JUSTICE AT THE INTERMEDIATE APPELLATE LEVEL: THE NEW JERSEY APPELLATE DIVISION

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INTRODUCTION

Improving the performance of state intermediate appellate courts has not particularly arrested the attention of court reformers. Judicial reform for the most part has concentrated upon trial courts, overall court structure, general aspects of court administration and certain ancillary judicial concerns such as corrections and sentencing, probation and juvenile in-take, to mention just a few. In contrast, the work and adequacy of appellate courts generally had been viewed with tepid interest. Nevertheless, the problems affecting trial courts inevitably lap the shores of appeals courts and the resulting erosion in the dispensation of justice at the intermediate appellate level has become palpable.

Gains in expedition achieved in trial are lost on appeal because of the increasing delays now encountered by courts of intermediate or last resort. Reforms, designed to improve the dispensation of justice and to surmount the inordinate delays in disposing of litigation, frequently are cancelled out when the case goes up on appeal. Moreover, slippage in judicial performance at the appeals stage of litigation has a way of working itself back to the trial level. Inadequacies at the appellate level indirectly become embedded in trial court attitudes and performance.

Reform of appellate courts has been sluggish. It seems that for change to get underway there has to be a perception of crisis. More importantly, the time must be right and recognition of the need for reform must be shared by persons in a position to do something about it. In New Jersey, efforts to improve appellate performance have come slowly. Nevertheless, reform has started and a modest beginning has been made.[1]

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[1] The thrust of this article is to present the New Jersey experience with respect to current reforms of its intermediate appellate court as they may relate generally to state intermediate appellate courts. It is by no means an aside to mention at the outset that these reforms and their resultant, initial success are very much a reflection of the attitude and concern on the part of the New Jersey Supreme Court under the stewardship of Chief Justice Richard J. Hughes. It is entirely fitting, therefore, that the accomplishments in this area of judicial reform be men-

THE BACKGROUND FOR CHANGE

The imperative for change at the intermediate appellate level in the state was written in the arithmetic of appellate litigation. Statistics left no escape from the conclusion that the justice system was foundering on the appellate as well as trial levels. One word can be said to describe the sum: delay.

Unquestionably the major cause of the pervasive delays in the justice system has been the litigation explosion, a phenomenon occasioned by a combination of demographics, economic activity, and a sharpened public appetite for litigation.[2] This can readily be seen at the appellate level in this state in the growth of appeals. For the five year period, from 1973 through 1978, case filings in the state Appellate Division rose dramatically, from 3,801 in the 1973-1974 term to 5,306 in 1977-1978, a forty percent increase.[3] Similar expansion occurred with respect to ancillary court business such as motions generated in the Appellate Division: 2,097 motions were filed in 1973-1974 compared to 4,593 five years later,[4] an increase of more than one hundred percent.

One consequence of the litigation explosion might be said to be a judicial and administrative implosion. Confronted with the massive filings of appeals and motions, court clerks and supporting administrative staff have been less able to keep up with the volume and maintain adequate case management. Others participating in the appellate process, trial judges, court reporters and lawyers, have also been slowed by the sheer number of appeals. Delays encountered in the filing of essential trial documents—transcripts, appendices and briefs—have contributed to prolonging the time required to perfect cases on appeal and have them ready for disposition by the court. Not unexpectedly, the "ripple effect" has had its impact on the judges. The appellate judges have encountered greater difficulties and personal hardship in coping with the volume of cases. Thus one untoward result of the litigation explosion within the court itself has been

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tioned in tribute to the retirement of Chief Justice Hughes as well as that of Associate Justice Worrall F. Mountain, whose contributions to the cause of justice are reflected not only in his many excellent opinions but in his unstinting support of the judicial and professional reforms sponsored by the Supreme Court.

[2] National Center for State Courts, *A Study of the New Jersey Appellate Division Clerk's Office* 14, 103–13 (1979); National Center for State Courts, *Appellate Courts: Staff and Process in the Crisis of Volume* 7–9 (1974).

[3] National Center for State Courts, *A Study of the New Jersey Appellate Division Clerk's Office, supra* note 2, at 11–12, 104.

[4] *Id.* at 49.

that it now takes slightly more than one year after filing for an appeal to be concluded.[5]

These problems have not gone entirely unheeded. Delays in appellate justice have been the subject of frequent complaints and commentary. The invariable solution throughout the years, for the most part, has consisted of increasing the numerical size of the Appellate Division. Thus, when this court was created as part of the modern New Jersey court system with the adoption of the New Jersey Constitution of 1947, it consisted, in its first term, of two three-judge parts. It remained with a total of six judges for one more year and was then increased by another three-judge part. Nine judges served in the Appellate Division through 1960-1961.[6] The appellate court went to four three-judge parts in 1961-1962 and remained at that level until 1970-1971.[7] Another, fifth part was added in that year and the court continued at fifteen judges for the next three years until 1973-1974 when it went to eighteen judges sitting in six parts. One year later, in 1974-1975, the Appellate Division reached its current level of twenty-one judges organized into seven different parts.[8]

