) the present members of the court are attempting diligently to meet their responsibilities and

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19. In California, the highest level clerks are called "principal attorneys."

20. Supra, p. 46.

(2) they are dissipating time on matters which are not integral to the proper exercise of judicial power. As indicated earlier,[21] it seems evident that in the New Jersey Appellate Division the first condition is satisfied. Indeed, the judges appear to be seriously overworked.

Satisfaction of the second condition is far harder to determine, since there is no easily recognized threshold beyond which reliance on staff work derogates from responsible performance of the judicial function. Both in discussions and in their answers to the questionnaires the judges of the Appellate Division have evinced the conviction that more legal assistance will help them to meet their responsibilities. The staff shares this conviction. There is no reason to believe that they are wrong.

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21. See Chapter II, supra.

CHAPTER VI

REFORMING THE JUDICIAL PROCESS

A. Staff Proposals

When the reporters first gathered to discuss project objectives and alternative strategies for their achievement, the Project director expressed the hope that in each of the state courts the staff would serve as an important agent of procedural change. Here in New Jersey it has not played that role.

As indicated earlier, the staff attorneys did not find a glaring need for procedural reconstruction. They, as well as the judges, were unpersuaded by several of the most widely touted reform proposals. Reforms deemed useful, such as a power to abbreviate oral argument and use of per curiam opinions in doctrinally insignificant cases, had already been adopted.

The staff has not been entirely uncritical. In addition to the successful effort to eliminate briefs in excessive sentence cases,[1] the staff also suggested that elimination of formal briefs in other cases would be appropriate. The same procedure could be used readily in cases involving voluntariness or propriety of a guilty plea and in those cases in which the sole issue is the weight or sufficiency of the evidence or the accuracy of the fact finding process. These cases uniquely involve facts, not law. An extensive brief is not needed; reviewing the record in light of the established

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1. The procedure requiring letter briefs only in excessive-sentence cases has been in successful operation since March 1973. Automatic review by a three-judge panel of all sentences within 30 days of imposition is now being considered for adoption. Such a procedure could effectively eliminate appellate review of sentences as it is presently practiced.

scope of appellate review is the most crucial task. Statistically a large number of cases involve such grounds so that an abbreviated procedure for these cases would cut into the problem of delay by insuring that these cases, at least, became ready promptly.[2] While this suggestion has not been put into effect, it merits reexamination in light of the successful experience of the court in eliminating formal briefs in excessive sentence cases.

The staff suggested several modest although beneficial changes in the processing of the court's cases which could not be implemented with present staff manpower. But an enlarged staff in the future might undertake these tasks. For example, the workload of the court presently precludes it from engaging in any monitoring of the substantive adequacy of the briefs filed. During the course of the first year of its work, the staff found that it frequently requested additional transcripts, exhibits filed in the court below, and other portions of the record below which were vital to the decision on appeal, but had not been provided by counsel. Before staff prepared cases went before the court, these materials had been received and were duly noted in preparation of the memoranda and sample per curiam opinions.

In those cases which go directly to the court, there has been no review of substantive adequacy. Consequently, the judges get cases in which things are missing which are crucial to proper decision on appeal. Since the court does not get the case and its supportive material until the case has been actually calendared,

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2. See Table 7, Appendix I.

requests for additional materials slow the progress of the appeal. Were the staff to expand and change its focus in part, it could undertake substantive monitoring, so the court would have the complete record before work was begun on any given case. Because staff attorneys are critical of the court's failure to reject briefs which are substantively inadequate, there is some support in the staff for seeking authority to impose sanctions after reviewing all briefs.

Should the staff expand to sufficient size, it would be able to handle a limited number of exceptionally difficult appeals. During the past year, at the special request of the court, the staff has handled approximately fifteen such cases. With their greater experience, members of the staff are equipped to analyze these more quickly, and possibly with more insight, than the law clerks. Having manpower available to help with these cases can only enhance the usefulness of the staff, even though it is contrary to the original emphasis of the project.

Certain other ideas discussed by the staff which were not directly related to its work but were intimately connected to the appellate process included the appointment of a standing master to hear and determine housekeeping motions, such as requests for extensions of time. In the questionnaire circulated by the staff director in January 1973 the judges were asked whether they felt a Standing Master was presently needed in the Appellate Division. Eight judges out of eleven responding indicated that they would like such a position to be added to the court.

New Jersey has a tradition of Standing Masters who are

appointed by the Supreme Court to fulfill varied functions.[3] This power of appointment has been exercised rarely within recent years: at the time of this writing there are only two standing masters in the entire court system, one in the Matrimonial Division of Superior Court and the other serving the Chief Justice of the Supreme Court. Since the duties of standing masters are prescribed by the Supreme Court according to its needs, a standing master could be assigned to perform the coordinating and other functions, described in this monograph as not necessarily related to the staff concept, and could be given authority as a quasi-judicial officer to invoke certain sanctions which the Central Appellate Staff presently cannot invoke on its own.

