



Spring 1992

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### Recommended Citation

Thomas B. Marvell, *The New Mexico Court of Appeals Summary Calendar: An Evaluation*, 22 N.M. L. Rev. 501 (1992).

Available at: <https://digitalrepository.unm.edu/nmlr/vol22/iss2/4>

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# THE NEW MEXICO COURT OF APPEALS SUMMARY CALENDAR: AN EVALUATION\*

THOMAS B. MARVELL\*\*

## I. INTRODUCTION

The New Mexico Court of Appeals, using its summary calendar, decides most appeals in three to four months. This is a substantial feat. The typical American appellate court takes well over a year to decide most cases.<sup>1</sup> The court of appeals is able to accomplish this by dispensing with transcripts, briefs, and oral arguments. Decisions are made on the basis of a record proper, a docketing statement filed by trial counsel soon after the notice of appeal, calendar notices sent to the parties and giving grounds for a proposed summary decision, and memos in opposition submitted by appellate counsel in response to the calendar notices.

Under traditional appellate procedure the trial court sends the trial transcript and record, counsel prepare appellant and appellee briefs and give lengthy oral arguments, and the judges write full published opinions. Since the late 1960s courts throughout the country have responded to caseload pressures by curtailing these procedures, mainly by limiting oral argument and opinion writing.<sup>2</sup> The New Mexico Court of Appeals is at the forefront of this trend toward increased efficiency, and the summary calendar is as far as any court has gone in cutting back on the traditional procedures.<sup>3</sup>

The purpose of this article is to evaluate this bold innovation. The following sections outline the origin and evolution of the summary calendar, describe in detail its current operations, and determine its impact on delay,

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\* This article was prepared under a grant from the State Justice Institute. Points of view expressed herein are those of the author and do not necessarily represent the official position or policies of the State Justice Institute. I benefitted greatly from comments on earlier drafts by several judges and, especially, Judge Lynn Pickard, New Mexico Court of Appeals. Portions of this article have been previously published. See Marvell, *Abbreviate appellate procedure; an evaluation of the New Mexico Summary Calendar*, 75 JUDICATURE 86 (1991) (reprinted with permission of author).

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1. Statistics concerning appellate court decision times can be found in: NATIONAL CENTER FOR STATE COURTS, *STATE COURT CASELOAD STATISTICS: 1988 ANN. REP.* 74-81 (1990); J. CHAPPER & R. HANSON, *INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING* 26-29 (1990); J. MARTIN & E. PRESCOTT, *APPELLATE COURT DELAY: STRUCTURAL RESPONSES TO THE PROBLEMS OF VOLUME AND DELAY* 84-87 (1981); S. WASBY, T. MARVELL, & A. AIKMAN, *VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES* 28-33 (1979).

2. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 291 (1989).

3. Only one other appellate court, the New Hampshire Supreme Court, has made extensive use of summary procedures as extreme as the New Mexico summary calendar. Marvell, 72 JUDICATURE at 290; Douglas, *Innovative Appellate Court Processing: New Hampshire's Experience with Summary Affirmance*, 69 JUDICATURE 147 (1985). A drastic abbreviated procedure was the subject of an experiment in Arizona, but it was not actually implemented. Jacobsen & Schroeder, *Arizona's Experiment with Appellate Reform*, 63 A.B.A. J. 1226 (1977).

productivity, and quality of justice. The latter is the most difficult topic and is studied mainly by obtaining the views of judges and appellate counsel and by analyzing reversal rate trends.

## II. THE NEW MEXICO COURT OF APPEALS<sup>4</sup>

### A. *Basic Trends*

The court of appeals' jurisdiction in criminal appeals, which has not changed since the court was created in April 1966, includes all cases except those involving sentences of death or life imprisonment, which go directly to the supreme court.<sup>5</sup> The court, therefore, has long received some ninety percent of the state's criminal appeals. Until 1975, in addition, the court received post conviction cases, constituting some five to ten percent of the total caseload.<sup>6</sup> Civil jurisdiction, as expanded in July 1983, extends to all appeals except contract cases, appeals from the Public Service Commission and State Corporation Commission, habeas appeals, and other specific categories of appeals reserved for the supreme court.<sup>7</sup>

The court of appeals caseload has increased tremendously. Filings in 1990 and 1991 were five times the 1970 level,<sup>8</sup> and appeals decided grew by nearly that rate.<sup>9</sup> The fact that decision growth almost matches filing growth suggests that the court has not fallen further behind over the years. In fact, the court has never had a particularly severe delay problem when compared to most state appellate courts.<sup>10</sup> Judgeships have increased at a much slower pace than caseload growth. The original court had four judges, a fifth was added in 1972, two more were added in 1979.<sup>11</sup> Three more were added in the summer of 1991, after this study was conducted. Filings per judge and decisions per judge have nearly tripled since 1970.<sup>12</sup>

The staff has grown more than the number of judges. The court has always had one law clerk per judge, who works primarily on non-summary calendar cases. The central attorney staff, called the Prehearing Division, was created in 1975 with two attorneys, and now it has thirteen. Because the Prehearing Division is central to the operation of the summary calendar, it is described at length in section IV(C) of this article.

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4. Information concerning the operations of the court of appeals were obtained from: 1) court rules and internal procedure manuals, as noted; 2) interviews with the judges, all judges sitting in 1989 and three recently retired judges and the court staff; and 3) court annual reports. The statistical data were obtained from NEW MEXICO JUDICIAL BRANCH, THE NEW MEXICO COURTS 1991 ANNUAL REPORT [hereinafter 1991 ANNUAL REPORT] and volumes for the prior 25 years.

5. N.M. R. APP. P. 12-102(A)(2).

6. See Table 1.

7. N.M. R. APP. P. 12-102.

8. See Table 1.

9. See Table 2. This caseload growth is typical. Appellate caseloads nationwide have been doubling approximately every decade since the 1950s. BUREAU OF JUSTICE STATISTICS, THE GROWTH OF APPEALS, 1973-83 TRENDS (1985); Marvell, *Are Caseloads Really Increasing?* 25 JUDGES' J. 35, 35-36 (Summer 1986).

10. See *supra* note 1.

11. See Table 1.

12. See Tables 1 and 2. This imbalance between caseloads and judgeship growth is typical of other appellate courts. Marvell, 72 JUDICATURE 282, 284.

Table 1

Filing Trends in the New Mexico Court of Appeals

Year <sup>a</sup>	Appeals Filed <sup>c</sup>			Total	Judges	Appeals per judge
	Criminal	Civil	Post conviction			
1966 <sup>b</sup>	2	1	21	24	4	6
1967 <sup>b</sup>	41	39	28	108	4	27
1968 <sup>b</sup>	41	67	44	152	4	38
1969	56	82	30	168	4	42
1970	64	76	28	168	4	42
1971	97	118	17	232	4	58
1972	88	134	13	235	5	47
1973	157	144	15	316	5	63
1974	263	187	20	470	5	94
1975	259	197	48	504	5	101
1976	221	219	2	442	5	88
1977	333	235	0	568	5	114
1978	299	234	0	533	5	107
1979	252	265	0	517	7	74
1980	295	275	0	570	7	81
1981	242	256	0	498	7	71
1982	312	287	0	599	7	86
1983	248	313	0	561	7	80
1984	252	377 <sup>c</sup>	0	629	7	90
1985	259	471	0	730	7	104
1986	253	470	0	723	7	103
1987	269 <sup>d</sup>	392 <sup>d</sup>	0	661	7	94
1988	254	458	0	712	7	102
1989	339	482	0	821	7	117
1990	319	524	0	843	7	120
1991	304	513	0	817	7	117

a) Calendar year through 1979; then fiscal year ending June 30.

b) The court's initial jurisdiction extended only to cases filed in the trial court after April 1, 1966. Therefore, for several years many cases within its subject matter jurisdiction continued to be filed in the supreme court.

c) Jurisdiction over some civil appeals was transferred from the supreme court to the court of appeals effective June 17, 1983.

d) Filings declined in 1987 largely for two reasons: 1) After January 1, 1987, time limits from trial court judgment to the docketing statement increased from 20 to 60 days in criminal, workers' compensation, domestic relations, and children's court cases. If the parties took full advantage of the time limits, 40 days worth of appeals were lost, or about 35 criminal and 20 civil appeals. 2) There was a jurisdiction change in workman's compensation appeals, which declined from 111 in 1986 to 84 in 1987, or 94 after adjustment for changes in time limits.

e) Filings include (discretionary) interlocutory appeals, which constitute roughly ten percent of both civil and criminal filings. The filings are not adjusted for transfers of cases to the supreme court (approximately five percent of the civil filings).