While increasing the size of the court was designed to keep pace with growing volume, the filing of appeals and the backlog of pending undisposed cases did not diminish. Thus, when the court consisted of two parts, filings increased from 673 to 814 and the backlog of undisposed cases went from 287 to 364. In 1961-1962, when the court added a fourth part, the Appellate Division disposed of more appeals than before and brought the backlog of cases down from 663 in the prior term to 648.[9] Thereafter, however, the march of new filings and the resultant backlog continued unabated, increasing from 1,115 and 762 in 1962-1963 to 2,449 and 2,185, respectively, in 1969-1970. When the court went to five parts in 1970-1971, the growth continued from 2,749 and 2,521, respectively, to 3,801 and 3,725 in 1973-1974 at which time the court was increased to eighteen judges. Since the court reached its present size of twenty-one judges in 1974-1975, new appeals rose from 4,383 to 5,305 in 1977-1978; the backlogs of pending cases similarly flourished during the same period of time, 4,210 to 6,193.[10]

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[5] *Id.* at 43–45.

[6] For part of both the 1952–1953 and 1957–1958 terms, twelve judges sat.

[7] In the two terms of 1963–1964 and 1964–1965 the Appellate Division dropped back to three parts.

[8] The figures are derived from the annual reports of the Administrative Director of the Courts for each year and statistical summaries furnished directly by the Clerk of the Appellate Division.

[9] *Id.*

[10] *Id.*

It is true that during this period of time, when the size of the Appellate Division was increased, the overall production of the court improved at least in terms of total case dispositions. The efficiency of the court system, however, measured in terms of case dispositions per sitting judge did not markedly improve. Thus, during the time the Appellate Division increased in size from six to twenty-one judges, the average number of cases disposed of by the Appellate Division as a whole increased by a factor of approximately seven times (6.7). The output of the court for each sitting judge, however, increased only by a factor of 2.5. In large measure the increase in total productivity was due not only to the fact that more judges were added to the court but that judges individually were disposing of more cases. Hence, the increase in productivity of the court as a whole is accounted for by harder work on the part of individual judges in terms of hours and workload; it is not a reflection of increased efficiency on the part of the court. This is illustrated by the following chart[11] showing the numerical growth of the court and its correlation to the total number of cases disposed of each term and by each judge through opinions (as opposed to dismissals, withdrawals and the like):

Term	Total Dispositions	Disposition by Opinion	Number of Judges	Total Dispositions per Judge	Opinions per Judge
1948–49	386		6	64.3	64.8
1949–50	644	389	6	107.3	
1950–51	781		9	86.5	
1951–52	683		9	75.9	
1952–53	850		9(12)	94.4	
1953–54	781		9	86.7	
1954–55	699		9	77.6	
1955–56	767		9	85.2	
1956–57	711	410	9	79.0	45.6
1957–58	730	409	12	60.9	34.1
1958–59	705		9	78.3	
1959–60	851		9	94.5	
1960–61	925	498	9	102.7	55.3
1961–62	1163	600	12	96.9	50.0
1962–63	1001		12	83.4	

[11] *Id.* Performance for the term 1978–79 is considered *infra*.

Term	Total Dispositions	Disposition by Opinion	Number of Judges	Total Dispositions per Judge	Opinions per Judge
1963–64	1061		9	117.9	
1964–65	986	555	9	109.5	61.6
1965–66	1661		12	138.5	
1966–67	1449		12	120.7	
1967–68	1570		12	130.8	
1968–69	1660		12	138.3	
1969–70	1937	1228	12	161.4	102.3
1970–71	2410		15	160.6	
1971–72	3012		15	200.8	
1972–73	3461	2300	15	230.7	153.3
1973–74	3590	2448	18	199.4	136.0
1974–75	3898	2660	21	185.6	126.7
1975–76	4819	3143	21	229.4	149.7
1976–77	4249	3001	21	202.3	142.9
1977–78	4754	3032	21	226.4	144.4

This graphic representation of the relationship between the increase in the size of the Appellate Division and the productivity of that court readily yields the conclusion that increasing the number of judges as a tool for judicial reform is a finite palliative. There was no consistent reduction in the accumulated backlog of undecided appeals at the end of each year; judges, on the basis of individual performance, did tend to dispose of more cases but hardly enough to increase the efficiency of the court as a whole. Nor was there any compression in the delays between the filing of an appeal and its final disposition. Thus, increasing the size of the appellate court constitutes an inefficient and expensive technique for dealing with the large growth of new appeals each year and is largely ineffective in terms of surmounting the glut of undisposed cases left at the end of each court term. It seems clear that as long as litigation continues to expand and the growth in new appeals does not abate, adding judges cannot serve both to increase judicial production and to achieve reasonable efficiency of judicial performance.