A standing master could additionally be authorized to perform housekeeping functions relative to the motions which are consuming more and more time of the judges. The tremendous increase in motion practice before the Appellate Division indicates a real need for preparation of some of these motions prior to submission to the court and also for delegation of responsibility to decide some of these. The number of motions and petitions decided now approaches closely the number of appeals decided. More and more of these motions involve questions of a complexity comparable to that of the average appeal. The judges presently decide motions without aid of either their personal law clerks or any other research assistant. Since motions are no longer an incidental part of the judge's day, aid in the form of a commissioner or standing master should be afforded to the judges.

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3. See R.1:34-1 and N.J.S.A.2A:1-7.

A commissioner or standing master could assist the Appellate Clerk's Office in preparing a balanced caseload for each individual session of the court. In the past members of the Administrative Office of the Courts rated each appeal on a sliding scale from "1" to "5" according to the difficulty of the appeal. These ratings provided a method whereby the Clerk's Office could balance individual calendars not only as to the kinds of case but also according to the difficulty of the cases. As the Administrative Office of the Courts itself became more pressed, this practice was abandoned. About the same time the workload of the Appellate Division began increasing rapidly. The Clerk's Office had no capability to absorb this rating task. Reviving this practice would aid the court by insuring in so far as possible a balanced caseload each session.

All of these may appear to be very modest innovations. That is no reflection on the imagination of the staff. Rather it is a consequence of the fact that the staff services a well-administered, procedurally-progressive court.

B. The Implications of the Data

1. Reconsideration of Appeals as of Right. During the year, statistics were kept as to grounds asserted on appeal, and as to types of cases and reversal rate on appeal.[4] The results of this table suggest certain reforms unrelated to the staff per se, which could be undertaken now that the proofs are in. For example,

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4. See Table 4 and 7, Appendix I.

of the major categories of civil cases, administrative law cases have one of the lowest reversal rates, 14 percent. One of the most common grounds raised in agency appeals is the sufficiency of the agency's findings of fact.

That ground is rarely argued successfully, often because the court defers to the agency's expertise. Under the New Jersey Contitution, one appeal as of right lies to the Appellate Division, even if, as in many agencies, there was an internal review, or reviews, of the initial decision. Appeal by leave in agency cases-- and perhaps in all cases-- should be explored.[5]

2. Changing counsel after trial. As anticipated, it appears that in criminal cases some delay results where trial counsel does not handle the appeal[6]; the delay seems to increase where appellate counsel comes from a different firm or office. The total median time lapse from the trial court judgment to appellate court decision is 346 days where counsel is unchanged, 376 days where the change is intramural, and 413 days where the firm or office is changed as well.

There appears to be little functional significance in these differences in lapsed time. In the first place, the apparent delay where there is an intramural change in counsel is deceptive.

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5. If the Constitution were amended to eliminate the absolute right of appeal in agency cases, the judges would have to review the record to determine whether leave should be granted, which can be as time consuming as deciding the case, except that no opinion need be written, and perhaps only one judge could review the application. The staff could be used to review the record on such applications.

6. See Table 4, Appendix I.

The change occurs primarily in the Office of the Public Defender which has a separate appellate section. In the opinion of attorneys who have worked in that office and others familiar with its problems, the separation of trial and appellate functions is in fact the most efficient means for handling the high volume of litigation. With respect to private, low-volume counsel, perhaps time would be saved if trial counsel invariably handled the appeal. On the other hand, recourse to counsel specializing in appellate work should enhance the prospects for superior briefs and oral argument and might speed completion of briefing. In any event, the court obviously cannot compel clients of private attorneys to persevere with losing counsel. Even where clients were willing, if reluctant counsel were compelled by court order to handle appeals, they might be lax in meeting the formal time schedule and careless in preparing their cases, thus throwing an additional burden on the staff and the court.

3. The merits of criminal appeals. The data also confirmed the common assumption that reversals in civil appeals are far more frequent than in criminal ones. The percentage of reversals in the former category is 24; in the latter it is 11.

Do these statistics support the hypothesis that the majority of criminal appeals are little short of frivolous? Conceivably they could reflect nothing more than a different standard for determining when error is "prejudicial" in criminal as opposed to civil appeals. The figures may also reflect judicial reluctance to disturb jury verdicts: over 59 percent of all criminal appeals are from jury trials. Several of the civil categories in which the

reversal rate is highest, domestic relations, taxation, trusts and estates, and municipal law, are tried without a jury.[7] Two of the other three civil categories with high reversal rates, property and contracts, are often tried without a jury.

Aside from these inconclusive statistics, supporters of the frivolous appeal hypothesis should also be interested in the judgment of the staff. Its consensus is that almost no appeal can fairly be described as wholly lacking merit. In many appeals the appellant can demonstrate that some kind of error was made in the trial court. Determination of the appropriate result thus requires the exercise of judgment about the significance of that error rather than the mechanical application of established doctrine to a widely replicated fact pattern.

