CRITICAL REQUIREMENTS FOR THE ORAL COMMUNICATION OF STATE TRIAL JUDGES

by

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P.A.P.

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CHAPTER I

INTRODUCTION

The National College of the State Judiciary was first opened in 1964, at the University of Colorado and the following year was moved to its present location on the campus of the University of Nevada, Reno. It is now housed in a new building (completed in 1971) with its own modern law library and classroom facilities.

The National College of the State Judiciary was an outgrowth of the Joint Committee for the Effective Administration of Justice formed in 1961 and sponsored by the American Bar Association. The committee members represented the most prestigious and active legal and judicial organizations in the country. The Joint Committee was chaired by Justice Tom Clark and was financed by the W. K. Kellogg Foundation. The Joint Committee conducted judicial seminars for state trial and appellate judges. At the end of three years, the seminars had been offered to the trial judiciary of every state, and the response to the seminars resulted in the creation of the National College of the State Judiciary.[1]

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[1] Laurance M. Hyde, Jr., "Educational Programs for State Trial Judges," The Improvement of the Administration of Justice (A Handbook Prepared by the Section of Judicial Administration, American Bar Association, 1971), pp. 118-119.

Since the National College opened in 1964, approximately thirty percent of the nation's trial judges have graduated from it. To become a graduate, a judge must attend a four-week seminar session held during the summer. Two sessions are conducted each summer with approximately 125-150 judges from nearly all of our 50 states attending each session.

The program consists of intensive work in various areas of study. The topics studied and discussed include evidence, ethics and special problems in the judicial function, sentencing and probation, criminal and civil law, court administration and many more. The format of the program centers around small group participation and group discussion rather than lecture.[2]

Although judicial experience ranges from only a few weeks to twenty-five years, the judges have an average of two years of judicial experience and are in their middle forties. All of them have ten to twenty years of legal experience.

During the past year the National College has conducted eight sessions for graduates of the basic four-week program. Two programs were given for court administrators and chief judges. The College also co-sponsored, with the American Bar's Appellate Judges' Conference, a

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[2] Ibid., p. 119.

series of four regionally located four-day conferences for state and federal appellate judges. These new programs are in addition to the basic four-week summer session, and the twenty to twenty-five state or regional seminars given each year throughout the country.

The National College of State Judiciary is becoming an increasingly important force within the area of judicial education. It is providing assistance to each state in helping the particular state to develop its own judicial educational programs. These programs are then supplemented by the national educational programs.

In March of 1972, Laurance Hyde, Dean of the National College, discussed with the author the possibility of setting up a communication program for the National College. The communication program would be for the judges enrolled in the four-week summer sessions. After several meetings with Dean Hyde, the program was finalized. Two members of the Speech and Drama Department at the University of Nevada, Reno, were to work with the investigator in the program. This was the beginning of the author's interest in judicial communication.

Purpose of the Study

The purpose of this study is to determine and prepare a list of the critical requirements for the oral communication of state trial judges. These critical

requirements may be used as criteria for effective oral communication of the state trial judiciary. The critical incident technique will be the method implemented in this study in order to derive the critical requirements.

More specific objectives are to identify: (a) the general areas of oral communication that the state trial judge utilizes in accomplishing his assigned tasks, (b) the areas of oral communication in which the state trial judge needs to be effective, and (c) the areas of oral communication in which the state trial judge seems to be ineffective.

A general objective of this study is to eliminate some of the guess work in the area of oral communication for state trial judges. Maurice Rosenberg supports this view:

> . . . the custodians of every sector of human activity are eager to compile a list of qualities that 'best equip' a man to perform the chosen work with excellence, but everywhere the composition of the list is notoriously elusive. It is particularly obscure when the qualities sought are personal, subjective, and human--those that are important in measuring a lawyer for judgeship. Yet as hard as the task may be, there is a special urgency for finding the human qualities in a judge that are most promising and the flaws most damaging.[3]

By providing critical requirements for the oral communication of state trial judges, it may become

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[3]Maurice Rosenberg, "The Qualities of Justice--Are They Strainable?" Texas Law Review, XLIV, No. 6 (June, 1966), 1064.

apparent that criteria in this area of oral communication are necessary in the selection of judges. This study may be used as an impetus toward the improvement of performance evaluations for judges. Rosenberg argues for these performance evaluations:

> . . . the essential problem is to seek standards and procedures that will help identify the little differences that count. . . . performance standards must be devised through the slow, hard process of observation and audit of the work of many judges. . . . Without usable standards and faithful adherence to rules, the solemn process of seeking lawyers best equipped for the bench will be for the most part a noble charade.[4]

If this study can provide the necessary information needed to help "identify the little differences that count" in the area of oral communication for judges, then the study will be worthwhile.

Operational Definitions

One of the more important areas of any research study is to provide a common frame of reference so that the reader shares with the investigator the concepts and meanings of the various terms used in the study. Consequently, several key terms are defined in the next few paragraphs.

State Trial Judge

A state trial judge is an elected or appointed public official who presides over trial courts of general

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[4] *Ibid.*, p. 1080.

or unlimited jurisdiction, that is, with jurisdiction over both criminal and civil cases above a certain level of offense or above a certain level of claims.

The certain level of offense or the certain level of claims over which the state trial judge presides in the court of general jurisdiction varies from state to state; however, in general, the inferior courts or courts of limited jurisdiction hear misdemeanor cases or civil cases involving small amounts of money. Above the courts of limited jurisdiction are the courts with authority to try all types of cases, civil or criminal. These are known as trial courts of general jurisdiction. Even if there are some limitations on the power of the court of general jurisdiction, if for instance, its jurisdiction begins where the jurisdiction of the limited trial court leaves off, at $500 for example, it is still referred to as a trial court of general or unlimited jurisdiction.

The courts of general jurisdiction are variously named in the different states. In many, they are called Superior Courts; in others they are called District Courts, or Circuit Courts, taking their names from the circumstance that the state is divided into judicial districts or circuits; in some they are called Courts of Common Pleas, still following the ancient English tradition. In the state of New York, the state trial court of general

jurisdiction has the unusual title of the Supreme Court, which is confusing because that name is usually reserved for the highest appellate court of a state.