There was some perception of the limitations inherent in simply increasing the size of the court. Other measures to improve the situation in the appellate court were also instituted or suggested. Judges of the Appellate Division early in the 1970's, for example, were instructed for a time to dispense with the writing of opinions. Some time later the judges were adjured to submit "per curiam" or un-

signed opinions, to discourage "pride of authorship" and induce the prompt filing of terse, economical opinions. A later change in the New Jersey Court Rules authorized the submission of brief opinions, in effect disposing of appropriate cases by order in an attempt to economize judicial efforts. Rule 2:11-(3)(e), adopted in 1975, provided for affirmances without opinion in civil appeals in cases in which sufficient evidence is found to support findings of fact, jury verdicts or administrative decisions. Such affirmances were also approved for both civil and criminal appeals in instances in which legal issues raised are found to be without merit.[12]

The plight of the Appellate Division was described in the editorial columns of the *New Jersey Law Journal*. It was recommended, at least on an interim basis, that decisions in the Appellate Division be rendered by a single judge with provision for three-judge dispositions under certain circumstances.[13] A report on the status of the Appellate Division was submitted by the Appellate Practices Study Committee of the New Jersey State Bar Association, which recommended (albeit as an alternative to increasing the size of the Appellate Division) dispositions of cases by less than three judges.[14] The use of two-judge panels was explored by other commentators.[15] These and

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[12] New Jersey Court Rule 2:11-3(e) provides in full:

(e) Affirmance without Opinion:

(1) **Civil Appeals.** When in a civil appeal the Appellate Division determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:

(A) that a judgment of a trial court is based on findings of fact which are adequately supported by evidence;

(B) that the evidence in support of a jury verdict is not insufficient;

(C) that the determination of a trial court on a motion for a new trial does not constitute a manifest denial of justice;

(D) that the decision of an administrative agency is supported by sufficient credible evidence on the record as a whole;

(E) that all issues of law raised are clearly without merit and the court determines that an opinion would have no precedential value; then and in any such case the judgment or order under appeal may be affirmed without opinion and by an order quoting the applicable paragraph of this rule.

(2) **Criminal Appeals.** When in a criminal appeal the Appellate Division determines that some or all of the issues raised by the defendant are clearly without merit, the court may affirm by an opinion which, as to such issues, specified them and quotes this rule and paragraph.

N.J.R.2:11-3 (e).

[13] *What To Do About the Appellate Division Backlog: One Version*, 99 N.J.L.J. 116 (Feb. 12, 1976).

[14] Report of The Appellate Practices Study Committee of the New Jersey State Bar Association (unpublished 1976).

[15] Botter, *Two-Judge Appellate Panels*, THE REPORTER XX (Nov. 1976).

other techniques for enhancing the performance and productivity of the Appellate Division were the subject of a report of Appellate Division judges submitted to the Supreme Court in June 1976 and discussed in the official publication of the State Bar Association.[16] Many other proposals were put forward such as summary dispositions in appropriate cases, automatic dismissals of delinquent appeals, mandatory one-line opinions in simple affirmances, elimination of oral arguments, and the use of oral decisions in cases requiring argument, as well as a streamlined motion practice; longer-range recommendations entailed restructuring the Appellate Division and limiting appeals as of right.[17]

Nothing discernible emerged from this rash of suggestions until 1978, when Chief Justice Hughes, with the approval of the Supreme Court, designated a committee of the Court itself to undertake a review of the status and performance of the Appellate Division with a view towards presenting to the Court recommendations for reforms and improvements. Its report was submitted to the Court in July 1978.[18]

THE REFORM PROGRAM FOR THE INTERMEDIATE APPELLATE COURT

The July 1978 Report of the Supreme Court's Committee on the Appellate Division was a relatively sparse document. It recounted the nature of the crisis within the Appellate Divsion, noting the problems of calendar congestion and delays or "lag time" in the disposition of individual appeals despite the numerical increases in the size of the Appellate Division. Among the matters mentioned were problems besetting the Office of the Clerk of the Appellate Division, delays in the filing of transcripts and briefs, counterproductive "deficiency" practice which served to slow. the perfection of appeals for disposition and ineffective discipline of attorneys who failed to adhere to appellate rules of practice and court directives.[19]

The major proposals put forth by the Committee were: (1) a thorough and professional study of the operation of the Office of the Clerk of the Appellate Division; (2) the disposition of appeals in appropriate cases by two judges; (3) the summary disposition of suitable

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[16] Handler, *Reforming the Appellate Division—Now*, N.J.S.B.J. 30 (Feb. 1977).

[17] *See* Supreme Court Committee on the Appellate Division, *Report on Appellate Division Reforms*, 102 N.J.L.J. 41, 65 (July 20, 1978).

[18] *Id.*

[19] *Id.*

cases; (4) the disposition of most motions by single judges; (5) the use of letter briefs; (6) a more efficient procedure for the handling of deficient briefs and other filed papers; and (7) the development of stricter and more consistent discipline of attorneys who offended appellate rules. The Report suggested that other areas be reserved for further consideration and recomendations at a later time. These included study of the basic organization and structure of the Appellate Division, the possible limitation upon the unqualified right of appeal, the utilization of supporting staff for legal research, and the subject of appellate opinions and dispositions in general.[20]

The pivotal recommendation of the Supreme Court's Committee was for the disposition of appeals in appropriate cases by two judges. It observed that because of the unqualified right to appeal there were a substantial number of cases amenable to final decision by two judges. Such cases could be reasonably identified. They would be those which were obviously uncomplicated, clear-cut, noncontroversial and relatively unimportant to the public. A final disposition by two judges of cases with these characteristics could be accepted with the same confidence as would their decision by three judges. In making this recommendation, the Committee contemplated that in all cases judges would retain the discretion to utilize a third judge in the disposition of the appeal.[21]

This proposal, after adoption by the Supreme Court, was incorporated in its Court Rules. The language of Rule 2:13-2(b), in pertinent part, states:

> Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge in his discretion determines that an appeal should be decided by a panel of 3 judges. Such a determination may be made where the appeal presents a question of public importance, of special difficulty, of precedential value, or for such other special reason as the Presiding Judge shall determine. The panel of 2 judges to which an appeal is submitted for decision may elect to call the third judge to participate in the decision at any time before making its determination and shall do so if the 2 judges cannot agree as to the determination.[22]

Another key proposal related to the procedures of the Clerk of the Appellate Division with respect to the time-lags in readying filed

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[20] *Id.*

[21] *Id.*

[22] N.J.R. 2:13-2(b).

appeals for court submission. The Report noted that the Clerk's office performs an invaluable service to the court by screening all appellate papers and briefs for deficiencies and rejecting defective documents. The system was designed to serve the convenience of the judges by assuring the technical quality of the papers submitted to them. This service by the Clerk, however, had become counterproductive, causing substantial delays in the submission of cases to the court for adjudication. It was suggested, therefore, that the Clerk under the direction of the court reduce the list of deficiencies justifying the rejection of briefs or other filed papers but that, if deficiencies were sufficiently grave to require rejection, an automatic fine to cover costs should be imposed as a condition for filing.[23] A corollary recommendation called for uniform, consistent and strict discipline by judges of attorneys who violate rules of appellate practice without reasonable excuse. These recommendations were ultimately implemented by court directives.[24]

The Supreme Court thus approved the adoption of the proposals of its Committee and authorized their implementation for the next Court term, effective September 1978.[25]

Assumptions Underlying the Reform Proposals

There was relatively little exposition in the Committee Report of the jurisprudential, traditional or historical assumptions which lay at the heart of its particular proposals to improve the quality of justice at the intermediate appellate court level. Nonetheless there appeared more than a hint of its important value-judgments. The Committee commented that "cognizance should be taken that the principal responsibilities of the Appellate Division as an intermediate appellate court are: (1) to dispose of appeals justly and fairly and expeditiously; and (2) to foster, develop and contribute to the law through its judicial decisions."[26] In fashioning a program for reform, there was evident concern for the appropriate role to be fulfilled by the intermediate appellate court. The Committee had this to say:

> Primary emphasis should be on measures which will ameliorate as rapidly as possible the performance of the Appellate Division with respect to the delays in deciding cases and the persistent backlog. Initial reforms should therefore (1) accelerate the rate of the

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[23] *Report on Appellate Division Reforms, supra* note 17, at 41, 65.

[24] *See* 102 N.J.L.J. 137–42 (Aug. 10, 1978).

[25] *Id.*

[26] *Report on Appellate Division Reforms, supra* note 17, at 41, 65.

> disposition of cases; the time within which an appealed case is decided must be compressed; and (2) they should also increase the number or volume of appeals determined annually and thus reduce effectively the backlog of pending cases. Other mediate solutions should endeavor to consolidate efficiencies of performance and enhance the judicial achievements of the court in its singular role as an intervening appellate court, but which so often becomes the final court of appeals.
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> Of necessity any solutions ultimately adopted, whether immediate or long-range, should be complementary and interrelated so that the Appellate Division can properly fulfill its role and discharge its responsibilities as an intermediate appellate court in deciding cases justly and with reasonable dispatch while continuing to contribute to the growth of law.[27]

In its capacity as a reviewing tribunal, the Appellate Division operates as a judicial fail-safe. It provides a means by which the fallibility of the adversary system of litigation, with its attendant risk of error, in some measure can be overcome. This—judicial review—squares with widespread and prevailing notions of what is needful for the fair and adequate resolution of litigated disputes and the dispensation of justice.[28] Hence, as part of the dispute-resolving machinery of a state judicial system, an intermediate court of review fails in its responsibilities if it cannot conclude controversies before it without ruinous delays and untoward costs.

The initial priority adopted by the Supreme Court's Committee related to improving the performance of the court in this, perhaps its most important function—to provide judicial review of individual cases.[29] Obviously, to discharge this responsibility, an intermediate appellate court must do its job efficiently and expeditiously. The mischief spawned by delays in a justice system has been copiously recounted. It is, of course, illogical and indefensible to believe that delays in the final and ultimate resolution of litigation encountered on the appellate level are any less intolerable than those experienced in the trial courts.

The role of the intermediate appellate court in furnishing judicial confirmation or correction of individual litigated cases takes on added

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[27] *Id.*

[28] ABA Comm. on Standards of Judicial Administration, STANDARDS RELATING TO APPELLATE COURTS §3.00, at 4 (Approved Draft 1977) [hereinafter cited as ABA Standards]; Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459, 460–64 (1975); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 CALIF. L. REV. 901, 910–15 (1971).