The staff director has noted that no one expected that creation of a central staff would -- or could -- constitute a major reform in the appellate process. That process is not one which admits of brillant innovations without a total revamping of its underpinnings.[8] It is a truism that a staff of five lawyers which lacks any authority to institute or

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7. Unfortunately, statistics on the percentage of civil appeals from jury trials were not kept.

8. Some broad observations about appellate organization have been made by staff members which would constitute a change in underpinnings. Perhaps the level of appellate activity in the state has reached a level that it is worth considering the feasibility of decentralizing the appellate division. Such a decentralization would involve appellate judges sitting permanently in a specified geographic area in sufficient number to handle the caseload generated from that area. A step in this direction took place during March 1974, when the Appellate Division began not only to sit in Newark and Trenton but in Hackensack as well. Decentralization, of course, might save nothing but travel time. But it might avoid the problem of unwieldiness which is inevitable as more and more judges are added to the appellate roster.

implement practical reforms cannot expect to reform. Reform in the judicial process is as conservative as the process itself, and, in a very real sense, the impact of the staff on reform has yet to be measured because it has not had the manpower to do all the tasks it could undertake and because the statistics which suggest reform were not completed until the end of the Project year. The very acceptance of the central staff concept by the New Jersey Appellate Division to the point where refunding of an expanded staff has been sought from the State Legislature,[9] demonstrates willingness at least to consider delegation of tasks previously regarded as exclusively judicial.[10]

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9. Such refunding has been requested from the State of New Jersey for the fiscal year beginning in July 1974.

10. This paragraph represents the opinion of the staff director, and not that of the reporter.

CHAPTER VII - CONCLUDING OBSERVATIONS ON THE PROBLEMS OF A CENTRAL STAFF

A. Recruitment

The success of efforts to recruit highly qualified personnel for any central staff will in large measure be a function of the scale of financial compensation, the prestige associated with staff positions, the staff's relationship with its court, and the flexibility of staff work rules.

In New Jersey the scale of compensation -- roughly from $15,000 for a very recent graduate to a maximum of $28,000 for the Staff Director's position -- makes staff positions generally competitive with private practice for roughly the first six to eight years following graduation. After that, the comparative financial advantage of private practice grows progressively greater, eventually reaching plateaus far above staff salaries.

There is, of course, no plausible prospect for a significant reduction of this income gap. Judges themselves receive compensation well below that of successful practitioners. This has been true for decades and no one appears to anticipate that it will change.

An inference likely to be drawn from the long-run financial advantage of private practice is that younger lawyers represent by far the largest potential source of highly qualified candidates for staff positions. As indicated earlier, New Jersey's staff profile is consistent with that inference.

In addition to private firms, the main competitors of the staff

in recruiting young lawyers will be public or quasi-public institutional advocates -- such as Legal Aid, the Office of the Public Defender, and the various prosecutorial authorities -- with generally comparable salary scales. One of their attractions to young attorneys is the relevance to private practice of the experience they offer.

It obviously is too early to assess the market value of staff experience. Both staff experience and the experience of public advocacy should sharpen writing skills, although only the staff will have the potential benefit of judicial appraisal of all its work. Both experiences enhance familiarity with the procedural and substantive law. If the staff attorneys continue to be generalists, they will have a far broader exposure particularly to the substantive law than attorneys in most public offices. The latter, on the other hand, will have experience in oral advocacy and negotiation which is unavailable to members of the central staff. But the staff attorney's familiarity with judicial styles and the inner workings of the court may offer some compensating value to potential employers.

Individual cases will obviously turn on the distinctive needs of particular firms. Overall there appears to be no clear marketing advantage for either experience if the Bar is as well informed about the nature of staff work as it is about the work of public advocates.

The staff's prestige -- and unquestionably its morale -- will also be influenced by the character of its relationship to the court. Several staff members expressed concern and disappointment about their lack of contact with the judges. Feedback of any kind

has been rare. The impact of memoranda and draft per curiams has had to be inferred from official opinions handed down weeks after the completion of the relevant staff work.

One modest palliative would be to include with each set of staff papers a simple rating card on which the three judges of the part hearing the case could record their evaluation of staff work. It is evident, however, that the attorneys would also appreciate some personal contact. The comparative simplicity of staff-processed cases may produce few occasions for the most natural and stimulating form of interaction: an exchange of views on genuinely perplexing legal issues. For that reason, there may be merit in the idea of including in the staff-processed mix a number of peculiarly difficult appeals. Moreover, since staff attorneys are more experienced than law clerks, staff processing of the most difficult appeals would seem desirable even if contact were not a consideration. A few complex appeals were, in fact, assigned to the staff during the Project year.