Trial courts of general or unlimited jurisdiction are distributed geographically throughout the state by dividing the state into judicial districts or circuits and establishing a court for each geographical unit. There is a state trial judge sometimes called a district or circuit judge for each geographical unit, and in districts where judicial business is heavy, more than one judge is appointed or elected. The largest trial court of general jurisdiction is the Superior Court of Los Angeles, California, which has 120 state trial judges.[5]

Communication

Communication is defined as "a generally predictable, multilevel, continuous, and always-present process of the sharing of meaning through symbol interaction."[6]

The above definition serves the purpose of this study because it is neither all inclusive nor is it so exclusive as to reduce the study to an inconsequential

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[5]Milton D. Green, "The Business of the Trial Courts," in The Courts, The Public, and The Law Explosion, ed. by Harry Jones (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965), pp. 7-28.

[6]Gail E. Myers and Michele Tolela Myers, The Dynamics of Human Communication (San Francisco: McGraw-Hill Book Co., 1973), p. 12.

area. The definition allows for the underlying assumption that communication is transactional which is to say that people are engaged in sending and receiving messages simultaneously and that every person is constantly sharing in the encoding and decoding process and are affecting each other.

Communication is a process. David Smith, in exploring the idea of process, states:

> Our categories do not give a one-to-one fit with reality. They necessarily represent in some measure the nature of the category creator. Inasmuch as the phenomena in question are constantly changing the student of those phenomena can report only what he can see from a single perspective at a single point in time.[7]

The definition allows for the following five "secondary" postulates.[8] Frank Dance calls them commonalities of agreement and laws of human communication.[9] Dean Barnlund refers to them as "postulates."[10]

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[7]David H. Smith, "Communication Research and the Idea of Process," Speech Monographs, XXXIX (August, 1972), 179.

[8]C. David Mortensen, Communication: The Study of Human Interaction (San Francisco: McGraw-Hill Book Co., 1972), pp. 14-21.

[9]Frank E. X. Dance, "Toward a Theory of Human Communication," in Human Communication Theory: Original Essays, ed. by Frank Dance (New York: Holt, Rinehart and Winston, Inc., 1967), pp. 288-299.

[10]Dean Barnlund, "A Transactional Model of Communication," in Foundations of Communication Theory, ed. by Kenneth K. Sereno and C. David Mortensen (New York: Harper and Row, 1970), pp. 87-94.

Communication Is Dynamic

Communication is constantly changing. The act is evolving and is continually taking on new shape and new dimensions. David Berlo states that "it does not have . . . a fixed sequence of events. It is not static, at rest. It is moving."[11] It is extremely difficult to describe such a process because, as Wenburg and Wilmot state: "We are using static concepts--stable, unchanging, discrete, concepts."[12]

Communication Is Irreversible

This postulate is uniquely explained in a poster which states: "Today is the first day of the rest of your life." People engaged in communication can only move forward, never backward. The past cannot be reclaimed.

> As communication ebbs and flows, its content and meaning ever widens. Each phase of the on-going sequence helps to define the meaning assigned to each succeeding aspect of what is said and done. Seen in this light, no statement, however repetitious, can be regarded as pure redundancy. Somehow, repetition of even the same signal alters the larger significance of the exchange. Once the transaction begins, there can be no retreat, no fresh start, no way to begin all over again.[13]

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[11] David Berlo, The Process of Communication (New York: Holt, Rinehart and Winston, 1960), p. 24.

[12] John R. Wenburg and William W. Wilmot, The Personal Communication Process (New York: John Wiley and Sons, Inc., 1973), p. 4.

[13] Mortensen, Communication: The Study of Human Interaction, p. 16.

Communication Is Proactive

People engaged in communication, argues Mortensen, "are proactive because they enter the transaction totally."[14] This postulate perhaps is even more apparent in the judicial setting, especially in the case of the defendant and the judge. Both are actively selecting, manipulating, and expanding the signals that are sent their way. They are continually selecting the signals that fit their expectations. If the defendant perceives the judge as a person who is unfair and untrustworthy, he will try to select the signals that meet these expectations. It seems safe to assume that the individuals involved in the judicial process are actively committed and have a sense of real concern in what is said and done, because in the case of the defendant it may be a "life or death" matter.

Communication Is Interactive

The term interaction suggests a "give and take" atmosphere or a reciprocal influence. In communication literature, this interaction is generally referred to as intrapersonal and interpersonal communication.

> It is important not to think of either form of interaction--intrapersonal or interpersonal as the discrete action of particulars working under separate power; nor even to think of them as

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[14] Ibid., p. 17.

> balancing elements in causal connection. The notion of interaction entails the far more complex idea of interdependence--a mutual influencing process among countless factors, each functioning conjointly so that changes in any one set of forces affect the operations of all other constituent activity in a total field of experience.[15]

Communication Is Contextual

Communication is not something that merely happens, devoid of context. It does not occur in a vacuum. A communication act is something that is defined by a "particular set of forces at work in the immediate physical environment,"[16] for example, the judge's chambers, the judge's courtroom, or the judge's interaction with the community. These factors, situational or contextual, help to define the emotional overtones of what is said. They influence the communicative act.

> A communication theorist rejects the possibility that nature consists of events or ingredients that are inseparable from all other events. He argues that you cannot talk about the beginning or the end of communication or say that a particular idea came from one specific source, that communication occurs in only one way and so on.[17]

Critical Incident

John C. Flanagan provides us with the best definitions of a critical incident. He describes the critical incident as:

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[15] Ibid., p. 19. [16] Ibid., p. 289.

[17] Berlo, The Process of Communication, p. 24.

> . . . any observable human activity that is sufficiently complete in itself to permit inferences and predictions to be made about the person performing the act. To be critical, an incident must occur in a situation where the purpose or intent of the act seems fairly clear to the observer and where its consequences are sufficiently definite to leave little doubt concerning its effects.[18]

In this study, an incident must meet four criteria to be considered critical. (1) The incident must have occurred within the past year. (2) The respondent must clearly state why the actual behavior reported was critical. (3) The description must contain all relevant factors. (4) The incident must be determined effective or ineffective by the observant.