Table 2

Year <sup>a</sup>	<u>Decision Trends in the New Mexico Court of Appeals</u>				
	<u>Appeals Decided</u>		<u>Percent Decided With:</u>		
	<u>Number</u>	<u>Per judge</u>	<u>Summary procedures</u>	<u>Memorandum opinions</u>	<u>Oral arguments<sup>g</sup></u>
1966 <sup>b</sup>	2	—	0	—	—
1967 <sup>b</sup>	35	—	0	—	—
1968 <sup>b</sup>	102	26	0	0	60
1969	127	32	0	0	73
1970	128	32	0	0	76
1971	191	48	0	0	78
1972	186	37 <sup>d</sup>	0	0	79
1973	193	39	0	17	58
1974	266 <sup>e</sup>	53	0	18	58
1975	383	77	5 <sup>f</sup>	59	32
1976	428	86	13	67	22
1977	367	73	16	59	17
1978	350	70	13	56	20
1979	382	55 <sup>d</sup>	18	52	34
1980	443	63	19	54	30
1981	444	63	20	57	27
1982	440	63	23	53	30
1983	423	60	17 <sup>f</sup>	60	31
1984 <sup>c</sup>	450	64	26 <sup>f</sup>	63	16
1985	435	62	41	64	—
1986	446	64	48	72	2
1987	646	92	52 <sup>f</sup>	71	2
1988	566	81	66	73	5
1989	594	85	69	78	6
1990	600	86	66	75	5
1991	574	82	68	76	6

See Table 1 for notes a, b, and c.

d) Judges added: one in 1972 and two in 1979.

e) Two judge screening panel, with decisions without opinion.

f) Summary procedures were adopted effective September 1, 1975, for criminal and juvenile cases. In FY 1983 they were expanded to workers' compensation and children's court cases, in FY 1984 to domestic relations cases, and in FY 1987 to almost all appeals.

g) Number of arguments in the year as a percent of cases decided.

### *B. Internal Procedures*

The court processes cases in two vastly different routes, summary and non-summary calendars. The summary calendar, which now receives most cases,<sup>13</sup> is fully described later. The court's two non-summary calendars have procedures similar to those in other appellate courts, and differ from the summary calendar in that they have full briefing and, with a few exceptions, transcripts or tape recordings of the trial court proceedings.<sup>14</sup> All cases are decided by three-judge panels.

13. The supreme court does not use a summary calendar, even though authorized to do so, possibly because it does not have a central staff.

14. Compare N.M. R. APP. P. 12-210(B) and 12-210(C) with N.M. R. APP. P. 12-210(D).

The non-summary calendars are: 1) the general calendar, where the court receives a transcript or tape, and the attorneys are given thirty days to file briefs, and 2) the legal calendar, where attorneys are given only twenty days for briefing, and there is no record of the trial proceedings.<sup>15</sup> The legal calendar is used for the few appeals raising important issues that can be decided without a trial transcript. The record consists of the record proper, which is the papers filed in the trial court, and a tape or transcript of the trial court proceedings.<sup>16</sup> The first filing, due thirty days after the notice of appeal, is the docketing statement, in which the appellant summarizes the facts, issues, and arguments in the case.<sup>17</sup> The briefs in non-summary calendar cases are similar to those in appellate courts generally.<sup>18</sup> The court does not hold oral arguments unless it specifically orders them, either *sua sponte* or at the request of counsel.<sup>19</sup> In fiscal year 1990, the court heard argument in only five percent of all appeals and fifteen percent of non-summary calendar appeals.<sup>20</sup>

The prehearing staff, or occasionally law clerks, prepare a prehearing report, which is a thorough discussion of the facts, issues, and legal authority in the case. The court reviews some fifteen to twenty non-summary calendar cases a month, and the clerk assigns cases to panels using computerized randomization. The case is randomly assigned to one judge for opinion preparation. If the other two judges on the panel do not agree with the proposed opinion, the opinion is rewritten so all can agree if possible. Otherwise authorship is reassigned.

The court issues two classes of opinions: 1) regular published opinions, and 2) unpublished memorandum opinions, which cannot be cited as precedent.<sup>21</sup> The type of opinion is determined by majority vote of the panel. Memorandum opinions are now used in three-fourths of the decisions.<sup>22</sup>

The clerk assigns non-summary calendar cases to panels in order of the court's priorities, which are:<sup>23</sup> (1) interlocutory appeals, children's court cases, and mental health cases; (2) criminal cases; (3) workers' compensation cases; (4) domestic relations in which child custody or support is involved and unemployment compensation; and (5) all other civil cases. In recent years the first four categories largely filled up the dockets, resulting in a large backlog of category (5) cases. The average time from notice of appeal to decision was 654 days for such cases decided on the general calendar in 1989.

The clerk has authority to grant the first motions for extension of time for up to two weeks with respect to the filing of most documents,

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15. N.M. R. APP. P. 12-210.

16. *Id.* §§ 12-209, 12-211.

17. *Id.* § 12-208.

18. For a description of briefs in non-summary cases see *id.* § 12-213.

19. *Id.* § 12-214.

20. See Table 2.

21. N.M. R. APP. P. 12-405(C).

22. See Table 2.

23. 1991 ANNUAL REPORT, *supra* note 4, at 21.

including briefs and docketing statements.<sup>24</sup> Such motions are generally granted. Additional requests for extension of time must be decided by the motions judge who is also the calendaring judge, in charge of the summary calendar.

### *C. Attorneys*

Civil appeals are usually handled by trial counsel, but criminal appeals are generally handled by specialized appellate counsel. The appellate section of the state public defenders office represents all indigent defendants, or approximately ninety percent of the criminal appeals. The appellate section of the attorney general office represents the state in all criminal appeals. Both offices are widely considered to provide good to adequate representation, but the public defenders office is viewed as being very understaffed.

### *D. Taped Recorded Proceedings*

A unique feature of the court of appeals is the frequent use of tape recordings on cassettes instead of typed transcriptions. Although, with rare exception, the court receives a record of the proceedings below only in non-summary calendar cases, the tapes are important to the summary calendar because they are available to, and occasionally used by, the attorneys when preparing docketing statements and memos in opposition.

New rules in 1975 provided for the use of tape-recorded proceedings in criminal trials, with the tapes themselves as the official record of proceedings on appeal.<sup>25</sup> The portion of cases with tapes increased over the years as more and more trial courts selected this procedure. By the mid-1980s almost all criminal cases had tapes, but the portion has declined in recent years because computer-aided transcription has taken the place of tapes in Bernalillo County, the source of almost a third of the criminal appeals. In recent years, the court has also received tapes in some civil cases, but most still have transcripts.

### *E. Programs to Increase Output and Reduce Delay*

In addition to the summary calendar, the court of appeals has adopted several other programs to manage its growing caseload and to reduce delay. The use of taped transcripts has already been described. Table 2 shows that the court has reduced oral arguments and increased the use of unpublished memorandum opinions. Other programs are:

#### 1. Two-judge Panels and Decisions Without Opinions

As an emergency measure to address a rising caseload in 1974, the court adopted two interrelated programs for appeals considered clear-

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24. NEW MEXICO COURT OF APPEALS, POLICIES AND PROCEDURES, § V(A)(5) (1988) [hereinafter POLICIES AND PROCEDURES].

25. N.M. R. APP. P. 12-211(B).

cut. The chief judge and senior judge formed a two judge panel that disposed of thirty-six appeals, and the court decided sixty-seven cases including the thirty-six two-judge decisions, without issuing opinions.

## 2. Prehearing Settlement Conferences

In July 1985 the court initiated a limited prehearing settlement conference program. Conferences are scheduled at the request of the court or the parties, but they are not held if one party objects.<sup>26</sup> The program was used in less than ten cases per year between 1985 and 1990, and then in 142 cases in 1991.

## 3. Lawyer Panels

From August 1986 through 1987 the court used volunteer lawyers to sit as quasi-judges. The lawyers sat in three judge panels and prepared draft opinions. Court of appeals panels then reviewed the drafts, and response memoranda from counsel, and decided the cases. Lawyer panels heard seventy cases in fiscal year 1987, and by the end of the next year forty-four had resulted in court of appeals decisions.

# III. HISTORY OF THE SUMMARY CALENDAR<sup>27</sup>

In the mid-1970s several court of appeals judges decided that major steps were required to deal with problems of caseload growth and delay. The major problems were the length of transcripts and the delay in producing them. Transcript volume increased so much that the court was forced to store case records in court corridors. The summary calendar was only one of several experiments the court adopted in the mid-1970s to deal with these problems.

The experiments resulted largely from the efforts of two judges, Joe W. Wood, who was one of the initial judges appointed in 1966, and William R. Hendley, who joined the court in January 1969. Both judges had considerable experience in court administration matters before joining the court, especially work on bar committees, and both prided themselves as innovators.

In the early 1970s the court faced a rapidly growing caseload.<sup>28</sup> The court never developed a severe delay problem, but the judges were concerned. Criminal appeal growth was especially large, a fact attributed to the state public defender's appellate office, created in 1973.

The two judges adopted several innovations to address these problems. Some were considered successful and others were abandoned. In 1974 they established themselves as a two-judge screening panel.<sup>29</sup> Judge Hen-

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26. POLICIES AND PROCEDURES, *supra* note 24, § IV(J).

27. The information in this section is based on interviews with two judges and three attorneys who were involved in the creation and early operation of the summary calendar, as well as a cursory review of summary calendar documents.

28. See Tables 1 and 2.

29. Described in section II(E)(1) *supra*.



dley was instrumental in establishing the central staff. He unsuccessfully tried to centralize the preparation of transcripts by having the tape recordings transmitted over phone lines to Santa Fe, where a pool of typists would transcribe the trial proceedings. He did, however, initiate an experimental program in one county to substitute tape recordings for stenographic records, which was later adopted state-wide.<sup>30</sup>

Judge Wood was primarily responsible for the summary calendar, viewed as a mechanism to reduce the need for transcripts. Initially, he attempted to persuade the public defender's office to order only relevant parts of the transcript, but defenders insisted that the complete transcript was necessary. In 1974, he initiated an experiment to shorten transcripts by having court of appeals judges travel to the trial courts and hold hearings, with the attorneys and trial judge, to determine what portions of the proceedings needed to be transcribed. The procedure was used in some ten to twenty appeals, but it proved to be too laborious and was abandoned.