In addition, the reporter has suggested that contact might be encouraged by assigning staff attorneys to service particular parts. But, as indicated earlier, one attorney feared that this might deprofessionalize the staff and thus reduce its attractions as a possible career. The same attorney expressed the belief that if the range of compensation were comparable to that of other government legal jobs, the staff might be able to retain a certain number of its members for an indefinite period. There are, he believes, able attorneys who would find the more relaxed atmosphere, less demanding hours, and scholarly approach adequate offsets for the higher income of private practice.

Another factor influencing the success of recruiting efforts is the flexibility of work patterns. If staff members are allowed to vary arrival and departure times to suit their individual circumstances and, if necessary, work at home during some portion of the week, the staff's attractiveness to women attorneys with children -- a rapidly growing class of lawyers -- will be greatly enhanced.

The New Jersey experience with flexible work rules has thus far been successful. The one staff member with young children has been working at home for part of each week and has fully satisfied the qualitative and quantitative standards for staff output. The three other staff attorneys, while they normally work at the staff offices in Trenton, are authorized to work at home or at a convenient law library whenever, in the words of the Staff Director, "they feel it necessary".

Flexible office hours even for a preponderance of the staff are not inconsistant with greater contact between the staff and the court. The judges, after all, normally are in Trenton only on hearing days. During much of the week they are geographically dispersed and communicate with each other by phone. Some decentralization of staff work should therefore have as little effect on staff-court contact as centralization has managed to produce.

Nor does a flexible schedule and the decentralization of work to the residences of staff attorneys represent as dramatic a departure from prevailing work habits in the profession as might at first be supposed. Practitioners maintain daily attendance at a central place in part to facilitate access by clients, in part to facilitate the collaboration which is an essential feature of

law-firm life, in part to maximize efficient use of support personnel and research materials, in part because that is the way many other commercial enterprises are organized (the mimetic or cosmetic motive), and in part because of inertia. Yet even in a law firm, irregular tenure at the office and geographic dispersion are commonplace.

Particularly in a large, urban firm, both arrival and departure hours vary over a wide range. Some attorneys often work at home after dinner. Others commonly dine downtown and then return to the office. Small firms frequently find it more economical to maintain very limited libraries; firm members will conduct much of their research outside the office in, for example, county or bar association libraries.

On the academic side of the profession, the home office is commonplace. Many scholars do the bulk of their writing there, away from the administrative bustle and persistent conviviality of the law school.

The work of central staff attorneys consists -- and with a few conceivable exceptions for coordinating and quality-control activities will continue to consist -- almost exclusively of research and writing. Since their tasks are standardized, the quantum of necessary conversation with clients, i.e. the judges, is very small in comparison to the necessities of practice. While staff attorneys find it useful to exchange ideas and to draw on each other's relative expertise in various areas, sporadic dialogue is qualitatively different from the systematic and integral collaboration of, for example, the law firm litigation team or a group

of attorneys processing a securities offering. Being impromptu, staff dialogues may be promoted by daily propinquity. But perhaps such advantages as may thereby accrue must be balanced against time lost in the casual socializing which is a natural concomitant of unstructured conversations among colleagues working in very close proximity and relatively free of onerous time constraints. Exchange of ideas and information can surely be helpful. But the basic task of research and, particularly, writing is very much an individualistic exercise, best performed with the minimum of distractions.

In any event, wholesale reestablishment of cottage industry is not proposed. To facilitate contact with the judges and the regular exchange of ideas on problems common to the entire staff or the court, it might be desirable for staff attorneys to come to the central office during hearing days. And even on other days, staff attorneys who have no particular reason for working at home might be expected to spend the bulk of their time at staff headquarters. The central point is that staff work rules should remain sufficiently flexible to permit recruitment of those attorneys who cannot maintain regular office hours.

B. The Limits of the Staff Function

Do or can staff operation encroach on the judicial prerogative? Any answer to that question must rest on answers to two precedent questions: (1) what intellectual operations does the staff perform for the court? (2) What intellectual operations is a judge obligated to perform as preconditions to decision?

The staff provides the court with a version of the facts and the relevant legal doctrine to lay alongside the versions offered by the parties. The danger to the judicial prerogative lies not in what the staff does but rather in what the court does with the staff's product. If the judges conclude that the staff memorandum relieves them of the obligation of reading the record and the relevant judicial precedents, are they delegating critical features of the judicial function?

As noted earlier, not infrequently the ultimate issue in an appeal is the significance of some demonstrable error. In light of all the evidence, was it prejudicial? The court's belief in the importance of seeing a case whole inhibited recourse to abbreviated records in criminal appeals. It would seem to follow, therefore, that if judicial time were not a scarce commodity, where the weight of an error must be judged, the court should not rely on a staff attorney's summary of the record.

Reliance on summaries of the applicable case law would also appear to be a deviation from the ideal conception of the judicial function. The uniqueness of every fact pattern is a banal truth which is occasionally forgotten. One has only to peruse the decisions in an area such as search-and-seizure to be reminded of its profound relevance. As a judge acquires a feel for prejudicial error by reading the entire record, so he acquires a feel for the operational substance of a doctrine by studying the precise factual settings of its prior invocations.