Critical Requirement

For this study, a critical requirement may be defined as that requirement, expressed in behavioral terms, which has proved to be an important factor in differentiating successful or unsuccessful performance.[19]

Rationale for the Study

There is a need to study the oral communication of state trial judges for three vital reasons: (1) state trial judges are an important part of the judicial system,

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[18] John C. Flanagan, "The Critical Incident Technique," Psychological Bulletin, LI, No. 4 (July, 1954), 327.

[19] Thomas Gordon, "The Airline Pilot's Job," Journal of Applied Psychology, XXXIII (1949), 125.

(2) oral communication plays an important part in the judge's work, and (3) little research in the area of oral communication for judges is available. These three reasons will be discussed separately in the next few paragraphs; however, in Chapter II, a more extensive exploration and explanation of the three areas is presented.

(1) State trial judges are an important part of the judicial system.

> Judges are the essence of the court as a social system. The judicial role is composed of many parts. It is unique. Part of this uniqueness comes from the professionalization and the recognition accorded judges as an elite group.[20]

There seems little room for argument concerning the importance of the judge. He makes ". . . final disposition of virtually all of the legal disputes which come to the courts."[21] He is the key man in our system of adjudication. A legal system without good trial judges is like a school system without devoted and able classroom teachers.

(2) Oral communication plays an important part in the judge's work. Solutions are needed concerning how to

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[20] Ernest C. Friesen, Edward C. Gallas, and Nesta M. Gallas, Managing the Courts (New York: The Bobbs-Merrill Co., Inc.), p. 114.

[21] Glenn R. Winters and Robert E. Allard," Judicial Selection and Tenure in the United States," The Courts, The Public, and The Law Explosion, p. 148.

bridge communication gaps between judges, lawyers, defendants, representatives of mass communication media, and the myriad other groups concerned with the courts.[22]

The state trial judge is continually interacting with people at an important level of communication. He must be concerned with his communicative effectiveness when working with the jury either in the courtroom or in the chambers, when sentencing or placing the defendant on probation. Furthermore, he must at all times be concerned with the "image" of the legal system which is influenced by the perceptions of the spectators in the courtroom. Consequently, oral communication would appear to be a decisive and integral force in the judge's work.

(3) Little research for judges in the area of oral communication is available. In Chapter II, the two research studies available, which deal only indirectly with the area of oral communication for judges, will be reviewed. There simply has not been any work in this important field.

> There is very little in legal literature on the nature of the judicial process . . . in trial courts of general jurisdiction. A few thoughtful trial judges, notably Joseph C. Hutcheson, Curtis Bok, and Charles Wyzanski, have provided sensitive interpretations of their past, but there is

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[22]Friesen, Gallas, and Gallas, Managing the Courts, pp. 19-20.

> practically nothing available by way of systematic examinations. . . .[23]

According to Jabob and Vines, ". . . courts in general have rarely been examined."[24]

Winters and Allard point out that "emphasis upon trial judges . . . is a recent development in American jurisprudence."[25] The state trial judges cannot be neglected because their place within the judicial system is too important.

> . . . the function of the courts in protecting individual freedoms and the public welfare within an ordered society becomes one of the most critical issues of government in the United States. Ultimately, the success or failure of the courts to meet these emerging challenges rests on the judges of the courts. Courts and judges should become a national concern.[26]

Limitations of the Study

Two limitations have been imposed on this study. (1) The study is limited to state trial judges. These judges sit in courts of general jurisdiction, that is,

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[23]Harry Jones, "The Trial Judge--Role Analysis and Profile," The Courts, The Public, and The Law Explosion, p. 124.

[24]Herbert Jabob and Kenneth Vines, "The Role of the Judiciary in American State Politics," in Judicial Decision Making, ed. by Glendon Schubert (New York: The Free Press of Glencoe, 1963), p. 245.

[25]Winters and Allard, The Courts, The Public, and The Law Explosion, p. 148.

[26]Ibid., p. 177.

with jurisdiction over both civil and criminal cases above a certain level of claims or above a certain level of offense. Therefore, this study does not consider the lower trial judges with limited or specialized jurisdiction. Furthermore, judges of the appellate courts are not included. However, this study may serve as a basis for studying the oral communication of other types of judges.

(2) The purpose of the study is to prepare a list of critical requirements for the oral communication of state trial judges based upon the observations of the judges. Therefore, generalizing from the findings will be limited. For example, the critical requirements for state trial judges as reported by defendants, jurors, or attorneys might differ significantly. The limits imposed by definition are important in viewing the findings.

Organization of the Following Chapters

The remainder of this study is divided into four chapters. Chapter II presents a profile of the state trial judge. Included in this profile will be the organizational structure of the judicial system, the judge's role within that structure, and the role of judicial communication. Chapter III describes the methodology used in gathering the data. It includes a review of the literature concerning the critical incident technique. Chapter IV presents the results of the study. The results include a list of the

critical requirements for the oral communication of state trial judges and also presents additional data obtained from the critical incidents such as the frequency of reported effective and ineffective incidents, and the source of the reported incidents. The supplemental material which was gathered through the interview is also discussed. Chapter V summarizes the entire study, discusses possible conclusions and implications of the findings, and presents suggestions for further research.

CHAPTER II

PROFILE OF A STATE TRIAL JUDGE

This chapter presents an analysis of the state trial judge's roles, functions, and duties within the judicial system. From this the reader will gain a better perspective of the profile of the state trial judge. Because the judge's role varies from state to state, this profile will be a general one, selecting those areas most common to all. The areas analyzed will include the organizational structure of the state judicial system, the state trial judge within that system, and the role of judicial communication.

Organizational Structure

The trial court of general jurisdiction over which the state trial judge presides has a place within an appellate hierarchy. The lower courts, in the hierarchy of appeals, are monitored by the higher courts. They are, for example, directed in how to decide future cases involving the same or similar facts, and they are limited in the way cases may be processed. The objective of the appellate organization is to control the quality of judicial decisions in individual cases. The appellate structure creates supervisory relationships that are part of the

organizational structure of the courts.