In 1973, Judge Wood requested and received from the supreme court permission to form a committee to explore the transcript problem and to draft rules proposing solutions. He was the chairman, and the six other members included two public defenders, two prosecutors, one district court judge, and one civil attorney. The committee began operations in the fall of 1973, and it finished the spring of 1974. After discussing various possible amendments to the rules, the court decided instead to prepare a new complete set of criminal appellate rules. They contained the summary calendar rules that are essentially the same as the current rules.<sup>31</sup> The changes were limited to criminal appeals not because the procedures were only suitable for criminal cases, but because Judge Wood felt that civil lawyers, especially those on the supreme court's appellate rules committee, were not receptive to change. He believed that changes in criminal appellate procedure would be more feasible, and that the civil bar would eventually accept the changes and incorporate them into the civil rules.

The proposed rules were endorsed by all committee members except the head of the appellate section of the public defender's office. After the supreme court adopted the rules, the public defenders contested the summary calendar procedures in the New Mexico and federal courts without success. A year after the rules were issued, a new public defender was appointed, and the office became less aggressive. The appellate defender staff was greatly reduced, and the summary calendar procedure was no longer contested. One of the public defenders who contested the summary calendar in 1975 was later appointed director of the Prehearing Division, and thus become responsible for administering the procedure.

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30. See section II(D) *supra*.

31. The original kernel of the summary calendar procedure, according to an interview with Judge Wood, came from an article by then Circuit Court Judge Griffin Bell, which argued that the appellate court should take active responsibility for transcript preparation. See Bell, *Toward A More Efficient Federal Appeals System*, 54 JUDICATURE 237 (1971).

The summary calendar rules were effective for appeals from trial rulings occurring on or after September 1, 1975.<sup>32</sup> It applied only to criminal, delinquency, and need of supervision cases. The summary calendar was expanded, effective January 1, 1983, to include workers' compensation and all children's court cases, and effective June 17, 1983, to include domestic relations cases. Finally, in January 1987, the court applied the procedures to all except several very narrow categories of cases.<sup>33</sup> The last change was part of a complete revision of the New Mexico appellate rules, which combined the previously separate criminal and civil rules. These changes resulted in sizeable increases in docketing statements filed during the 1980s.<sup>34</sup>

Table 3

Year	Docketing Statements Filed					Total
	Criminal	Workers' comp.	Domestic relations	Children's court	Regular civil	
1981	202	—	—	—	—	202
1982	302	—	—	—	—	302
1983	234	14	—	—	—	248
1984	232	53	47	13	—	345
1985	233	92	47	9	—	381
1986	234	111	40	40	—	425
1987	244	84	43	36	64	471
1988	224	99	36	30	168	557
1989	328	124	49	41	235	777
1990	304	125	56	36	276	797
1991	290	119	60	31	268	768

Section IV *infra* describes the changes made in the various elements of the summary procedure. In all, the procedures have not changed greatly since 1975, and the changes that did occur evolved through practice rather than through a court-wide planning process. Perhaps the most important change, taking place in the mid-1980s, was to broaden the category of cases suitable for summary decision by issuing calendar notices designed to elicit further information from counsel, rather than to state the grounds on which the court actually intends to base a decision. A second important change, in the early 1980s, was to expand the calendar notice from a curt handwritten note to a lengthy explanation of the grounds for the proposed summary decision.

#### IV. OPERATION OF THE SUMMARY CALENDAR

##### A. Notice of Appeal and Docketing Statement

The notice of appeal must be filed in the trial court within thirty days of the ruling below, although the judge may grant extensions up to thirty

32. See N.M. R. Crim. App. 101 & 207(d) (Supp. 1975).

33. Interlocutory appeals are also technically not under the calendaring rules, but the court has traditionally treated applications for interlocutory appeals, which are discretionary, as docketing statements.

34. See Table 3.

days for good cause, and for longer periods if reason is shown.<sup>35</sup> The court accepts late notices of appeal in criminal cases. The lateness is conclusive evidence of ineffective assistance of counsel unless the defendant pleads guilty and stipulates that there will be no appeal.<sup>36</sup> The notice of appeal provides cursory information about the case, and it is accompanied by the judgment or order appealed from.<sup>37</sup>

The next step in almost all appeals is the filing of the docketing statement, which the trial counsel must file within thirty days after the notice of appeal.<sup>38</sup> The contents must include a concise and accurate summary of material facts, a statement of the issues, a showing that the issues were raised below, and a list of legal authorities relied upon plus any contrary authorities known by the appellant.<sup>39</sup> Counsel are required to give a simple statement of the proposition for which an authority stands, rather than full arguments on the law.

Thus, trial counsel, not appellate counsel if different from trial counsel, must file the docketing statement in the court of appeals, not trial court, soon after the notice of appeal. From 1975 through 1986, under the old criminal rules, only ten days were allowed. The change to thirty days was a compromise made when civil cases were brought under the calendaring procedure. The trial court cannot extend the time for filing the docketing statement.<sup>40</sup> The rules do not provide for a response to the docketing statement, but on occasion the court receives them, sometimes in the form of motions to sanction the appellant for misleading the court.

The court uses the docketing statement, and the accompanying record proper, to decide whether the case should be placed on the summary calendar and, if so, what the proposed ruling should be. In practice, the docketing statements are only moderately less elaborate than briefs.<sup>41</sup> They average some eight or nine double-spaced pages. The court purposely has not set a page limit, to mitigate any feelings on the part of litigants that they are not given a chance to present their case. Some are as long as fifty pages.

The statement of facts is crucial. As discussed above, the rules call for a full statement of the facts, but also emphasizes conciseness. Trial counsel are required to state the facts and issues on the basis of what they remember about the trial, unless they review a tape recording of the trial.<sup>42</sup>

35. N.M. R. APP. P. 12-201. Before the 1987 rule consolidation, the notice of appeal had to be filed within 10 days in criminal, worker's compensation, children's court, and domestic relations cases.

36. *State v. Peppers*, 110 N.M. 393, 398, 796 P.2d 614, 619 (Ct. App.), *cert. denied*, 110 N.M. 330, 795 P.2d 1022 (1990).

37. N.M. R. APP. P. 12-202(B).

38. *Id.* § 12-208(B).

39. *Id.*

40. *In re Lucero*, 90 N.M. 566, 566 P.2d 115 (Ct. App. 1977).

41. The docketing statements are considerably shorter and more spare than briefs received in general calendar cases, but the latter are typically more complex appeals than those decided on the summary calendar.

42. Appellate counsel, however, has the opportunity to amend the docketing statement. N.M. R. APP. P. 12-208(C).

### *B. The Record Proper*

The appellant must send a copy of the docketing statement to, among others, the trial court clerk. The clerk then begins to prepare the "record proper," which consists of all papers and pleadings filed in the trial court.<sup>43</sup> The appellant must pay the clerk the costs of preparing the record within ten days after the docketing statement is filed.<sup>44</sup> The clerk copies the record and typically sends the copy to the court of appeals,<sup>45</sup> usually within two weeks of the docketing statement.

The record proper is a rather substantial document, often at least a half inch thick, but it does not include any account of the testimony. A transcript is not prepared, and tapes of trial proceedings, if any, are not filed with the appellate court.<sup>46</sup> Thus, the only information about what occurred in the courtroom comes from the attorneys' contentions in the docketing statements and later memoranda.

### *C. The Prehearing Division History and Organization*<sup>47</sup>

The appeal is then processed by the Prehearing Division, which as of 1992 contained thirteen attorneys. Most of its work consists of reviewing docketing statements for calendar assignment and, thus, is central to the summary calendar process.

The history of the Division is closely tied to the summary calendar. It began with authorization for two attorney positions effective on July 1, 1975. It was expanded to three in 1978, four in 1981, five in 1982, seven in 1984, and thirteen in 1987. The staff has always been augmented with law clerks, whose time is donated by their judges. For several years in the mid and late 1970s, two judges assigned their law clerks nearly full time to the central staff. In recent years the court has sought to encourage calendaring judges to assign their law clerks to the central staff to help prepare pre-hearing memoranda. Several have done so on a limited basis, although the practice has declined in recent years.

The staff directors have been seasoned attorneys with considerable experience as criminal defense lawyers. The original staff director was Winston Roberts-Hohl, who had been Judge Hendley's law clerk and was later a federal public defender. He was also on the committee that drafted the 1975 criminal rules creating the summary calendar. He resigned in 1981 and was replaced by Lynn Pickard. Lynn Pickard was appointed to the New Mexico Court of Appeals in 1991, and she was replaced by current staff director, Gina Maestas. Lynn Pickard was Judge Hendley's law clerk in 1974, an appellate public defender in 1975, and then a private attorney specializing in appellate practice.

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43. *Id.* § 12-209(A).

44. *Id.* § 12-209(B).

45. N.M. R. APP. P. 12-209 and N.M. R. JUD. ADMIN. 22-301, however, state that the original record is sent to the appellate court.

46. On rare occasions, however, appellants do send tapes along with the docket statement. Court staff sometimes reviews these tapes, even though technically they should not have been submitted.

47. This section is based on interviews with judges and court personnel.

As for the rest of the prehearing staff, the court prefers attorneys with some experience, and many practiced for several years before joining the Prehearing Division. Only about one-fifth of the attorneys come directly from law school. The attorneys, other than the director, are short-term employees. When hired they are asked to commit themselves for two years. The average stay is roughly two and a half years, and until recent years very few stayed longer than four. The task of interviewing and selecting attorneys is delegated to the staff director. The attorneys come from all over the country, usually, at least half are from New Mexico. Before joining the staff, many worked for legal services or small law firms or were law clerks.