[29] *See Report On Appellate Division Reforms*, *supra* note 17, at 41, 65.

importance in view of the fact that the intermediate appeals court is in most cases the court of last resort.[30] This is undeniably the situation in this state. To take three court terms, for example, the Appellate Division by opinions and dismissals disposed of 4,333 cases in 1975-1976, 4,237 in 1976-1977 and 4,741 in 1977-1978. Cases coming to the Supreme Court from the Appellate Division, both by appeals as a matter of right and by certification for each term respectively, were 190, 201 and 168. Thus, less than five percent of all the cases matriculating through the intermediate appellate court were decided eventually by the Supreme Court.[31] Even if there were added to this total, cases considered by the Supreme Court by way of its review of petitions for certification (including those denied as well as accepted), namely 705, 967 and 698 for each of these terms, the percentage of cases which wend their way to the Supreme Court is still quite modest.[32] The empirical realization that the intermediate appellate court constitutes the final court in most litigated cases brings greater significance to its role in reviewing and adjudicating the correctness of the results of the trial court in individual cases and is an added reason for demanding efficiency and dispatch in the performance of this responsibility.[33]

The other twin goal of the intermediate appellate court is "to develop the law for general application in the legal system."[34] As stated by the Supreme Court Committee, an intermediate appellate court has the important function, "to foster, develop and contribute to the law through its judicial decisions."[35] It is, of course, true that an intermediate court of review functions in a subordinate capacity to that of the highest court and its contribution to the decisional law of the state must occur "within the doctrinal framework fashioned by the highest court."[36] That the intermediate appeals court in fact becomes the court of last resort in the overwhelming majority of cases which go beyond the trial level, however, underscores the significance of its role in developing and fashioning the law of its jurisdiction. Also, the intermediate appellate court deals with many cases

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[30] Hopkins, *supra* note 28, at 464.

[31] *See* note 8 *supra*.

[32] *Id.*

[33] Many jurisdictions, ever diminishing, still function without an intermediate appeals court. Hufstedler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 595 & n.43 (1969).

[34] ABA Standards, *supra* note 28, at 4. *See also* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 2-12 (1976); Hufstedler, *supra* note 33, at 587.

[35] *Report On Appellate Division Reforms*, *supra* note 17, at 41, 65.

[36] ABA Standards, *supra* note 28, at 4.

which are hardly routine or insignificant. That court is often confronted with cases presenting important, complex and novel issues which transcend the interests of the individual litigants. While many of these appeals may be appropriate for disposition by the highest court, only a few ever reach that court.[37] Hence, the intermediate appeals court cannot avoid decisions in such cases. And, in deciding them, the junior court necessarily generates and contributes to the growth of the body of decisional law governing the society and individuals within its jurisdiction. This role of the court in developing the law takes on greater significance since most states have strongly established jurisprudential traditions rooted in the common law. In such jurisdictions, judicial influences strongly shape the law and a large segment of the law is judge-made. In that frame of reference, the responsibility of an active intermediate appellate court becomes particularly meaningful.[38]

In addition to the assumptions relating to the overall purposes of an intermediate appellate court, alluded to in the Committee's Report, there was recognition, if not acceptance, of the idea that appellate tribunals are collegial bodies and their decisions must be a collective effort.[39] It seems to be more or less an axiom with respect to the structure of appeals courts that they be collective bodies. It is widely believed that the proper discharge of the judicial review function calls for more than one judge acting jointly in deciding cases and that such a tribunal should optimally be composed of at least three judges.[40]

The reasons for a judicial triad at the level of the intermediate appellate court are not self-apparent. History may have had a role in the evolution of collectivity on the part of courts of review. That history reveals that appellate tribunals under the common law did not arise from any preconceived notions as to the principles governing the organization of a proper and effective court system. In some measure their configuration was associated with the rise of monarchical power and the impetus toward centralization of government.[41] Perhaps there was some belief that, even in a judicial system, strength

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[37] *See* text accompanying notes 30–32 *supra*.

[38] Leflar, *Appellate Judicial Innovation*, 27 OKLA. L. REV. 321 (1974). *See also* Weintraub, *Judicial Legislation*, 81 N.J.L.J. 545 (Oct. 30, 1958).

[39] *See Report On Appellate Division Reforms*, *supra* note 17, at 41, 65.

[40] *See* ABA Standards, *supra* note 28, §3.00; Hufstedler, *supra* note 33.

[41] *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 128–43 (2d ed. 1936); I W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (7th ed. 1956); C. KINNANE, A FIRST BOOK ON ANGLO-AMERICAN LAW 208–86 (2d ed. 1952). *See generally* F. POLLACK & W. MAITLAND, THE HISTORY OF ENGLISH LAW 115–204 (1895).

was to be found in numbers. One of the earlier forms of appeal, a writ of *pone*, for example, was used to transfer a royal plea from a local court to the Court of Common Pleas, to be considered by five justices or the tribunal which met around the king himself, the *curia regis*.[42]

Still, for a very long period of time, an appeal to the "king" for relief did not embrace an appeal according to the settled principles of the law. The development of a structured system of appeals appears to have begun in the 14th Century. This is exemplified in part by the establishment of the Court of Exchequer Chamber which could call upon the justices of the common law courts as "assessors" as well as the barons of the Exchequer to hear errors.[43] Much later, a second Court of Exchequer Chamber was established in which six justices were necessary before judgment could be given, once again illustrating the advancing conceptualization of an appeal with collective decisions[44] as an integral part of the judicial process.