The quality control function of the state court systems of the United States is generally carried out within a three-step hierarchy. First, there is a court of last resort--usually called the supreme court. Second, there is a trial court of general jurisdiction that is the more important trial court. Third, there is a court of limited jurisdiction that handles lesser civil and criminal matters. In addition to these three levels within the appellate hierarchy, "most systems have one or more courts of special jurisdiction that defy universal categorization."[1]

In most instances, the authority of the supreme court is to hear appeals from the trial courts of general jurisdiction. Because of the increase in appellate workloads, several states have created an intermediate court of appeals between the trial court of general jurisdiction and the supreme court. Where these courts actually exist, appeals on some types of cases may be taken to the supreme court only in the discretion of the supreme court; however, a precise pattern is lacking as to the jurisdiction of the intermediate court of appeals in the states which have

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[1]Ernest C. Friesen, Edward C. Gallas, and Nesta M. Gallas, Managing the Courts (New York: The Bobbs-Merrill Co. Inc., 1971), p. 28.

created such courts.[2] A diagram illustrating the judicial appellate hierarchy structure is shown in Figure 1.

Organization of state court systems for management purposes is almost nonexistent, except for poorly defined authority to assign trial and appellate judges to temporary assignments within the system and to gather statistics. New Jersey, Colorado, and Connecticut are notable exceptions. In these three states, there is broad-based authority over the judges of the system. In addition, under a recent court reorganization, Colorado has direct authority over most of the supporting functions of the courts.[3]

Figure 2 compares the nature of management authority between a typical state and the state of New Jersey.

A Typical State

As illustrated in Figure 2, the typical state has no central authority for court management. Several of the states have created an office of court administration; however, its scope is limited. California is an example of a typical state. Its court administrative office has no direct managerial functions except as staff to the chief justice and the Judicial Council. As a staff function, it may assist the chief justice in exercising his authority

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[2] *Ibid.*, p. 29.

[3] *Ibid.*, pp. 31-33.

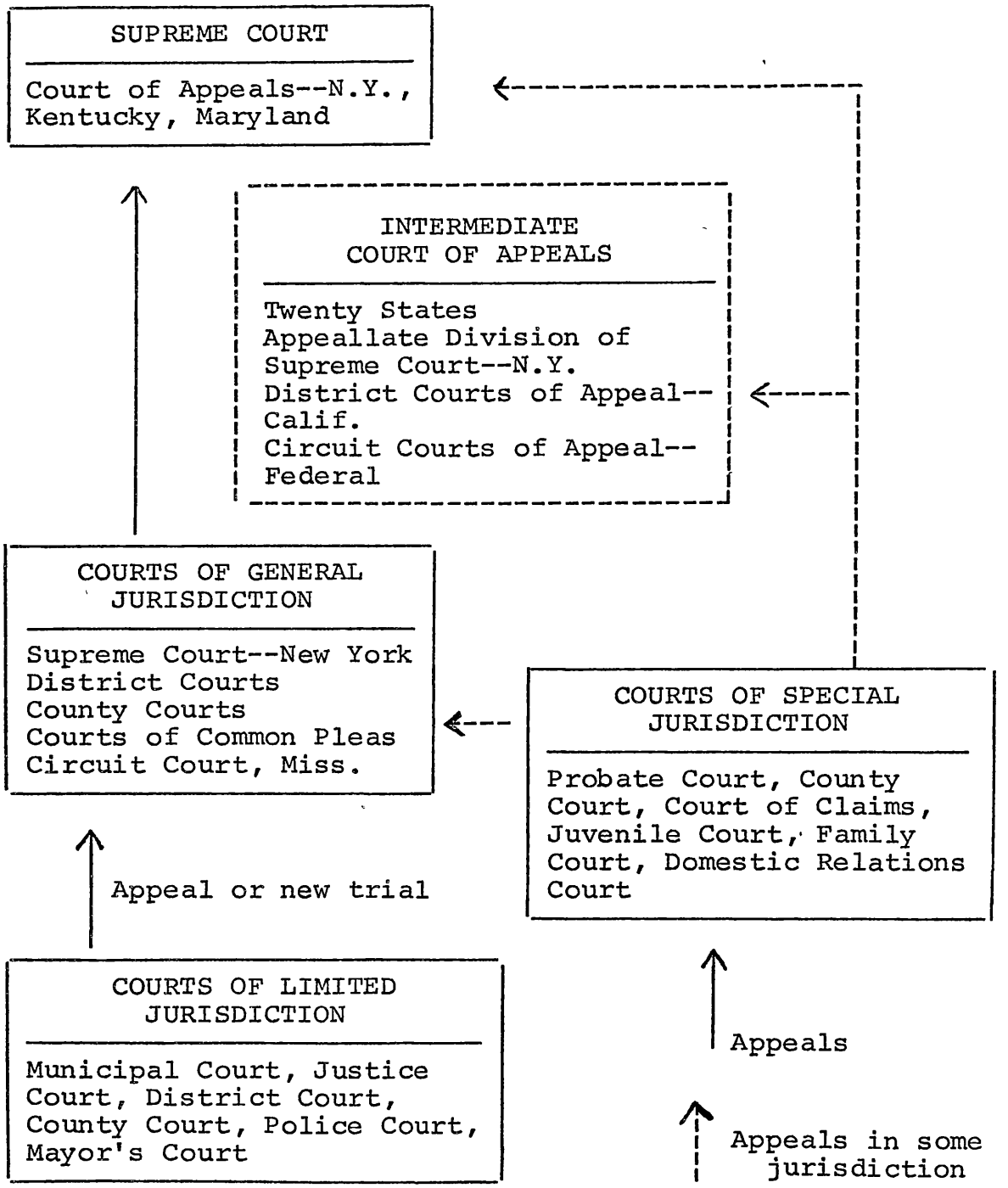
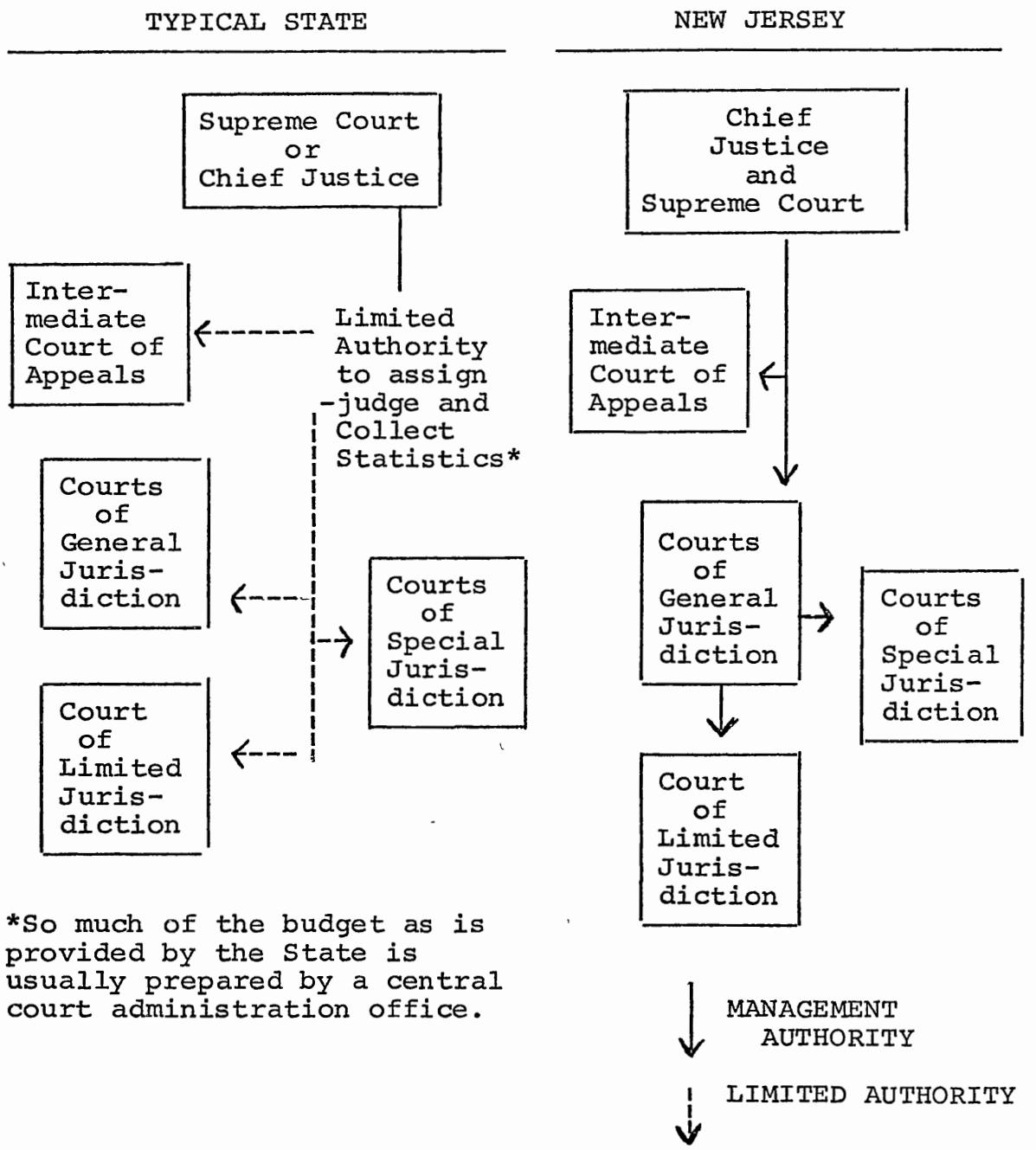