The Prehearing Division has two major duties: 1) working on cases after docketing statements are filed, preparing memoranda, draft calendar notices, and draft memorandum opinions; and 2) preparing pre-hearing reports for the judges in cases not on the summary calendar. The first function absorbs about two-thirds of the staff time. The staff director or one of the more experienced staff members reviews all work done by staff members. They may simply read the memorandum produced, or they may delve into the papers in the appeal, depending largely on the experience of the particular staff attorney.

The staff office has a one week deadline for initial processing of summary calendar cases and preparing draft calendar notices. The attorneys ordinarily process cases in the order they arrive, but they sometimes give priority to cases obviously destined for a non-summary calendar and, when there is an unusually large backlog, criminal cases are given priority. The individual staff members average four to seven calendarings per month. This includes processing both the initial docketing statement and the later responses from the attorneys. Each attorney also averages roughly one pre-hearing report a month in addition to their calendaring duties.

#### *D. Preparing Staff Memoranda*

The former chief staff attorney, Lynn Pickard, has prepared the following guidelines to aid in reviewing the docketing statement and record proper:<sup>48</sup>

- I.     a) Check the record for a final judgment and notice of appeal;
- b) Determine whether jurisdiction is in the court of appeals;
- c) Check the date of the notice of appeal.
- II.    Scan the issues raised.
- III.   Review the record proper.
- IV.    Verify the allegations in the docketing statement against the record.

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48. L. Pickard, *Appellate Practice Materials 3-4* (New Mexico Court of Appeals, 1990). This document, however, states that cases differ so much that many require departure from these guidelines and that calendaring is largely an intuitive matter. *Id.* at 4.

- V. a) Critically read the docketing statement to determine whether it conforms to the rules;
- b) Analyze the docketing statement for the real legal problems underlying the issues raised.
- VI. Check authorities and do independent research if necessary.
- VII. Let your recommendation reflect the practicalities of our procedures.
  - a) Is the issue raised covered by New Mexico precedent or without merit?
  - b) If a *Franklin*<sup>49</sup> issue is suggested, has counsel specified what the defendant wishes to raise?
  - c) Is there an obvious issue for reversal?
  - d) Is the issue a purely legal question for which there is no New Mexico authority?
  - e) Will a review of the proceedings below be required even though counsel has drafted an adequate docketing statement.

The staff attorney reads the docketing statement and the record, the only materials presented, and sometimes conducts independent research. Then he or she prepares a memorandum for the calendaring judge and a draft calendar notice. If a summary calendar is recommended, the calendar notice, as described later, is similar to a draft opinion. The staff memorandum is a shorter document, typically some two double-spaced pages, which focuses on specific aspects of the case that the attorney wishes the judge to focus on, such as jurisdiction problems or key issues. This material is reviewed by the senior staff and sent to the calendaring judge.

### *E. Calendaring Judge*

A single judge decides calendar placement.<sup>50</sup> The ultimate choice, again, is whether the case will be placed on the summary calendar and a proposed opinion issued or whether it will be placed on one of the two non-summary calendars, where cases have full briefing and, with few exceptions, complete transcripts or tapes of the proceedings.

Judges now rotate into the calendaring judge position on a three month basis. Hence, each of the seven judges is calendaring judge approximately every other year. The position rotates by seniority. New judges usually do not become calendaring judge until on the court for at least a year, but there are exceptions and one accepted assignment six months after appointment.

The judges interviewed did not object to being calendaring judge, most saying they enjoyed the change in routine and the more fast-paced work. The most common objection was that they had difficulty finishing up

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49. *State v. Franklin*, 78 N.M. 127, 428 P.2d 982 (1967) (an attorney must file an appeal if the defendant wishes even though the attorney believes there are no grounds for reversal).

50. POLICIES AND PROCEDURES, *supra* note 24, § IV(G).

their work on non-summary calendar cases they had been assigned before going on the summary calendar.

In earlier years, however, many judges did not like summary calendar work, and the job was conducted by only a few judges. Judges Hendley and Wood were the only calendar judges in the 1970s, and they, along with Judge Mary Walters, performed nearly all of this duty into the mid-1980s.<sup>51</sup> These judges did their share of the work on the non-summary cases as well. One estimated that calendaring took one and a half to two hours a day, on top of work on non-summary appeals. The handling of the summary calendar was affected by the elevation of Judge Walters to the supreme court in December 1983, and the retirements of Judges Wood and Hendley in January and December 1986, respectively.

Because all cases are calendared now, the calendaring judge does not hear other appeals unless he or she volunteers, which several judges regularly do. The calendaring judge is also the motions judge for the three month period.

The judge makes calendaring decisions on the basis of the staff memorandum and the docketing statements. They read the key authorities they are not familiar with, and they usually read parts of the record proper.<sup>52</sup> Judges occasionally discuss cases with the attorney assigned or the staff director, and they quite often ask the staff for further research. Judges assign their law clerks to do research on a few summary calendar cases. The law clerks, however, work primarily on non-summary calendar cases even when their judges are calendaring judges, working on opinions in cases assigned earlier or on pre-hearing memoranda.

Calendaring judges nearly always accept attorneys' recommendations. Estimates varied from eighty to ninety-eight percent. The judges also usually accept the proposed calendar notices without change, although some are edited and a few are sent back to the staff for rewriting.

#### *F. Calendar Notice for the Summary Calendar*

If a case is placed on a non-summary calendar, now a rather rare event for a first calendar notice, the calendar notice sent to counsel simply specifies which of the two calendars is to be used. If the case goes to the summary calendar, the calendar notice states the "basis for the proposed disposition."<sup>53</sup> It is in effect a proposed opinion, signed by the calendaring judge and on rare occasion by a second judge also. The average calendar notice is one to one and a half pages, single spaced. For each issue raised, it states the reasons for the suggested holding, along with citations to the authorities relied upon. Because the calendar notice is addressed to the parties only, it does not recite the facts of the case.

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51. The summary calendar was mainly limited to criminal cases in those days.

52. That is the record, excluding the transcript of proceedings.

53. N.M. R. APP. P. 12-210(D).

In the early days of the summary calendar the calendar notice was only a short note written by the judge, typically four or five handwritten lines. This practice continued until about 1980. The calendar notices were then typed, but for several years they continued to be quite short.

### *G. Criteria for Summary Calendar Placement*

The rules do not state criteria for placing cases on the summary calendar, but in interviews the judges gave similar criteria. The most important is easily deducible: that the staff and the calendaring judge believe that the court may be able to decide the case without a transcript or tape of the trial proceedings. A second criterion is whether the case needs full briefing because it presents issues of first impression. In practice this criterion adds little beyond the ability to decide without transcript or tapes because the court decides few cases with full briefs but without the transcript or tapes.<sup>54</sup> The key issue, therefore, is whether the court can obtain sufficient information about the facts of the case from the record proper and docketing statements. As a general rule, the summary calendar is not used if the parties differ concerning the facts or if the court must decide whether an error is harmless.

If the case has a major legal issue, it is placed on a non-summary calendar even if the facts are not disputed. But over the years, there has been a general tendency away from limiting the summary calendar to cases where the outcome is considered clear, that is, concentrating on simple, run-of-the-mill cases, towards using it in more complex cases and in cases where the outcome appears quite uncertain at the time of calendaring. Because of this change, the court places a much larger portion of the appeals on the summary calendar in the first calendar notice, including nearly all criminal appeals.<sup>55</sup>

Table 4

#### Initial Assignments in Cases Subject to Calendar Assignments

Year	Criminal		Civil		Total	
	Summary	Non-Sum.	Summary	Non-Sum.	Summary	Non-Sum.
1981	116	82	—	—	116	82
1982	117	182	—	—	117	182
1983	—	—	—	—	96	141
1984	—	—	—	—	163	170
1985	—	—	—	—	269	101
1986	193	62	109	49	302	111
1987	238	14	164	26	402	40
1988	230	5	275	61	505	66
1989	328	20	306	55	645	75
1990	288	25	332	90	620	115
1991	284	8	325	56	609	64

Dashes mean that the data are not available. These are the initial calendar

54. That is, cases are seldom placed on the legal calendar. See Table 4.

55. See Table 4.



assignments, and the figures do not include reassignments. Cases on the non-summary calendar are nearly all on the limited or (after 1986) general calendar. In 1981-90 there were 13, 18, 4, 13, 6, 9, 7, 6, 16, 6, 9, and 6 cases, respectively, placed on the legal calendar.

In the early years the court was reluctant to use the summary calendar when the docketing statement was very poor or the judges believed that defendant's counsel was not capable. These factors still enter calendaring decisions, but to a lesser extent. Also, there is less reluctance than in the past to reverse cases on the summary calendar. In 1982 through 1984, the only years for which the court published data, the calendaring judge proposed reversals or partial reversals in about a fifth of the cases.<sup>56</sup>

Table 5

Recommended Disposition for Cases on the Summary Calendar

Year	Affirmance	Reversal	Dismissal	Partial Reversal
1982	78	21	14	4
1983	72	12	7	5
1984	121	18	15	9

#### *H. Memo in Opposition*

After a calendar notice proposes summary disposition, the party against whom the court proposes to rule has ten days to answer the court.<sup>57</sup> This gives the party the opportunity to argue that the case is not suitable for the summary calendar or that it should be retained on the summary calendar, but with a proposed disposition in the opposite direction.