The evolution of collegial appellate review is at least as much a product of historical forces as it is of any articulated principle about the role of law in society. The judicial appeal as a structured and regular part of the judicial machinery for the adjudication of disputes emerged gradually over a long period of time. Only in the early 18th Century did the concept of an appeal as a matter of course, as opposed to a privilege granted by the crown in each individual case, or as discretionary with the judges, appear to have taken root,[45] giving some support to the belief that the growth of the modern appellate system is tied in with the rule of law itself. It is of some significance that the principle of collective decision-making as a component of judicial review was a concomitant in its historical growth. But, despite the respectability invested by tradition and history, the assumption of collectivity as an invariable and indispensable element of the judicial review function is ripe for examination. That inquiry should be in terms of the role and objectives of the intermediate appellate court in the judicial system.

Unquestionably, as a general proposition, there is a genuine need for collective decisions at the intermediate appellate level. It has been recognized that, insofar as the appellate tribunal serves merely to review individual cases and to confirm or correct trial re-

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[42] T. PLUCKNETT, *supra* note 41, at 345; 3 W. BLACKTSONE, COMMENTARIES 32–41.

[43] T. PLUCKNETT, *supra* note 41, at 147; I W. HOLDSWORTH, *supra* note 41, at 41–42; C. KINNANE, *supra* note 41, at 450–51.

[44] C. KINNANE, *supra* note 41, at 450–51; T. PLUCKNETT, *supra* note 41, at 154–55.

[45] C. KINNANE, *supra* note 41, at 450; I W. HOLDSWORTH, *supra* note 41, at 215.

sults, this responsibility is better discharged by more than one judge. On this level of analysis, however, the notion of what is "better" is a simple truism: two heads are better than one. There cannot be any sharp dispute with that tautology. The belief is entirely reasonable that a single judge sitting in judgment of the work of another judge (or jury) does not constitute a qualitative advance in the judicial process.[46] In that approach, there is no sufficient hedge against the error that may be made by a judge acting alone and hence the purpose of judicial review as a correcting mechanism is not predictably fulfilled by a single appellate judge. Moreover, the process of reaching decisions at the appellate level is intensely personal and entails, to a substantial degree, subjective individual effort.[47] Hence, in a great many situations the pooled thinking of more than one judge and the exchange of thought between judges bring about a decisional result, as well as an articulation of reasons, which not only may differ markedly from that of a single judge but also will represent a qualitatively more distinguished judicial end-product.

If we concentrate upon the role of the intermediate appeals court in contributing to the growth of the substantive law of the jurisdiction the need for collegiality is even stronger. The cases which result in opinions and which become a part of the decisional law of the state, usually through official publication, peculiarly call for combined interchange of thought. Illustrations of the kind of case which would work its way into the stream of law may be found in the standards for the publications of opinions for inclusion in the court reports which constitute the body of state decisional law. In New Jersey these have been developed by the Committee on Opinions.[48] The standards call for the publications of an opinion which presents "substantial [constitutional] questions" or "determines a new and important question of law" or "involves a novel matter" or is "of continuing public interest and importance."[49] It is immediately obvious that collectivity of effort at the decisional level is vitally important for the generation of opinions worthy of a place in the reported decisional law of the state. It has been recounted, and it can be verified by any appellate court judge, that the interchange of thinking that comes about in the decisional process among three or more judges frequently has a profound effect upon the decision in a given case and the opinion

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[46] *See* Hufstedler, *supra* note 33.

[47] Hopkins, *The Winds of Change: New Styles in the Appellate Process*, 3 HOFSTRA L. REV. 649 (1975).

[48] *See* N.J.R. 1:36-2.

[49] Standards For Publication of Judicial Opinions (May 2, 1974).

embracing that decision.[50] The interaction of ideas and analyses with other judges serves, in ever so many cases, to change, influence, modify or confirm individual thinking. Minds initially made up are unlocked. Thoughts tentatively held may be dislodged or strengthened. Ideas, dimly perceived, may wither under debate or sharpen with focus. In other words, many things happen on an intellectual and pragmatic level when judges confer with a view towards reaching a decision as a court in a particular case. This dynamic is vital in terms of the role of that court as a maker and exponent of law.

Having said all of this, must there be uncritical acceptance of or commitment to the notion that all appellate cases must be decided by at least three judges? It seems that, while the principle of collective decision-making at the appellate level is generally accepted and a tribunal of at least three judges may be optimum, that triad is by no means sacrosanct. The Court Rules in New Jersey contemplate that two judges may constitute a quorum of the Appellate Division[51] and that the parties may consent to a decision by two rather than three judges.[52] Many courts have recognized that three judges for appellate review may be the norm but it is not an absolute[53] and, assuredly, it is not an indispensable component of judicial due process or elemental fairness anymore so than is the right to judicial review itself.[54]

It has also been recognized that there are a great many cases which really do not demand or deserve the combined contributions of three or more independent minds. It has been questioned, for example, whether all cases which reach the appellate level require in-depth analysis and exhaustive opinions.[55] To suggest that such cases do not require definitive opinions is to open the possibility that they do not require the cooperative thinking of three judges in order to reach the correct result. In New Jersey, by way of illustration, the Rules of Court, specifically Rule 2:11-3(e), provide for the dispensation of a written opinion in cases where the issues presumably are

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[50] Botter, *The Making of Appellate Decisions and Opinions*, N.J.S.B.J. 34–36 (Feb. 1977).

[51] N.J.R. 2:13-2(b) (1979).