Fig. 1. The Appellate Structure



*So much of the budget as is provided by the State is usually prepared by a central court administration office.

Fig. 2. The Organization of the Courts for Management

to assign judges to duties outside of their home district. The office collects data about the court, conducts research in court operations, and makes recommendations to the Judicial Council and to the legislature. The office has no authority to implement what is learned from the studies. It is more a research and development center than a management center for the courts.[4]

New Jersey

The constitution of the state of New Jersey gives the supreme court authority to make rules governing the administration of all courts of the state. The constitution has been interpreted to mean that the court has authority over the supporting personnel who serve as court functionaries, such as clerks and sheriffs, regardless of whether they are employees of the court. This broad administrative authority is combined with the authority of the Chief Justice of the Supreme Court to appoint the assignment judge in each county. The assignment judge has authority over the administration of all courts in his county.

The court administrative office in the state of New Jersey functions as staff to the chief justice in the exercise of his general supervisory powers. The office

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[4] Ibid., pp. 33-35.

furnishes summary information to the assignment judges in each county which is based on centralized information about case flow. The budgets are also prepared for the limited areas under central control. A staff of examiner-consultants recommend improvements to the assignment judges within the various counties.

> The strength of the New Jersey system rests in the constitutional authority of the supreme court to make rules governing the administration of the courts. The New Jersey courts, by virtue of this authority, are able to control supporting personnel in the performance of their functions. This control extends to any outside activities that might reflect adversely on the court system.[5]

The brief accounts of the typical state and the New Jersey system illustrate the divergence in the operation and organization of the state court systems of the fifty states. Variations in structure of the court-management systems create wide differences in the allocation of managerial functions. Because of these differences, the state trial judge's administrative functions vary widely from state to state.

The State Trial Judge

In the development of a profile of the state trial judge, the importance of the judge within the judicial system will become apparent. The profile will be viewed from the following three areas: (1) judicial selection,

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[5] *Ibid.*, pp. 34-35.

(2) judicial tenure, and (3) judicial duties.

Judicial Selection

Judges are selected by: (1) popular vote, (2) appointment, and (3) merit.