Table 6

Summary Dispositions With and Without Opposition

Number disposed with and without memo in opposition

Year	Criminal		Civil		Total	
	With	Without	With	Without	With	Without
1985	52	66	25	37	77	103
1986	80	61	29	44	109	105
1987	134	64	73	66	207	130
1988	126	48	91	110	217	158
1989	176	63	78	119	254	182
1990	163	40	98	126	261	166
1991	143	52	100	127	243	179

Attorneys now file memos in opposition in about sixty percent of the summary calendar assignments, although in 1985, the first year for which

<sup>56</sup> See Table 5.

<sup>57</sup> N.M. R. App. P. 12-210(D).

data were published, less than half did.<sup>58</sup> Public defenders, who represent the vast majority of criminal defendants, file them in nearly all cases. The appellate division of the Attorney General's office quite often declines to contest summary reversals in defendants' appeals, when it has no answer to the grounds given in the calendar notice, and to accept summary affirmance in prosecution appeals, when it believes the local district attorney should not have brought the appeal.

The court interprets the lack of a memo in opposition as strong evidence that the attorney has no answer to the grounds for affirmance or reversal given in the calendar notice. If counsel for a criminal defendant does not file a memo in opposition, but later files a motion for rehearing after summary disposition, the court ordinarily grants the rehearing.

There is no procedure for the other side to reply to a memo in opposition, but parties can file memoranda in support of proposed orders within the ten-day deadline.

Memos in opposition are usually five to ten pages long, nearly as long as docketing statements. They are written by appellate attorneys, whereas trial attorneys prepare docketing statements.<sup>59</sup> The attorneys, especially in criminal cases, often respond to only some of the issues originally raised in the calendaring notice. Hence, the calendaring procedure serves to narrow the issues.<sup>60</sup>

Parties are permitted to amend docketing statements after the calendar notice arrives "for good cause shown."<sup>61</sup> In practice the amendments are routinely permitted if timely. They are nearly always placed in the memo in opposition, and approximately half of the memos do contain amendments. The amendments often add new facts, cite additional authority, or rephrase issues. Also, this procedure gives appellate counsel an opportunity to raise new issues not brought forth by the trial counsel. In the 1970s, however, the court was reluctant to permit new issues not raised in the docketing statement.

In nearly all appeals, trial counsel prepares the docketing statement, and appellate counsel, if different, has no role.<sup>62</sup> The trial attorney generally prepares the docketing statement without any information about the trial other than what was remembered from the trial. Trial and appellate counsel are the same in many, probably most, civil appeals. In most criminal cases the trial attorney, generally a public defender, prepares the docketing statement and, thereafter, the defendant is represented by the Appellate Division of the Public Defenders Office.

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58. See Table 6.

59. The trial and appellate attorneys are usually the same in civil cases, but they differ in nearly all criminal cases.

60. In addition, if reassigned to a briefing calendar, appellants sometimes abandon issues raised in the docket statement.

61. N.M. R. APP. P. 12-210(D)(3).

62. This description of attorney practices is based on interviews with 44 attorneys handling appeals in the court of appeals, including the eight appellate public defenders, the 10 members of the appellate division of the Attorney General office, and a sample of 26 private attorneys.

If the calendar notice recommends summary affirmance in a criminal appeal, the appellate defender prepares a memo in opposition. He or she talks with the defendant and trial counsel, sometimes at great length, but usually has no other access to information about what happened at the trial. Occasionally the appellate defenders request a copy of the tape from the lower court or from the local defender.<sup>63</sup> The defenders were asked how often they obtain tapes when preparing memos in opposition, and they gave widely varying estimates, from zero to twenty-five percent, with the average less than ten percent. When they obtain the tapes, the defenders usually listen to only parts, limiting review to sections considered directly relevant to the issues raised. Two appellate defenders said they ask the local defender to listen to the tapes in most cases, but others seldom made such requests. Trial counsel almost never send memoranda or other written information to the appellate counsel, other than the docketing statement.

The lawyers in the appellate division of the attorney general office are not involved with appeals unless the calendaring memo recommends reversal or the case is transferred to a non-summary calendar. That is, the lawyers do no work in the bulk of criminal appeals, those where the docket statement recommends affirmance and the court proceeds to summarily affirm. Hence, the summary docket means a vast reduction of the workload of the office.

If the Attorney General's office is called upon to prepare a memo in opposition, its procedure is similar to that in the appellate defender office. The attorneys telephone the local prosecutor who tried the case, but rarely communicate in writing. They are more likely to obtain copies of the tapes, however, getting them in approximately a third of the cases (where summary reversal is proposed). The prosecutors, like the defenders, seldom listen to the full recording, instead concentrating on parts they believe directly relevant.

### *I. Reassignment and Seeking Clarification of the Appeal*

The court now uses the calendar notice to elicit information from counsel by issuing a proposed affirmance or reversal even though proper calendar placement and case outcome are uncertain. The calendar notice is a mechanism to force attorneys to clarify their cases. A common example occurs when a criminal defendant raises the issue of insufficiency of evidence. The court is likely to issue a proposed summary reversal on that ground, in effect requesting counsel for the state to provide the evidence supporting conviction. Similarly, when the court feels that the docketing statement does not make the issues clear, it may issue a calendar notice proposing summary disposition stating what it presumes the issues

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63. The public defenders claim that in a few instances the court clerk refused authorizing the copying of the tape, requiring a court order for its production. Appellate defenders do not have access to a trial transcript for summary calendar appeals from Bernalillo County, where criminal trials are not taped.

to be. At that point, the appellant counsel can either accept the court's definition of the case or submit a restatement of the issues.

If the court decides not to issue a summary ruling, it sends a second calendar notice, which either assigns the case to a non-summary calendar or reassigns it to the summary calendar. If reassigned, the proposed ruling may be in the same direction as the original calendar notice, giving further grounds for the proposed decision, or it may be in the opposite direction if the memo in opposition persuaded the calendaring judge to that effect. Reassignment has become more common in recent years<sup>64</sup> reflecting the court's greater willingness to propose summary dispositions in cases where the outcome is not clear.<sup>65</sup>

This process has not appreciably increased the percent of cases reassigned to non-summary calendars. Roughly seventy percent of the cases assigned to the summary calendar are eventually decided summarily.<sup>66</sup> But the absolute number has increased greatly because more cases are assigned to the summary calendar.<sup>67</sup>

The number of reassignments to the summary calendar has grown even more dramatically, from less than ten a year through 1984 to 354 in 1991.<sup>68</sup> These figures do not represent the number of cases with reassignments, because some cases have two or more reassignments. In 1988, 146 cases, or twenty-nine percent of those originally assigned to the summary calendar, were reassigned there.<sup>69</sup>

Table 7

Reassignment of Cases That the Calendar Notice  
Placed on the Summary Calendar

Year	Criminal		Civil		Total	
	to Non-Sum.	to Summary	to Non-Sum.	to Summary	to Non-Sum.	to Summary
1981	27	8	—	—	27	8
1982	18	2	—	—	18	2
1983	—	—	—	—	22	5
1984	—	—	—	—	42	3
1985	58	33	36	18	94	51
1986	53	45	35	18	88	63
1987	40	74	26	39	66	113
1988	58	89	74	97	132	186
1989	84	165	110	111	199	276
1990	84	153	108	136	192	289
1991	92	189	96	165	188	354

The number of summary calendar cases with reassignments to the summary calendar (as

64. See Table 7.

65. See section IV(G) *supra*.

66. See Table 8.

67. See Table 4.

68. See Table 7.

69. This information was supplied by Lynn Pickard, former chief staff attorney, Prehearing Division, from office work papers.

opposed to the number of reassignments) was 46 in 1985, 60 in 1986, 94 in 1987, and 146 in 1988.

Table 8

Summary Dispositions as a Percent of Calendared Cases

Year	Criminal		Civil		Total	
	of those assigned to sum. calendar	of all cases calendared	of those assigned to sum. calendar	of all cases calendared	of those assigned to sum. calendar	of all cases calendared
1981	77%	—	—	—	77%	—
1982	85%	—	—	—	85%	—
1983	—	—	—	—	77%	—
1984	—	—	—	—	73%	—
1985	70%	54%	62%	41%	67%	49%
1986	73%	55%	67%	46%	71%	52%
1987	83%	79%	85%	73%	84%	76%
1988	76%	74%	73%	60%	74%	66%
1989	73%	69%	64%	55%	69%	61%
1990	70%	65%	67%	53%	69%	58%
1991	69%	67%	70%	60%	69%	63%

### *J. Summary Calendar Decisions and Opinions*

After the memo in opposition is filed, or time for filing has passed, the case is assigned to the staff attorney who originally reviewed the docketing statement. If the attorney recommends a summary decision, he or she prepares a memorandum and proposed opinion. At this point the calendaring judge reviews the case more thoroughly than in the earlier stages. The judge typically has and reviews the docketing statement, the record proper, the memo in opposition, staff attorney memoranda, and a proposed opinion.