There is a more subtle way in which the staff operation can inadvertently erode judicial responsibility. The fact of staff processing signifies to the court that the processed appeal does

not raise difficult issues. If the staff enjoys the court's confidence and the proposed disposition is affirmance of the judgment below, the staff's appraisal of the appeal's difficulty might dull the critical faculties particularly of overworked judges. All of the customary intellectual operations -- checking the record, scrutinizing the precedents, and so on -- may be performed but so ritualistically as virtually to preclude discovery of any error that may have eluded the staff.

Staff-drafted per curiams only intensify the danger. Opinion writing is a separate intellectual operation, hence a last chance to discover error. Over the years more than one judge by his own admission has been forced to relinquish a conclusion because "it would not write." The staff draft closes that interstice between decision and its explanation into which doubt can sometimes creep.

Congestion in the appellate courts heightens the risk of encroachment on the judicial prerogative by encouraging uncritical reliance on staff work. At the same time, however, congestion may make the staff on balance a useful buttress for the deliberative process. Our discussion of risks has assumed that if they had no staff, the judges would perform all necessary intellectual operations in a critical, inquiring and ruminative spirit. But can one really expect that of judges forced to hear from four to five hundred cases a year? Will they find the time to get the feel of every record and every relevant line of precedents? One must suppose that they will not.

What is more threatening to the judicial function: partial reliance on the research and analysis of an able and independent staff or total reliance on one's own sometimes harried and hence

cursory efforts to locate each unique case in the vast geography of the law? Perhaps during the era of the appellate avalanche an able staff is the best means for guaranteeing a comprehensive, independent appraisal of the legal merits of every appeal.

APPENDIX I

THE DATA TABLES

TABLE 1

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

ELAPSED TIME IN THE APPELLATE PROCESS

2,197 CASES*
(Total No.)

July 10, 1972 to June 30, 1973

Days from Appealable Trial Court Judgment to:	A. Civil	B. Criminal[1]	C. All Cases
1. Appeal Taken			
90th Percentile	49 Days	83 Days	63 Days
Mean	35 Days	57 Days	46 Days
Median	36 Days	43 Days	41 Days
Range	0 Days - 428 Days	0 Days - 1,844 Days	0 Days - 1,844 Days
2. Transcript of Testimony Filed in Appellate Court			
90th Percentile	228 Days	393 Days	335 Days
Mean	126 Days	224 Days	177 Days
Median	108 Days	200 Days	146 Days
Range	0 Days - 517 Days	0 Days - 1,533 Days	0 Days - 1,533 Days
3.** Trial Court Papers Filed in Appellate Court			
90th Percentile	N/A	N/A	N/A
Mean			
Median			
Range			
4. Appellant's Brief Filed			
90th Percentile	231 Days	407 Days	333 Days
Mean	141 Days	239 Days	189 Days
Median	126 Days	210 Days	159 Days
Range	0 Days - 505 Days	5 Days - 1,844 Days	0 Days - 1,844 Days
5. Appellee's Brief Filed			
90th Percentile	308 Days	456 Days	391 Days
Mean	194 Days	285 Days	239 Days
Median	178 Days	259 Days	211 Days
Range	0 Days - 569 Days	8 Days - 1,993 Days	0 Days - 1,993 Days

(Table 1 Continued)	A. Civil	B. Criminal[1]	C. All Cases
6. Reply Brief Filed[2]			
90th Percentile	388 Days	463 Days	388 Days
Mean	217 Days	290 Days	231 Days
Median	201 Days	269 Days	213 Days
Range	18 Days - 624 Days	93 Days - 572 Days	18 Days - 624 Days
7. A Oral Argument[2]	STAFF PROCESSED	STAFF PROCESSED	STAFF PROCESSED
90th Percentile	402 Days	551 Days	432 Days
Mean	310 Days	363 Days	328 Days
Median	285 Days	322 Days	292 Days
Range	179 Days - 710 Days	152 Days - 1,518 Days	152 Days-1,518 Days
7. B Submitted[2]			
90th Percentile	425 Days	606 Days	516 Days
Mean	309 Days	408 Days	364 Days
Median	312 Days	368 Days	329 Days
Range	157 Days - 610 Days	145 Days - 2,055 Days	145 Days-2,055 Days
8. A Appellate Decision (Oral Argument)			
90th Percentile	425 Days	568 Days	466 Days
Mean	332 Days	383 Days	349 Days
Median	313 Days	331 Days	319 Days
Range	197 Days - 739 Days	159 Days - 1,532 Days	159 Days-1,532 Days
8. B Appellate Decision (Submitted)			
90th Percentile	440 Days	621 Days	556 Days
Mean	328 Days	427 Days	383 Days
Median	331 Days	391 Days	351 Days
Range	171 Days - 630 Days	167 Days - 2,069 Days	167 Days-2,069 Days
8. C Appellate Decision (Oral Argument & Submitted)			
90th Percentile	431 Days	598 Days	535 Days
Mean	330 Days	417 Days	372 Days
Median	320 Days	377 Days	341 Days
Range	171 Days - 739 Days	159 Days - 2,069 Days	159 Days-2,069 Days