Selection by Popular Vote

Popular election is still the prevailing method for the selection of judges in the United States. The above statement is basically true, subject to three important qualifications. (1) In about a dozen states, election is not and never has been the prevailing method (although some judges are elected in some of these states). (2) In all but one of the election states, vacancies between elections are filled by appointment and these appointments comprise a majority of the initial selections. (3) In more than a third of the states some or all the judges are selected under the Merit Plan.[6]

Most judges are elected on party tickets along with other officers; however, of the states conducting elections, about one-third use a non-partisan ballot for judicial elections, and most of these states are located in the northwest part of the United States.[7]

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[6] Glenn R. Winters, "Improved Methods of Selecting Judges," The Improvement of the Administration of Justice (A Handbook Prepared by the Section of Judicial Administration, American Bar Association, 1971), p. 44.

[7] Ibid.

At least two arguments are generally presented as to why judges should not be selected by popular election through partisan or non-partisan ballots:

(1) The electorate is generally apathetic and uninformed.

> It is practically impossible for the public, especially in large centers of population, to know anything about the qualifications for judicial office of those who practice at the bar. . . . The voters, as a whole, know little more about the candidates than what their campaign pictures may reveal. Nor do they have any real desire to get to know much more--although bar associations do try to give them information. . . . Most often, when they reach the judicial candidates down on the ballot, they vote blindly for the party emblem.[8]

To further substantiate the argument, those opposed to popular election cite the poll conducted by Elmer Roper. This study was conducted within ten days after the New York general elections in 1954. This poll, taken in three different areas of the state--New York City, Buffalo (an upstate area), and Cayuga County (a semi-rural upstate area)--revealed that a large percentage of those who had voted for any judicial candidate (61 percent in New York, 48 percent in Buffalo, and 75 percent in Cayuga County) had paid no attention to the judicial candidates before the election. Even larger percentages (81 percent in New

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[8]Samuel I. Rosenman, "A Better Way to Select Judges," Journal of American Judicature Society, XLVIII (October, 1964), 86-88.

York, 70 percent in Buffalo, and 96 percent in Cayuga County) could not name one of the judicial candidates for whom they had cast their ballot.[9] Glenn Winters states:

> Either way [partisan or non-partisan], in all but the smallest communities, voters have little or no acquaintance with the judicial candidates and especially with their judicial qualifications, and the choices the voters make are mostly blind guesses. This is chiefly why voters tend to elect judges on a straight party basis in partisan election and to ignore a separate judicial ballot in either partisan or non-partisan elections. A ten percent vote on the judicial ballot is not uncommon, making possible a selection by barely over five percent of the voters.[10]

(2) The election process requires that the prospective judge be qualified not only for the office but also as a political campaigner. Even though a judge is well qualified for the position, he may fail to be elected for lack of political appeal or campaigning skill. It was thought that the non-partisan ballot would remove politics from the selection of judges; however, this does not seem to be the case.

> Experience in the states using that system indicates that while non-partisan election does eliminate some of the evils of partisan election, it is still highly political, and it still emphasizes non-judicial rather than judicial qualifications as a basis for selection. In one respect it is

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[9] "How Much Do Voters Know or Care About Judicial Candidates?," Journal of American Judicature Society, XXXVIII (February, 1955), 140.

[10] Glenn Winters, The Improvement of the Administration of Justice, p. 45.

> worse than partisan election in that it actually makes it possible for a candidate to get his name on the ballot who has nothing to commend him but his own ambition and perhaps his inability to make a living as a lawyer, and whom no political party would be willing to sponsor.[11]

The overriding argument against the selection of judges through popular election is that there is no assurance that the judges are selected on the basis of their judicial qualifications. Herbert Brownell, former Attorney General of the United States, states:

> As a matter of fact, judges are in most instances picked by political leaders. This is quite obvious in the case of elected judges. The party conventions and primaries that nominate judges are managed by professional politicians. This is what politicians are for. Sometimes they have good candidates nominated, but most often favor . . . shines on mediocre candidates.[12]

Selection by Appointment

The theory of judicial selection by means of appointment by a responsible elected official is based on the principle that the evaluation and comparison of the respective qualifications of the candidates calls for knowledge and judgment beyond the capacity of the electorate. It is further argued that the voice of the people may make itself heard in the appointive process through

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[11] Ibid.

[12] Herbert Brownell, "Too Many Judges Are Political Hacks," The Saturday Evening Post, April 18, 1964, p. 12.

the responsibility of the appointing authority to answer to the people as to the quality of his appointments. In most states using judicial appointments, there is a further check on appointments through confirmation by a legislative body or a governor's council; however, this check is only a veto which means that while they may reject one appointee, they cannot be certain that the next appointee will be any better qualified.

The argument is advanced that under the appointive system of selection there is still a failure to select the best qualified judges because of the pressure on the appointing officer to select from among members of his own political party to whom he owes a political debt.

> Although a chief executive is concerned about maintaining his reputation by appointing qualified judges--since he is primarily and publicly responsible for their selection--pressures within his party tend to control appointments in all cases except those in which the proposed appointee is totally unfit.[13]

Even though it seems that the selection of judges by appointment is, for the most part, a better method, the system still does not serve to eliminate the adverse effect of political pressure.

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[13]Glenn Winters and Robert Allard, "Judicial Selection and Tenure in the United States," in The Courts, The Public, and The Law Explosion, ed. by Harry Jones (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965), p. 160.

Selection by Merit

In 1913, Professor Albert M. Kales of the School of Law of Northwestern University conceived of the merit plan, later to be called the "Missouri Plan." It was developed as a method for overcoming the defects of both political elections and political appointments. It was given the official endorsement and sponsorship of the American Bar Association House of Delegates in 1937, in the following form:

> . . . That in its judgment the following plan offers the most acceptable substitute available for direct election of judges:
>
> (a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose,
>
> (b) If further check upon appointment be desired such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.
>
> (c) The appointee after a period of service should be eligible for reappointment periodically thereafter, or periodically go before the people upon his record, with no opposing candidate, the people voting upon the question "Shall Judge Blank be retained in office?"[14]

There are considerable options under this plan. The essential points are: (1) an elective officer of the state appoints judges from lists of qualified candidates selected by an impartial non-political commission, and

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[14]Winters, The Improvement of the Administration of Justice, pp. 46-47.