[52] *Id.*

[53] *See* People v. Gastellano, 79 Cal. App. 3d 844, 145 Cal. Rptr. 204 (Ct. App. 1978); Nelson v. Union Wire Rope Corp., 39 Ill. App. 2d. 73, 187 N.E. 2d 425 (App. Ct. 1963); Hoyt v. Hoyt, 351 S.W. 2d 111 (Tex. Civ. App. 1961); Fountain v. State, 101 S.E. 294 (Ga. Sup. Ct. 1919); Cowan v. Murch, 37 S.W. 393 (Tenn. Sup. Ct. 1896). *Contra*, State v. Lloyd A. Fry Roofing Co., 502 P.2d 253 (Ore. Sup. Ct. 1972).

[54] *See, e.g.*, Griffin v. Griffin, 351 U.S. 12 (1956); McKane v. Durston, 153 U.S. 684 (1893).

[55] P. GARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 34, at 31–41; Botter, *supra* note 50, at 34–36; Hufstedler, *supra* note 33.

lacking in merit.[56] Concomitantly, if the court in a given appeal is not engaged in a decision of precendential value but merely deciding the correctness of a routine case, plurality of effort may not be necessary or even desirable.[57] This is underscored by the reflection that the overwhelming majority of appeals are "doomed to failure;" in other words, most appeals will result in simple affirmances.[58] Thus, the palpable differences in the kind of cases coming through the intermediate appellate court—the simple vs. complex, mundane vs. important, routine vs. novel—very strongly suggest that decisions in appropriate cases could well be rendered by less than three judges.[59]

These thoughts influenced the Supreme Court's Committee on the Appellate Division to recommend, as its primary reform, the use of two judges for the disposition of suitably-defined appeals. Its purpose, as mentioned earlier, was several-fold. To increase the productivity of the court as a whole was the paramount goal.[60] It sought as well to increase the productivity or efficiency of individual judges and also, in some measure, to provide a means of relief for the judges from a burdensome and oppressive workload.[61] A correlative, if not immediate goal of this two-judge proposal, was to provide a mechanism whereby the intermediate appellate court could continue to function, and do so more effectively, in the development of the substantive law through the issuance of well-reasoned and definitive opinions in meritorious cases.[62] Thus, instead of spreading three judges thin over all cases coming before their court, the savings in time and effort achieved through the elimination of the third judge in the disposition of the "two-judge" cases could be reallocated and devoted to the disposition of the more demanding "three-judge" cases and the writing of deserving opinions called for by such cases. The theory of the reform was to increase the productivity *and* to enhance the quality of judicial performance of the intermediate appellate court.

GAUGING THE SUCCESS OF APPELLATE COURT REFORMS

It is still much too early to gauge the success of the New Jersey Appellate Division reforms, and particularly the two-judge approach.

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[56] *See also* ABA Task Force on Appellate Procedure, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS 107–19 (1977).

[57] Botter, *supra* note 15, at XX.

[58] Hopkins, *supra* note 47, at 650–51; B. CARDOZO, THE GROWTH OF THE LAW 80 (1924).

[59] *Report On Appellate Division Reforms*, *supra* note 17, at 41, 65.

[60] *Id.*

[61] *Id.*

[62] *Id.*

Nevertheless, there are indicia that the reforms which were proposed and implemented for the Appellate Division are meeting with reasonable success.

One measure of the success of these reforms is in terms of the increased and accelerated disposition of appeals. The statistical breakout of the activity of the Appellate Division for the 1978-1979 term, when compared to the previous term, demonstrates increased productivity and efficiency.

The Report of the Supreme Court's Committee, as will be recalled, also recommended that there be revisions of the deficiency practice within the Clerk's office. It proposed that this practice be modified so that fewer cases would be rejected on account of deficiencies, thereby increasing the flow of perfected cases into the respective parts of the Appellate Division for final determination.[63] The office of the Clerk, under the supervision of the Supreme Court's Committee, revised its notices and forms to reflect fewer requirements with respect to deficiencies; the number of deficiencies for which briefs would be rejected was reduced from nineteen to seven. These related only to the most essential aspects of appellate filings, such as the inclusion of the final judgment or order appealed from, the inclusion of essential pleadings, legibility and the like. By administrative directive the Clerk was authorized to notify attorneys that briefs would be rejected for these specific deficiencies, and if such deficiencies were not corrected within fourteen days, the appeal was subject to automatic dismissal. Upon the rejection of a brief because of a deficiency, the brief would not be accepted for filing unless a fee were paid to cover costs in the amount of $50.

In a relatively short period of time the revised deficiency practice has shown results. There seem to be fewer cases stalled in the Clerk's office due to deficiencies, and more cases are being passed through to the court; cases rejected because of deficiencies are corrected and "perfected" for final disposition more quickly.[64] Moreover, the assessment of an automatic sanction of $50 has been effective in stimulating prompt compliance.[65] Thus, for the court term, 1978-1979, the Clerk's office received 6,892 new briefs; it reviewed a total

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[63] *Id.*

[64] Handler, *The Appellate Division: A Progress Report*, 103 N.J.L.J. 157 (Feb. 22, 1979), as supplemented by Report of the Status of the Calendars for (Month of August, 1979) Administrative Office of the Courts.