(Table 1 Continued)

	A. Civil[1] NOT STAFF PROCESSED	B. Criminal[1] NOT STAFF PROCESSED	C. All Cases NOT STAFF PROCESSED
7. A Oral Argument[2]			
90th Percentile	489 Days	606 Days	546 Days
Mean	339 Days	397 Days	362 Days
Median	327 Days	374 Days	344 Days
Range	0 Days - 943 Days	5 Days - 1,186 Days	0 Days - 1,186 Days
7. B Submitted[2]			
90th Percentile	446 Days	505 Days	489 Days
Mean	329 Days	358 Days	346 Days
Median	322 Days	334 Days	328 Days
Range	13 Days - 713 Days	81 Days - 1,684 Days	13 Days - 1,684 Days
8. A Appellate Decision (Oral Argument)			
90th Percentile	546 Days	639 Days	586 Days
Mean	370 Days	423 Days	391 Days
Median	358 Days	400 Days	371 Days
Range	0 Days - 968 Days	23 Days - 1,230 Days	0 Days - 1,230 Days
8. B Appellate Decision (Submitted)			
90th Percentile	487 Days	535 Days	518 Days
Mean	353 Days	379 Days	368 Days
Median	344 Days	356 Days	350 Days
Range	31 Days - 736 Days	103 Days - 1,711 Days	31 Days - 1,711 Days
8. C Appellate Decision (Oral Argument & Submitted)			
90th Percentile	519 Days	576 Days	550 Days
Mean	363 Days	396 Days	379 Days
Median	350 Days	371 Days	360 Days
Range	0 Days - 968 Days	23 Days - 1,711 Days	0 Days - 1,711 Days

(*Here describe basis for selecting cases from which the data are drawn.)

1. Includes appeals in habeas corpus or other collateral attacks on convictions.
2. Does not occur in all cases.

** Not Applicable

Source: Card 1, Item 1-9

TABLE 1A

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

ELAPSED TIME IN THE APPELLATE PROCESS

Comparing Excessive Sentence Cases and Non-Staff-Processed Criminal Appeals

July 10, 1972 to June 30,1973

	Criminal	Criminal(Sentence Review)	(Without Sentence Criminal-Review)
	STAFF PROCESSED	NOT STAFF PROCESSED	NOT STAFF PROCESSED
7. A Oral Argument			
90th Percentile	551 Days	452 Days	615 Days
Mean	363 Days	302 Days	404 Days
Median	322 Days	290 Days	378 Days
Range	152 Days - 1,518 Days	150 Days - 474 Days	5 Days - 1,186 Days
7. B. Submitted			
90th Percentile	606 Days	446 Days	539 Days
Mean	408 Days	297 Days	391 Days
Median	368 Days	264 Days	363 Days
Range	145 Days - 2,055 Days	131 Days - 1,435 Days	81 Days - 1,684 Days
8. A Appellate Decision (Oral Argument)			
90th Percentile	568 Days	468 Days	647 Days
Mean	383 Days	320 Days	431 Days
Median	331 Days	312 Days	407 Days
Range	159 Days - 1,532 Days	173 Days - 489 Days	23 Days - 1,230 Days
8. B Appellate Decision (Submitted)			
90th Percentile	621 Days	461 Days	571 Days
Mean	427 Days	316 Days	412 Days
Median	391 Days	291 Days	385 Days
Range	167 Days - 2,069 Days	145 Days - 1,469 Days	103 Days - 1,711 Days
8. C Appellate Decision (Oral Argument & Submitted)			
90th Percentile	598 Days	463 Days	620 Days
Mean	417 Days	317 Days	422 Days
Median	377 Days	294 Days	395 Days
Range	159 Days - 2,069 Days	145 Days - 1, 469 Days	23 Days - 1,711 Days

CONTINUED

1 OF 2

TABLE 2

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

EXTENSIONS OF TIME ON APPEAL

July 10, 1972 to June 30, 1973

	A. Number of Cases in Which Extension Granted	% of Total Appeals	B. Number of Extensions In Cases Where 1 or More Extensions Granted	C. Number of Days for Which Extensions Granted
1. For Preparation of Transcript	N/A	N/A	N/A	N/A
2. For Filing Appellant's Brief	326	39%	90th Percentile: 2 Mean: 1.1 Median: 1 Range: 1 - 3	90th Percentile: 60 Days Mean: 33 Days Median: 30 Days Range: 7 Days - 116 Days
3. For Filing Appellee's Brief	638	76%	90th Percentile: 2 Mean: 1.2 Median: 1 Range: 1 - 3	90th Percentile: 84 Days Mean: 45 Days Median: 30 Days Range: 5 Days - 191 Days
4. Totals For All Purposes In All Cases	835	100%	90th Percentile: 2 Mean: 1.3 Median: 1 Range: 1 - 4	90th Percentile: 77 Days Mean: 41 Days Median: 30 Days Range: 5 Days - 191 Days