Calendaring judges generally agree with the staff recommendations, but less often than when reviewing suggested calendar notices, and the judges often substantially edit the proposed opinion. If the calendaring judge finds that summary disposition is appropriate, the proposed opinion and other papers in the case are circulated to two other judges on a panel. Panel members are randomly assigned by the court clerk, using a computerized randomization system, such that each case has a separate panel.<sup>70</sup> The other two judges review the papers, but the panel does not hold a conference or hear oral argument. Summary calendar cases have priority, and the other judges state their agreement or disagreement to the calendaring judge within a few days. If the other two judges agree, the case is summarily decided. If either believes that the appeal is inappropriate for summary disposition, the case is reassigned to a non-summary cal-

70. POLICIES AND PROCEDURES, *supra* note 24, § IV(G).

endar.<sup>71</sup> Such disagreements occur in a small percent of the cases, roughly five percent according to estimates from judges and staff. Typical reasons for disagreeing are that the case concerns facts about which the parties disagree or that the case contains a close question of law or an issue of first impression for which more substantial briefing is required.

The opinion is almost always a memorandum opinion, unpublished and not to be cited as precedent,<sup>72</sup> although the court issues full, published opinions in some fifteen to twenty summary calendar cases a year. Memorandum opinions vary greatly in length. Many simply state that the appeal is affirmed or reversed for the reasons given in the calendar notice. Others contain three or four double-spaced pages explaining why the attorney's memo in opposition does not answer the calendar notice. The opinions typically do not give the facts of the case.

Table 9

Appeal Outcomes in Criminal Appeals by Calendar Type

Year	Summary Decisions				Non-Summary Decisions				
	Total	Reversals		Total	Reversals		Total	Reversals	
		number	percent		number	percent			
1977	57	13 (7)	23% (12%)	209	42 (34)	20% (15%)	179	38 (23)	21% (13%)
1978	69	11 (5)	16% (7%)	179	46 (39)	29% (24%)	161	38 (23)	21% (13%)
1979	45	5 (3)	11% (4%)	161	46 (39)	29% (24%)	161	46 (39)	29% (24%)
1980	—	—	—	—	—	—	—	—	—
1981	89	21 (19)	24% (21%)	159	52 (44)	33% (28%)	159	52 (44)	33% (28%)
1982	99	18 (15)	18% (15%)	142	26 (22)	18% (15%)	142	26 (22)	18% (15%)
1983	74	19 (16)	26% (22%)	173	30 (27)	17% (17%)	173	30 (27)	17% (17%)
1984	119	12 (10)	10% (8%)	135	29 (25)	21% (19%)	135	29 (25)	21% (19%)

This table is based on the appeals decided in the year given. Reversals do not include cases partly affirmed and partly reversed. The numbers in parentheses are the number of reversals and reversal rates for defendant appeals. Data are not published for 1980 or after 1984.

Statistics for the outcomes of cases, available for several years,<sup>73</sup> show that the court is not reluctant to use the summary calendar for reversals. The percent reversed varied greatly from year to year, however, and it is usually lower in the summary calendar cases than in other appeals.

Finally, the foregoing description indicates that summary calendar cases are decided much more quickly than other appeals.<sup>74</sup> The average time for cases decided summarily in 1992 was 123 and 106 days for criminal and civil cases respectively, roughly a fourth of the time required for other appeals.<sup>75</sup> Moreover, the time could be shorter, as it was before

71. *Id.*, § IV(H).

72. N.M. R. APP. P. 12-405.

73. See Table 9.

74. See Table 10.

75. *Id.* These figures overstate the difference somewhat because the types of cases likely to be placed on the summary calendar were also the types given priority in scheduling, especially criminal, workers' compensation, and domestic relations appeals. Civil cases on non-summary calendars usually fall in the lowest priority category.

civil appeals were included and before the court recalendared large numbers of cases.<sup>76</sup> The average time for all appeals decided is approximately seven months, less than that for nearly all appellate courts in the country.<sup>77</sup>

Table 10

Time to Disposition in Summary Calendar and  
Non-Summary Calendar Cases

	Number of days from notice of appeal to decision					
	Criminal			Civil		
	All Cases	Summary Calendar	Non-Sum. Calendar	All Cases	Summary Calendar	Non-Sum Calendar
1981	137	47	204	280	—	—
1982	—	46	—	—	—	—
1983	—	56	—	—	44	—
1984	—	54	—	—	56	—
1985	—	56	—	—	66	—
1986	170	59	280	234	56	387
1987	126	61	265	364	66	530
1988	121	89	283	293	91	547
1989	155	100	372	244	92	498
1990	224	101	439	192	91	411
1991	217	123	436	258	106	568

## V. QUANTITATIVE ANALYSIS

The key question addressed in this study is whether the summary calendar benefits the court and the parties. This Section presents the quantitative analysis concerning this question, and Section VI presents qualitative analysis based on interviews with judges and attorneys.

### A. Statistical Research Design

The aim of the quantitative analysis is to estimate the impacts of the summary calendar on the volume of decisions made by the court, the amount of delay, and the outcome of appeals. The basic principles behind the research are that one should use research designs commonly considered suitable for studying causation, the impacts of the programs to be evaluated, and that the questions should be approached from as many directions as possible.

The empirical analysis uses two research designs, the pooled time series-cross section and the individual case time series. Both are varieties of regression analysis. In the first the unit of analysis is the court, using yearly data from the court of appeals and several control courts, over

76. *Id.*

77. See *supra* note 1.

seventeen to twenty years.<sup>78</sup> In the individual case time series, used to estimate the impact of the summary calendar on delay, the unit of analysis is the individual appeal, with a sample of 4,541 cases filed in the court of appeals between 1971 and 1987.<sup>79</sup>

### *B. Court of Appeals Output and Backlog*

The first research phase is a pooled time series-cross section regression using published data for the court of appeals and for fourteen other intermediate appellate courts that, like the New Mexico Court of Appeals, have been operating since at least the early 1970s.<sup>80</sup> The regressions estimate the impact of the summary calendar on 1) the number of appeals decided by the courts, and 2) the backlog index, which is pending appeals divided by dispositions. The first encompasses fifteen states for which data are available, and the second ten states. The states in the latter are Alabama, Arizona, California, Colorado, Missouri, New Jersey, New Mexico, Oregon, Texas, and Washington. The study of decision output also includes courts in Florida, Georgia, Massachusetts, Maryland, and North Carolina. The years encompassed are 1969 to 1989, although for a few states data are not available for one or two years.

The issue is whether the summary calendar increases the number of cases decided and reduces backlogs, controlling for as many other factors as possible. Cases decided are those disposed on the merits, and they exclude those withdrawn or dismissed for lack of progress.<sup>81</sup> The lowest level of decision output was eighteen appeals per judge for Missouri in 1970 and the highest is 302 for Oregon in 1987. It averages roughly seventy per judge in New Mexico over the span of this study.

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78. This pooled time series-cross section design has long been considered one of the best designs for studying social causation. See D. CAMPBELL & J. STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1967); T. COOK & D. CAMPBELL, *QUASI EXPERIMENTATION, DESIGN, AND ANALYSIS FOR FIELD SETTINGS* (1979); HSIAO, *ANALYSIS OF PANEL DATA* (1986).

The analysis here uses the standard model for pooled data, the fixed effects model, with separate dichotomous variables for each court and, if significant, for each year. See HSIAO, at 29-45. A more detailed description of the variables and statistical procedures used is found in the project report, MARVELL, *APPELLATE COURT PROCEDURES TO ADDRESS CASELOAD GROWTH* 68-70 (1991) [hereinafter *PROCEDURES TO ADDRESS CASELOAD GROWTH*], available from the author.

79. The cases were sampled to obtain, as best as possible, 100 to 200 each of civil and criminal appeals filed each year. The sampling consisted of every case filed in 1971-78, three-quarters filed in 1979-80, and every other case filed in 1981-87. The data were obtained from the docket sheets located in the clerk's office of the court of appeals.

80. The analysis closely follows that done for earlier research on state appellate systems. See T. Marvell & C. Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J.L. REF. 415 (1988).

81. This variable and the others used here are more fully described in *id.*, at 428-41, and *PROCEDURES TO ADDRESS CASELOAD GROWTH*, *supra* note 78, at 70-74. It and other continuous variables are in logarithm form.



Table 11

Impact of Summary Calendar on Decisions and Backlogs

Independent Variables	Dependent Variables (logged)			
	Number of Appeals Decided Per Judge (15 states)		Backlog Index (10 states)	
	Coef.	T-Ratio	Coef.	T-Ratio
<u>Summary Calendar</u>				
Portion Cases Decided on Summary Calendar	-.010	-.08	.423	1.77
<u>Control Variables</u>				
Portion Cases Decided by Motions on Merits (Washington)	.912	2.22*	-.856	-1.08
Appeals Filed (log)				
Current year	.353	6.66***	.486	3.33**
Prior year	.430	8.58***	-.117	-.94
Number of Judges (log)				
Current year	-.225	-2.87*	.225	1.03
Prior year	.271	3.87**	-.382	-2.38*
Use of Extra Judges#	.064	2.34*	-.084	-1.57
Portion of Opinions Unpublished	.052	.74	-.167	-.98
Use of Memo Opinions				
Limited use#	-.021	-.83	.030	.63
Major use#	.012	.28	-.345	-3.27**
Portion Decided Without Opinion	.415	2.86**	-.567	-1.47
Portion of Cases Filed in IAC	-.107	-.83	-.227	-.68
Average Size of Penal	-.083	-1.25	.127	.94
Oral Argument				
Limited Cutback#	.063	2.29*	-.067	-1.01
Major Cutback#	-.008	-.23	-.043	-.56
Oral Argument Length	-.003	-2.74**	-.004	-1.65
<u>F Value</u>				
State Dummies		16.14***		3.71***
Year Dummies		n.a.		1.83*
Adjusted R-Square		.99		.9%
Degrees of Freedom		245		135
Durbin Watson		1.93		2.07

Significance levels: \* = .05, \*\* = .01, \*\*\* = .001

# — Dummy variables (1 when the procedure is used, and 0 otherwise).

The backlog index is the number of appeals pending at the end of the year, divided by the number disposed that year. It measures the status of the court's docket and roughly estimates the number of years it would take the court to work off its current caseload. The backlog index varies from .27 for New Mexico in 1976 to 1.62 for Washington in 1975.