(2) the judges so appointed go before the voters at periodic intervals, on a noncompetitive ballot. The heart of the proposal was that the appointing authority would be restricted in his choice to the candidates presented to him by the commission; he could appoint one of them but no one else.

Missouri was the first state to adopt the plan in 1940. Missouri adopted it for the selection and tenure of all the state's appellate judges and for the trial judges of the cities of St. Louis and Kansas City.

The trial judges in the two metropolitan areas are selected by a five-member commission composed of a judge as chairman, two lawyers and two laymen. The commission selects three nominees for the judicial vacancy. From this slate the governor must appoint one to fill the vacancy. Terms of the lawyers and non-lawyer members are six years and the terms are staggered.[15]

Judge Elmo Hunter of the Kansas City Court of Appeals demonstrates through an example how the commission operates in practice. He was the presiding judge of the Court of Appeals and acted as chairman of the commission to select trial judges for Jackson County (Kansas City). He gives the following example:

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[15] Winters and Allard, The Courts, The Public, and The Law Explosion, p. 152.

Just a few months ago two of our trial judges retired because of a combination of age and illness. This created two judicial vacancies. Our judicial nominating commission issued a public statement carried by our press and other news media that the nominating commission would soon meet to consider two panels of three names each to be sent to the governor for him to select one from each panel to fill the vacancy, and that the nominating commission was open to suggestions and recommendations of names of those members of our bar best qualified to be circuit judges.

It received the names of many outstanding and highly qualified lawyers who were willing to be considered by the commission because of the non-political merit type of selection involved. The commission on its own surveyed all eligible lawyers in the circuit to see if it had before it the names of all those who ought to be considered. From all sources the commission ended up with 57 names.

After several weeks of careful study by the commission, the list of eligibles was cut to 12 then to nine and finally to those six whom the members of the commission sincerely believed to be the six best qualified of all. Those six names, three on each of the two panels, were sent to the governor, who, after his own independent consideration of them, made his selection of one from each panel. His selections were widely acclaimed by the press and the public as excellent choices from two very outstanding panels. The commission was glad to see the governor get this accolade, but its members knew that no matter which one of the three on each panel he selected, the people of Missouri would have been assured an outstanding judge.

It might be noted in passing that each of the two panels of three names submitted to the governor happened to contain the names of two Democrats and one Republican. The governor was a Democrat. He appointed a Democrat from one panel and a Republican from the other. I do not think this was deliberate, I am convinced that our plan has so proven its merit that our governor, who is oath-bound to follow the constitution, shares its spirit as well as its letter. He selected the two he thought best qualified, irrespective of political party.

This is not an isolated instance. Another rather dramatic example occurred just a few years ago when our legislature created three new judgeships for the Kansas City area to meet the increasing cases resulting principally from population growth. The judicial selection commission sent three panels of three names each to

> another Democratic governor. On each panel there were two Democrats and one Republican. The governor appointed two Republicans and one Democrat.[16]

As was pointed out in the example, the commission seeks out and submits names for appointment rather than merely screening names submitted for approval.

The "Missouri Plan" has been accepted by the public and in the opinion of the Bar Association has produced a higher quality judiciary. At the present time, over twenty states are using all or part of the plan in the selection of their judges.[17]

None of the three methods in use guarantees that a judge will not be selected for the wrong reasons. In actuality, judges are not selected by the persons who are responsible for their performances. Neither are they responsible to authority in the normal organizational setting. No selection system uniformly chooses low quality, neither does any system guarantee high quality; however, it seems to be the consensus that the merit plan of selection comes closer to guaranteeing high quality trial judges.

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[16] Elmo Hunter, "A Missouri Judge Views Judicial Selection and Tenure," Journal of American Judicature Society, XLVIII (December, 1964), 126-130.

[17] Winters, The Improvement of the Administration of Justice, pp. 46-48.

Judicial Tenure

An adequate selection method meets only a part of the problem of maintaining an able and independent judiciary. There also must be an adequate tenure method. The most commonly accepted provision calls for the re-election of judges for relatively short terms in partisan or non-partisan competitive elections. Many of the same criticisms already made of selection by popular ballot apply to this method of retention. Again the voter generally does not have the information nor the inclination to assess the qualifications of a long list of judicial candidates. Winters and Allard maintain that "the influence of politics is fully as strong in the retention of judges by election as in their initial selection."[18]

The federal courts and a few states retain a judge for life during good behavior. This method does assure judicial tenure, but it also allows the incompetent judge to remain frozen in his position. This method is criticized because it allows for no effective control of the judiciary.

The method of judicial tenure advocated by the judiciary is part of the "Missouri Plan." This method calls for the non-competitive re-election of the judge. It attempts to retain the best features of both the political

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[18]Winters and Allard, The Courts, The Public, and The Law Explosion, p. 163.

election method and the appointment for life method. The judge, to remain in office, must file a declaration to that effect. His name is then placed on a ballot without opposition and the voters are asked whether he should be retained. The judge is required to submit to this type of non-competitive re-election at the end of each successive term. The term varies from state to state.

The "Missouri Plan" serves two purposes. First, there is no need for political campaigns. Judicial time is not lost during an election campaign, and the expense for filing for retention is minimal. Second, the electorate still has the power of veto, which is not the case under appointment for life. If a judge is incompetent, there is a method for removing him.[19]

Mandatory retirement is another safeguard against incompetence or unethical conduct in office, and over half the states now have a mandatory retirement program. The retirement age varies from seventy in most states to eighty in Louisiana.[20]

There is an increase in awareness of the importance of fair and workable procedures for the investigation of complaints against judges and for the removal,

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[19] Ibid., p. 164.

[20] Ibid., pp. 166-167.

retirement, or disciplining of unfit members of the judiciary. One of the more successful of these procedures was adopted by California through constitutional amendment in 1960. Many states are adopting or have adopted variations of the California Plan called the Commission Plan.