**-Not Applicable

Source: Card 1, Item 10

TABLE 3

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION
NEW TRIAL MOTIONS

July 10, 1972 to June 30, 1973

A. Type of Case	Cases in Which B. New Trial Motion Filed		C.* Days Elapsed From Filing of New Trial Motion Until Denial by Trial Court
	No. of Cases	% of Total	
Civil	105	10%	Mean: 50 Days (58 Cases) Median: 31 Days Range: 0 Days - 368 Days
Criminal	64	6%	Mean: 48 Days (29 Cases) Median: 20 Days Range: 0 Days - 217 Days

Source: Card 2

*Based on those 87 cases in which both dates could by ascertained.

TABLE 4

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

TYPES OF CASES AND REVERSAL RATE

July 10, 1972 to June 30, 1973

TYPE OF CASE	No. of Cases	% of Total	REVERSED		NOT REVERSED	
			No. of Cases	% of Cases in this Category	No. of Cases	% of Cases in this Category
Administrative Law	197	9%	27	14%	170	86%
Contracts	183	8%	47	26%	136	74%
Criminal	777	35%	99	13%	678	87%
Criminal Guilty Plea	238	11%	14	6%	224	94%
*Criminal Sentence Rev.	*225	*10%	* 7	* 3%	*218	*97%
Post-Conviction Relief	78	4%	7	9%	71	91%
Quasi-Criminal	43	2%	4	9%	39	91%
Domestic Relations	91	4%	24	26%	67	74%
Property	78	4%	21	27%	57	73%
Taxation	43	2%	17	40%	26	60%
Tort	207	9%	65	31%	142	69%
Trusts & Estates	38	2%	12	32%	26	68%
Workmen's Comp.	114	6%	23	20%	91	80%
Other	14	1%	5	36%	9	64%
Municipal Law	76	3%	18	24%	58	76%
Contempt	4	0%	0	0%	4	100%
Bankruptcy	6	0%	3	50%	3	50%
Election	7	0%	1	14%	6	86%
Banking	2	0%	0	0%	2	100%
Gun Permit	1	0%	0	0%	1	100%
TOTALS	2,197	100%	387	18%	1,810	82%

*Criminal Sentence Rev. Only - (Not included in totals) Included with Guilty Plea. It is recognized that there have been a small number of cases involving a jury which the sole issue has been sentence. These cases will be included in the sentence review category, but have been statistically counted in the designation "Criminal".

All Cases	REVERSED		NOT REVERSED		TOTAL	
	No. of Cases	% of Cases in this Category	No. of Cases	% of Cases in this Category	No. of Cases	% of Total
Civil	267	24%	837	76%	1,104	50%
Criminal	120	11%	973	89%	1,093	50%

Source: Card 1, Item 12

TABLE 5

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION
CRIMINAL APPEALS (EXCLUDING POST CONVICTION)

July 10, 1972 to June 30, 1973

	Total No. of Cases	% of all Criminal Appeals
1. Jury Trial	597	59%
2. Guilty Plea or Non-Jury Trial	412	41%
3. Counsel:		
a. Court Appointed or Prosecutor	23	2%
b. Public Defender or Legal Aid	746	74%
c. Privately retained	240	24%
d. Same Firm as at Trial	930	92%
e. Same Individual as at Trial	196	19%
4. Pending Appeal Defendant		
a. In Custody	723	72%
b. Not in Custody	286	28%

Source: Card 2

TABLE 6

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION
CRIMINAL APPEALS (EXCLUDING POST CONVICTION):
RELATION BETWEEN COUNSEL AND TIME CONSUMED IN APPELLATE PROCESS

July 10, 1972 to June 30, 1973

Counsel on Appeal	A. Time lapse from trial court judgment to appellate decision	B. Reversal Rate
1. Same individual as trial counsel	90th Percentile 477 Days Mean: 342 Days Median: 346 Days Range: 23 Days - 783 Days	29%
2. Different individual from trial counsel A. in same firm or office as trial counsel	90th Percentile 584 Days Mean: 404 Days Median 376 Days Range: 42 Days - 1,711 Days	* 92%
B. not in same firm or office as trial counsel	90th Percentile 656 Days Mean; 442 Days Median: 413 Days Range: 34 Days - 1,057 Days	8%

Source: Card 2

*The great majority of criminal appeals in New Jersey are handled by the office of the Public Defender which has a separate appellate section. Thus if a case is handled by that office throughout, a different counsel will invariably handle the appeal although the same agency is involved.