The summary calendar is represented by the portion of cases each year decided summarily.<sup>82</sup> The analyses includes a large number of control variables.<sup>83</sup>

In all the analyses indicate no evidence that the summary calendar affects either the volume of appeals decided or the court's backlog.<sup>84</sup> In these regressions, however, the data available do not permit us to distinguish between criminal and civil cases.<sup>85</sup> As discussed later, such a distinction may be important.

### C. Individual Case Regression Analysis of Delay

The second regression phase explores the impact of the summary calendar on delay by using the sample of 4,551 appeals in an individual case time series regression. Delay is measured by the number of days from notice of appeal to decision in each case. The use of the summary calendar is represented by four variables, two each for summary calendar use in criminal and civil cases. A dummy variable, which equals one or zero, indicates whether or not the case was decided summarily; this simply estimates whether summary calendar cases are decided more quickly than cases on the general calendar. An additional variable, used to estimate whether the summary calendar affects overall delay, is the portion of cases filed in the particular year that were decided summarily.

The summary calendar has an enormous impact on reducing delay in the cases where it is used.<sup>86</sup> This result is no surprise given the procedures used, and it does not mean that the summary calendar reduced delay overall because the quicker decisions in summary calendar cases may simply be at the expense of more delay in the remaining cases. This possibility is tested by using the variables indicating the extent to which criminal and civil cases filed that year are decided on the summary calendar. The results<sup>87</sup> are clear: the extent of summary calendar use for criminal appeals is associated with less overall delay; whereas the more the summary calendar is used for civil cases the more overall delay the court experienced. For each one percent more criminal cases decided on the summary calendar, the overall delay at the court declines by roughly half a percent. A corresponding use of the summary calendar for civil cases is associated with an increase of approximately one fourth of a percent more delay in civil cases.<sup>88</sup>

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82. See Table 2.

83. See Table 11. The most important control variables are the state dummies, which are separate dummy variables, equal to zero or one, for each state court and which indicate that the overall level of output and backlog differs appreciably between courts even after controlling for the other variables. Also, the number of cases decided per judge are greatly affected, as one might expect, by the number filed in that year and in the prior year.

84. See the first row of figures in Table 11.

85. Data are available for criminal and civil cases decided by summary calendar, but it is organized according to the year the case is filed, whereas the data used in the regressions in Table 11 are organized according to year of decision.

86. See Table 12.

87. *Id.*

88. See PROCEDURES TO ADDRESS CASELOAD GROWTH, *supra* note 78, at 85.

There are several possible explanations for the adverse findings with respect to civil appeals. Adding civil cases to the summary calendar may have slowed down the summary calendar process, and it may have led judges to concentrate on the summary calendar such that delay in non-summary calendar cases increased greatly (the court gives priority to criminal cases over civil cases). Much of the apparent impact of adding civil appeals is almost surely due to the fact that the court of appeals lengthened the time limit for filing the docketing statement from ten to thirty days at the same time that most civil cases were included in the summary calendar.<sup>89</sup> Finally, as one judge currently on the court suggested, the expansion to civil cases occurred just after the two most productive judges, Judges Wood and Hendley, retired.

The impact when using the summary calendar for criminal cases is roughly balanced by the impact when adding civil cases. Indeed, if the use in criminal and civil cases are combined into a single summary calendar variable, the amount of summary calendar use has no relationship to the extent of delay.<sup>90</sup> This result is consistent with the lack of impact shown in Table 11.

The analysis in Table 12 contains a large number of control variables, most of which are very important. Several represent other programs designed to address the caseload growth in the court of appeals. The use of unpublished memorandum opinions is associated with less delay. The use of tape recordings for transcripts rather than ordinary typed transcripts, in criminal cases reduces delay, but the use in civil cases is associated with more, but not statistically significant, overall delay in the court. The use of volunteer attorney panels to hear civil appeals if anything caused more delay.

#### *D. Five Court Study—Impact on Delay*

The next phase of the regression analysis is a pooled time series-cross section analysis of the impacts of the summary procedures on delay, using data obtained from court files for the New Mexico court and four control courts, selected because they are similar intermediate courts from western states. They are Division 1 of the Arizona Court of Appeals, the Colorado Court of Appeals, the Oregon Court of Appeals, and the Washington Court of Appeals Division III. The data are based on cases filed from 1971 through 1987, with samples of 100 to 200 civil and criminal appeals each year.

Delay is average number of days from notice to appeal to decision in each year for each court.<sup>91</sup> The summary calendar is measured by the portion of cases filed in the year that are summarily decided.

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89. N.M. R. APP. P. 12-208.

90. This analysis can be found in PROCEDURES TO ADDRESS CASELOAD GROWTH, *supra* note 78, at 84.

91. It is necessary to analyze total delay in the court. Separate analysis of criminal or civil delay, for example, is not feasible because less delay in one may simply be at the expense of more delay in the other, reflecting changes in case priorities given by the court.

As seen in Table 13 the results of the pooled regression are similar to the results in the individual case analysis.<sup>92</sup> There is strong evidence that summary calendar use in criminal cases, but not civil cases, reduces overall delay at the court. Among the other variables of interest, the results are similar to those in Table 12 concerning the impact on overall delay of tape transcripts and attorney panels.

Table 12

Impact on Delay, Individual Case Analysis

Independent Variables	Dependent Variable	
	Days From Notice of Appeal to Decision	
	Coef.	T-Ratio
Summary Calendar (Criminal)		
Cases decided summarily#	-1.34	-56.32***
Portion of cases that year decided summarily	-1.39	-13.82***
Summary Calendar (Civil)		
Cases decided summarily#	-1.36	-39.45***
Portion of cases that year decided summarily	1.83	17.49***
Type of Case		
Whether criminal#	-.21	-12.01***
Whether interlocutory#	-.70	-17.60***
Appeals Per Judge in Year		
Case Was Filed (log)	.78	6.93***
Judges in Year Case Was Filed (log)	1.41	-7.48***
Unpublished Opinions		
Cases with unpub. op.#	-.18	-11.48***
Portion of cases that year with unpub. op.	-1.04	-8.02***
Time of Filing (Counter)	.00	.06
Taped Transcripts (Criminal)		
Cases with taped tr.#	-.19	-6.51***
Portion of cases that year with taped tr.	-.46	-4.35***
Taped Transcripts (Civil)		
Cases with taped tr.#	-.12	-2.38*
Portion of cases that year with taped tr.	.65	1.94
Use of Volunteer Attorneys		
Cases with vol. attys.#	.72	7.60***
Portion of cases that year with vol. attys.	2.50	4.40***
Adjusted R-Square		.67
Degrees of Freedom		4533
Durbin-Watson		1.93

Significance levels: \* = .05, \*\* = .01, \*\*\* = .001

# — Dummy variables.

92. Compare Table 13 with Table 12.

Table 13

Impact on Delay, Five Court Pooled Regression

Independent Variables	Dependent Variable: Days From Filing to Decision (logged)	
	Coef.	T-Ratio
Portion Decided with Summary Calendar (N.M.)		
Criminal	-1.44	-5.71***
Civil	.79	2.56*
Portion With Taped Transcripts (N.M.)		
Criminal	-.46	-1.34
Civil	3.09	4.51***
Portion of Civil With Vol. Attys. (N.M. and Ariz.)	.51	.88
Portion Decided by MMT (Wash.)	-.35	-1.01
Appeals Per Judge (logged)	.18	1.74
Number of Judges (logged)	.32	2.53*
Percent With Opinions Not Published	-.11	-.88
F Value State Dummies	86.27***	
Adjusted R-Square	.99	
Degress of Freedom	65	
Durbin-Watson	1.69	

Significance levels: \* = .05, \*\* = .01, \*\*\* = .001

### *E. Five Court Study—Impact on Reversal Rates*

The final topic is whether the various programs affected the outcome of appeals.

A potential problem with the summary calendar is that the absence of transcript and full briefing reduces information received and, thus, the quality of justice. If the summary calendar does reduce thoroughness of review, the court would presumably uncover fewer errors made below and, thus, would reverse fewer appeals.

For this analysis, reversal rates are calculated separately for criminal and civil appeals; reversals are typically much more common in civil cases. The criminal reversal rates are limited to appeals by defendants. Prosecution appeals comprise only a small portion of criminal appeals, but they are far more likely to be reversed than defendant appeals.

Appeal outcomes are categorized as affirmances, reversals, and mixed results. Affirmances occur when the court decides totally in favor of the appellee. They consist of cases where the ruling states that the trial court is affirmed or the appeal is dismissed. The latter category is infrequent

and does not include dismissals for lack of progress, which are not counted as decisions. Reversals are rulings that vacate the trial court ruling or remand the case for a new hearing. Mixed decisions occur when the trial court decision is modified, rather than reversed or affirmed, and when part is reversed and part is affirmed. We use two measures of reversal rates, one that counts the mixed results as affirmances, and the other that counts them as reversals. Table 14 gives the percent reversal of criminal and civil cases reversed, under both measures, for cases filed from 1971 through 1987.<sup>93</sup>

Although reversal rates have been declining in recent years<sup>94</sup> there is no evidence that the decline is connected with the summary calendar.<sup>95</sup> This result applies to both civil and criminal appeals and to both measures of reversals. Moreover, few of the control variables affect reversal rates. The major exception is the state dummies, indicating that some courts are consistently more likely to reverse than others.