[65] *Id.* Updated statistics disclose that $73,353 was assessed against attorneys in 1,062 cases under the deficiency practice.

of 7,030 (including briefs previously filed) under the new deficiency standards; it rejected 1,117 for deficiencies. More cases, almost 400, passed through the pipeline to the court, 3,186 cases perfected and sent on to the court, compared to 2,808 last term. The Clerk had more ready cases and was able to schedule cases twelve weeks in advance of the calendared date for disposition in contrast to only eight weeks in advance of submission to the court in 1977-1978. Moreover, the number of cases otherwise held up awaiting calendaring was sharply reduced.[66]

The deficiency procedures of the Clerk's office have dovetailed with the new two-judge practice. As noted, the amended Rule 2:13-2(b) now provides that all cases in the Appellate Division are to be decided by two judges except appeals involving questions of public importance, unusual complexity, precedential value or other "special reasons." Under this system as currently implemented, the presiding judge of each part of the Appellate Division makes the initial determination as to whether or not cases submitted to the part require three-judge disposition under the criteria of the Rule. Appeals are then assigned by the presiding judge to the judges within his part on a two-judge or three-judge basis and the Clerk of the Appellate Division is advised of these assignments. On the date calendared for dispostion, whether by oral argument or upon submission, each case is handled in accordance with its designation as a two-judge or three-judge case.

For the 1978-1979 court term there were calendared a total of 3,186 cases in the Appellate Division (compared to 2,808 for the previous term, 1977). Of these, 2,376, or approximately seventy-four percent, were designated by the presiding judges as two-judge cases; 810 cases, or approximately twenty-six percent, were categorized as three-judge cases.[67] Thus, approximately one quarter of the cases in the Appellate Division were deemed to be cases requiring three-judge disposition.

Improvement can be seen in the productivity and efficiency of the individual judges. During this period of time the Appellate Division disposed of 3,427 appeals by opinion (compared to 3,032 for the 1977-1978 term). It is noteworthy that the Appellate Division by opinion had disposed of —that is, by final disposition on the merits— almost 2,400 more cases than it did a year ago. Of the total number of opinions rendered during the first part of the term, 2,141, more

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[66] *Id.*
[67] *Id.*

than two-thirds, were two-judge dispositions and the balance, 1,076 cases, were decided by three judges. Judges wrote an average of 153.2 opinions per judge this term compared to 141.5 per judge one year before. It is reasonable to infer that the two-judge disposition of cases has been a material factor in the increased productivity and efficiency shown thus far in the Appellate Division.[68]

Supplementing this effort, the Clerk's office has followed up with the automatic dismissals of tardy and deficient appeals as authorized by the Supreme Court through administrative directive as part of the deficiency and related procedures. During the term, 2,442 cases were dismissed. The Clerk on her own motion on behalf of the court dismissed 1,664 of these cases. By way of contrast, in the prior term, without the Clerk's direct dismissal authority, only 1,654 cases were dismissed compared to 2,175 (2,442 less 267) this year, an increase of 521 cases.[69] This new practice has not only cleared the Appellate Division docket of stagnant and tardy cases, it has accomplished this without substantial expenditure of judicial time and effort.[70] Moreover, the Clerk's authority is obviously not being abused since of the total 2,442 cases originally dismissed only 267 were reinstated by the court. It is also important to point out that individual appeals seem to be decided with less delay; the backlog of cases is down. Thus, as of August 31, there were 31 pending cases, *i.e.*, those presented to the court for final disposition but not yet decided. In contrast, last year there were 49 cases pending undecided at this time.[71] Additionally, there were no cases awaiting court decision for more than four months following submission to the court compared to a considerable number of such cases last year at the same time.[72]

In sum, total dispositions in the Appellate Division, by opinion and dismissal, for the comparable terms were raised from 4,686 in 1977-1978 to 5,602 in 1978-1979—an increase of almost 1,000 cases in one year.[73] The conclusion is invited that the current reforms have accounted for an improvement in the productivity of the Appellate Division. Undoubtedly, more cases are being disposed of and they are being disposed of with greater dispatch and efficiency of judicial and clerical effort. The primary factors contributing to this development are the mechanism for two-judge dispositions of cases

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See* note 8 *supra*.
[73] Handler, *supra* note 64, at 157.

supplemented by the increased powers and authority vested in the Clerk of the court to dismiss cases without securing court intervention, to assess automatic penalties under court-prescribed standards and to accelerate the flow of cases for disposition.

CONCLUSION

The path to reform at the intermediate appellate level has not been straight and it certainly has not been swift. While the initial steps were long in coming and the journey, once started, has been marked with considerable hesitancy, interruptions and several wrong turns, it has nevertheless brought us to some important way-stations. These encourage the feeling that we are well on the way and that progress has been made, that we are embarked in the right direction and taking a proper course.

We can hope, with some basis, that the reforms thus far undertaken, will result in substantial achievements primarily in terms of increased output and productivity. Much will have been gained if the Appellate Division will be able to push its productivity to dispose of more cases annually, reduce the backlogs, and decide individual cases more promptly. Students of judicial performance should also be able to discern, in the future, an enriched quality in the opinions of that court in important and deserving cases. What is most significant, for the present, is that a substantial beginning has been made, laying the foundations for continued efforts toward reform and change designed to improve the dispensation of justice.