TABLE 7

SUPERIOR COURT - APPELLATE DIVISION
TOTAL: GROUNDS ASSERTED ON APPEAL

July 10, 1972 to June 30, 1973

Total No. of Times Ground Asserted on Appeals	*Percent of Appeals on Which This Ground Was Asserted	**No. of Reversals on This Ground	Percent Reversed on This Ground	By Appellant
662	30.1%	80	12%	Trial judge's or agency's findings of fact erroneous or not supported by evidence
486	22.1%	10	2%	Excessive sentence (in criminal cases)
480	21.9%	20	4%	Erroneous ruling on admissibility of evidence (admitting or excluding evidence)
344	15.7%	45	13%	Erroneous application of law
311	14.2%	27	9%	Erroneous instructions to the jury (giving or failing to give instructions)
173	7.9%	51	29%	Entry of directed verdict or judgment as matter of law against appellant (or appellee on cross-appeal)
164	7.5%	27	16%	Statutory interpretation
164	7.5%	12	7%	Refusal of trial judge to direct verdict or enter judgment as a matter of law for appellant (or appellee on cross-appeal)
164	7.5%	7	4%	Verdict against weight of evidence (in jury cases)
142	6.5%	13	9%	Plenary hearing needed
108	4.9%	2	2%	Illegal search and seizure
107	4.9%	3	3%	Prejudicial argument by counsel to jury
77	3.5%	4	5%	Identification procedure improper

(Table 7 Continued)

Total No. of Times Ground Asserted on Appeals	*Percent of Appeals on Which This Ground Was Asserted	**No. of Reversals on This Ground	Percent Reversed on This Ground	By Appellant
70	3.2%	1	1%	Inadequate representation by counsel (in criminal cases)
64	2.9%	1	2%	Statute or ordinance unconstitutional
63	2.9%	0	0%	Improper trial conduct of prosecuting attorney (in criminal cases)
49	2.2%	4	8%	Plea of guilty improper (in criminal cases)
47	2.1%	8	17%	Illegal sentence
45	2.1%	4	9%	Error in imposing or computing interest damage, penalty or assessment
42	1.9%	1	2%	Laches, res judiciata, collateral estoppel, and waiver
42	1.9%	2	5%	Improper conduct of judge
39	1.8%	4	10%	Error in award or failure to award counsel fees or costs. (Inadequate excessive or not appropriate for award)
39	1.8%	1	3%	Confession wrongly admitted
37	1.7%	8	22%	Lack of jurisdiction
36	1.6%	4	11%	Erroneous interpretation of law
34	1.2%	4	12%	Procedural defect below or failure to abide by rules
31	1.4%	0	0%	Cumulative error
29	1.3%	3	10%	Error in granting or denying motion for new trial

(Table 7 continued)

Total No. of Times Ground Asserted on Appeals	*Percent of Appeals on Which This Ground Was Asserted	**No. of Reversals on This Ground	Percent Reversed on This Ground	By Appellant
26	1.2%	2	8%	Error or defect in jury selection or jury composition
26	1.2%	1	4%	Erroneous grant of severance or joinder; erroneous consolidation
25	1.1%	0	0%	Error in denial of mistrial
24	1.1%	7	29%	Improper entry of judgment or improper judgment
22	1.0%	0	0%	Appellate procedural rules not followed
22	1.0%	22	100%	Legal search and seizure
22	1.0%	0	0%	Denial of due process
19	0.9%	1	5%	Evidence insufficient to support verdict (in jury cases)
18	0.8%	3	17%	Abuse of discretion
17	0.8%	1	6%	Prevailing rule of law erroneous
16	0.7%	4	25%	New Evidence
16	0.7%	1	6%	Erroneous denial of adjournment or continuance
16	0.7%	0	0%	New pre-sentence report required/error in considering certain matters in sentencing
14	0.6%	0	0%	Double jeopardy
13	0.6%	0	0%	Inconsistent or compromise verdict
10	0.5%	3	30%	Sequestration

(Table 7 continued)

Total No. of Times Ground Asserted on Appeals	*Percent of Appeals on Which This Ground Was Asserted	**No. of Reversals on This Ground	Percent Reversed on This Ground	By Appellant
10	0.5%	0	0%	Denial of right to speedy trial or excessive delay between offense and indictment
9	0.4%	1	11%	Erroneous dismissal
9	0.4%	4	44%	Federal or state preemption
7	0.3%	0	0%	Cruel and unusual punishment
7	0.3%	0	0%	Excessive verdict
7	0.3%	0	0%	Improper probation revocation hearing
7	0.2%	0	0%	Merger
5	0.2%	5	100%	Erroneous ruling on sufficiency of a pleading
5	0.2%	2	40%	Refusal to remit of bail forfeiture
4	0.2%	0	0%	Error in ordering arbitration or in refusing to submit thereto
4	0.2%	0	0%	Improper conduct of attorney
42	1.9%	0	0%	Other: Consist of grounds with less than four reasons for the same ground
4,471		403	9%	TOTALS

*Percent shown is based on the total of 2,197 appeals, even if more than one ground was asserted on an appeal.
**16 reversals have more than one ground asserted on appeal

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