Table 14

	<u>Percent of Appeals Reversed</u>			
	<u>Criminal</u>		<u>Civil</u>	
	<u>Reversals only</u>	<u>Reversals and mixed</u>	<u>Reversals only</u>	<u>Reversals and mixed</u>
1971	22.4	23.7	37.0	45.7
1972	18.4	20.1	38.1	50.0
1973	25.0	27.9	24.4	37.2
1974	22.4	24.2	32.1	37.6
1975	14.1	18.4	35.0	42.9
1976	17.2	21.5	39.1	47.1
1977	15.6	17.7	38.2	44.7
1978	15.2	19.9	29.7	35.7
1979	22.5	24.6	34.9	45.0
1980	24.2	27.3	38.7	47.9
1981	22.5	22.5	32.4	39.2
1982	16.5	23.9	24.8	33.7
1983	16.7	21.9	25.0	36.1
1984	21.0	25.0	30.8	42.5
1985	15.0	22.0	30.4	40.6
1986	7.5	13.4	17.2	27.9
1987	9.9	17.1	24.5	32.7

93. Again, these figures are based on data obtained from the court's docket.

94. See Table 14.

95. See Table 15.

Table 15

Impact on Reversal Rates, Five Court Pooled Regression

Independent Variables	Dependent Variable Reversal Rates							
	Criminal				Civil			
	Reversals only		Reversals and mixed		Reversals only		Reversals and mixed	
	Coef.	T-Ratio	Coef.	T-Ratio	Coef.	T-Ratio	Coef.	T-Ratio
Portion Decided with Summary Calendar								
Criminal	.036	.39	.032	.32	.018	.19	-.021	-.20
Civil	-.174	-1.50	-.118	-.91	-.127	-1.07	-.092	-.69
Portion with tape transcripts								
Criminal	-.037	-.29	-.003	-.02	.045	.35	.045	.31
Civil	.035	.16	.044	.18	-.388	-1.58	-.270	-.98
Portion With Vol. Attorneys					.249	1.37	.336	1.63
Portion Decided by MMT (Wash.)	.141	1.22	.136	1.06	-.094	-.81	-.004	-.03
Time to Decision <sup>x</sup>	.011	.13	.032	.32	.021	.25	.061	.65
Appeals Filed <sup>x</sup>	-.017	-1.25	-.021	-1.34	-.036	-2.79**	-.049	-3.27**
Number of Judges	.009	1.68	.009	1.43	.010	1.85	.017	2.70**
Portion of Opinions Not Published	-.097	-2.69**	-.066	-1.65	-.041	-1.20	-.049	-1.25
F Values State Dummies	10.66***		11.30***		6.72***		7.38***	
Adjusted R-Square	.57		.56		.57		.56	
Degrees of Freedom	67		67		69		69	
Durbin-Watson	1.95		1.91		2.23		2.24	

Significance levels: \* = .05, \*\* = .01, \*\*\* .001

x — Time to decision and appeals filed are divided by 1000.

It is interesting that reversal rates, especially in civil cases, increase when fewer appeals are filed or when judges are added to the courts. Several interpretations of these findings are possible: fewer appeals may give judges more time to thoroughly scrutinize the errors raised, fewer appeals may represent a greater tendency to limit filings to appeals with meritorious issues, or higher caseloads may lead judges to affirm more often to discourage more filings.

## VI. JUDGES' AND ATTORNEYS' VIEWPOINTS

The quantitative analysis, of course, is only part of the story. The merits of the summary calendar depend on many factors in addition to productivity, delay reduction, and appeal outcomes. This section presents information obtained from interviews with the judges and, especially, attorneys handling appeals before the courts of appeals. All seven judges sitting in 1989, as well as three retired judges, were interviewed. Also interviewed were forty-four attorneys, a sample of twenty-six private practitioners taken from both sides of cases filed in January to March

1989 (seventeen in civil cases and nine in criminal) all eight attorneys in the appellate division of the public defender's office, and all ten in the appellate division of the Attorney General's office.

The judges solidly favor the summary calendar as a valuable procedure to handle their caseload and reduce delay. A few said that they were suspicious of the procedure when first appointed but gave strong support after experience with it. They did not believe that summary procedure unduly interfered with the full presentation of the facts and issues. One judge, for example, explained that the court should tolerate some error in this regard, because without the summary calendar the court and public defenders would be so overworked that the rate of error in the appellate process would probably be higher.

The attorneys' opinions of the New Mexico summary calendar differed greatly among attorney types.<sup>96</sup> The prosecutors liked it, and the defenders greatly disliked it. Private attorneys, especially in civil cases, tended to have favorable opinions of the summary calendar.

Table 16

	<u>Attorneys' Views of the Summary Calendar</u>			
	Prosecutors	Defenders	Private Civil	Private Criminal
Favorable	7	0	9	2
Mixed	3	0	6	5
Unfavorable	0	8	2	2

When asked to list the benefits of the summary calendar, a large majority of the private attorneys and prosecutors said the appeal is decided sooner. The defenders seldom considered this a major benefit, however, because they claimed there were few cases where their clients received speedy reversals. The next most common benefit, given by a majority of all types of attorneys, is the savings in attorney time.

These benefits also mean cost savings. When asked if the summary calendar led to substantial cost savings, two-thirds of the private attorneys answered affirmatively. The cost savings to the state in terms of fewer prosecutors and defenders is probably also substantial, but it is hard to calculate how many more attorneys would be hired in the absence of the summary calendar. Other benefits volunteered by several attorneys are that the summary calendar helps the court in handling its caseload and that it helps narrow the issues.

The attorneys were similarly asked to list the drawbacks of the summary procedure. One cited by all defenders, but few others, is that the procedure does not permit sufficient development of the facts. The appellate defenders do not believe that they can rely on trial counsel for an adequate

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96. See Table 16.



statement of the facts.<sup>97</sup> Similarly, about half the prosecutors, but almost no private attorneys complained that the other side sometimes presents misleading facts that are not supported by the record.

Nearly a third of the attorneys, and half the defenders, complained that there is too much recalendaring, often arguing that the case should be transferred to the general calendar if the first calendar statement does not result in summary disposition. The final problem, mentioned by several civil attorneys, is that the docketing statement does not provide sufficient opportunity to present their full arguments.<sup>98</sup>

The appellate defenders and appellate prosecutors all believed that the quality of most docketing statements is poor. As noted above, the major complaint of the defenders is that the facts were not complete. When asked how often they needed a transcript or tapes, the defenders gave estimates of 40% to 100% of their appeals, with the average approximately 60%. In practice they obtain tapes in only about a tenth of the summary calendar cases.<sup>99</sup>

The appellate defenders argue that the docketing statements are often inadequate because the trial counsel cannot remember well what occurred at trial. Trial counsel do not write the docketing statement until several weeks after the trial, and they often do not take adequate notes during trial because they must focus on their trial strategy.

The defenders also complain that trial counsel miss issues when preparing docketing statements. Several claimed to have found new issues when the trial proceedings were reviewed after the case was transferred from the summary calendar. Upon learning of this complaint, the court of appeals asked for substantiation, and the defenders office submitted a list of twenty general calendar cases that, it claimed, contained issues not mentioned in the docketing statement. The court staff reviewed these cases and concluded that they provided no support for the contention. In every case, the staff answered, the issue not raised was either not relevant to the eventual holding or would have been found without the trial transcript or tapes because it was apparent from the docketing statement or record proper.

## VII. SUMMARY

The summary calendar is an innovative procedure to speed the appellate process by reducing the amount of material presented to the appellate court, primarily by eliminating the transcript and substituting memoranda for formal briefs. This procedure greatly reduces delay in the cases decided summarily, the more than three quarters of the appeals decided. The decision times in these cases, averaging approximately 100 days, are far less than those in other appellate courts and in non-summary cases in

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97. This problem did not pertain to the private attorneys because they were usually also the trial counsel and, if not, they generally reviewed the tapes of the proceedings.

98. The other types of attorneys rarely wrote docketing statements.

99. See section IV(G) *supra*.

the court of appeals. This is true even though expansion of the scope of the summary calendar has caused decision times there to double during the past decade. The average time to decision for all appeals is also comparatively very short, even though civil cases on the general calendar take much more than one year to decide.<sup>100</sup>

Nevertheless, the overall analysis here show mixed results. Most attorneys favor the summary calendar, primarily because the appeals are decided sooner and the procedure requires less work on their part. Especially, appellee counsel does no work in nearly half the appeals, those summarily affirmed after the first calendar notice.

The summary calendar probably reduces the amount of overall delay in the court, the time to decide the average decision, but the statistical analysis confirmed this result only for summary disposition of criminal appeals. The analysis suggested an opposite impact for civil appeals, a result probably due to other changes made in the court when the summary calendar was expanded to civil cases. The impact on productivity, appeals decided per judge, is also uncertain due to these changes.

As for the quality of justice, the results were also generally favorable. Reversal rates are not affected, suggesting that reducing the amount of information coming to the court does not reduce the chance of locating errors. The judges and lawyers are generally satisfied with the procedure. The most notable exception is the strong opposition by criminal defense lawyers, who particularly disliked their inability to review the trial proceedings to search for facts or issues favoring their clients and missed by trial counsel.

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100. See Table 10.