The Commission Plan is an independent tribunal composed of unpaid lawyers, citizens, and judges, with judges generally in the majority. It has day-to-day authority, responsibility, and means for investigating and hearing complaints or allegations involving judges. The proceedings are confidential, to protect the judge and complainant, until there is an official disciplinary proceeding. The Commission can only recommend to the State Supreme Court where formal public discipline can be imposed; however, at the Commission level the judge may be admonished by letter, may be advised of claimed shortcomings, and possibly may retire voluntarily rather than face charges.[21]

The plan allows for flexibility in order to cope with all types of judicial misconduct and incapacity. The California Commission said of its works:

> The Commission is mindful that it is exercising a significant and sensitive attribute of state sovereignty. By operating carefully and unobtrusively a practical contribution to jurisprudence

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[21] Jack E. Frankel, "Judicial Conduct, Discipline and Removal, and Involuntary Retirement," The Improvement of the Administration of Justice, pp. 55-58.

> is being forged. It has now been demonstrated that an independent commission, possessing the authority to investigate and hold hearings, can act for the maintenance of judicial fitness without infringing on the essential prerogatives of the judicial branch.[22]

The common bases for action in the removal of judges fall into the following areas: (1) physical and mental disabilities, (2) judicial misconduct, (3) excessive use of alcohol, (4) dishonorable personal conduct, (5) misbehavior in the performance of duties, (6) failure to perform duties, (7) activities for profit, and (8) criminal charges and conviction.[23]

The tenure of the judge is as critical as the method by which he is selected. A trial judge is expected to sever his connections with his clients before he takes office. When his term expires, a judge may be in no position to build another law practice. The method of selecting judges goes to the quality of persons who are willing to serve in a judicial capacity. The tenure of judicial office determines the freedom with which a judge exercises detached and independent judgment.

> Knowledge of how to create the kind of work environment that either motivates the judge to

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[22] Jack E. Frankel, "Removal of Judges: California Tackles an Old Problem," American Bar Association Journal, XLIX (1960), 166.

[23] Frankel, The Improvement of the Administration of Justice, pp. 58-60.

> perform or forces him to resign is in its infancy.[24]

Judicial Duties

The duties of the state trial judge for the purpose of this study is divided into the duties of administration and the duties of adjudication; however, it must be pointed out that there are no clear-cut lines between what is purely judicial and what is purely administrative.

Duties of Administration

From an administrative point of view, the judicial system compares to a university in that it is staffed with highly trained individuals who have a great sense and tradition of independence. Historically, the judge has been little concerned with the overall performance and the administrative problems of the system of which he is a part. This attitude seems to be changing, however slowly. Edward McConnell, Administrative Director of the New Jersey Courts, states:

> Substantial overall improvement of the administration and operation of a judicial system . . . can come about if each judge--and judges certainly are the determining factor in the success or failure of any court system, not the supporting staff--develops a real sense of responsibility, not just for

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[24] Friesen, Gallas, and Gallas, Managing the Courts, p. 55.

> his own performance but for the performance of the whole system as well.[25]

In state trial courts, the Administrative Judge or the Assignment Judge is generally charged with the overall operation of the court or courts under his authority. The judge may either be elected or he may be appointed by the Chief Justice of the Supreme Court. One of his most important duties will be the assignment of cases to judges. He is not necessarily looking for an even distribution of cases, but rather he is trying to use the special talents that a judge may have by matching them to the judicial tasks that need to be performed.[26]

The Assignment Judge's duties in New Jersey are representative of other states. His duties in New Jersey include:

> (1) The supervision of all trial judges sitting in the county and of all court clerks and other officers and employees of or serving the trial courts in the county.
> (2) The supervision of the jury commissioners, the selection of all grand and petit jurors, and the organization and operation of the grand jury in the county.
> (3) The supervision and expeditious movement of the civil and criminal trial calendars of the Superior and county courts, and through the judge or presiding judge thereof, of the juvenile and domestic relations court, the county district court and the municipal courts in the county.
> (4) The implementation and enforcement in the county of all administrative rules, policies and

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[25] Edward McConnell, "Court Administration," The Improvement of the Administration of Justice, p. 17.

[26] Ibid., p. 18.

directives of the Supreme Court, the Chief Justice, and the Administrative Director of the courts.

(5) The representation of the judicial branch of government in the county in all matters pertaining to budgets, personnel and facilities of the trial courts in the county.

(6) The performance of such other functions and duties as may be assigned to him by the Chief Justice or by rule of the Supreme Court.[27]

The problem facing the administrative judge is to enlist more support from the other judges to take more responsibility in administrative duties. Perhaps a judge would take a greater share of the responsibility if it were delegated to him.

Duties of Adjudication

Historically, scholars have been trying to describe and define the "duties" of the judge. As early as Socrates, this defining was taking place. The early writers were interested in the qualifications necessary to become a judge. Socrates listed four qualities that a judge must possess: "to hear courteously; to answer wisely; to consider soberly; and to decide impartially."[28] Later there came to be known the eight judicial virtues. These are: (1) the Virtue of Independence, (2) the Virtue of Courtesy and Patience, (3) the Virtue of Dignity, including the Judge's Sense of

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[27] Ibid., p. 19.

[28] Donald Caroll, ed., Handbook for Judges (Chicago: American Judicature Society, 1961), p. 29.

Humor, (4) the Virtue of Openmindedness, (5) the Virtue of Impartiality, (6) the Virtue of Thoroughness and Decisiveness, (7) the Virtue of an Understanding Heart, and (8) the Virtue of Social Consciousness.[29] Even when writers listed the qualifications necessary to become a judge, the underlying factor in the descriptions was the judge's ability to make decisions.

From a judge's viewpoint, he is judged by his peers in terms of his effectiveness as an adjudicative official. The trial judge's basic function is to make decisions within the legal system. As a decision-making and decision-influencing officer of the legal order, he makes final decisions on approximately ninety percent of the cases brought before him.

> . . . at least 90% of even these blue ribbon controversies are determined and controlled, as to practical outcome by rules of law applied and facts "found" at the trial-court stage, as against 10% at most that are controlled in result by what happens to them in the appellate courts. It is in the appellate courts that precedents are forged for the future and statutes given their authoritative interpretations and effect, but, as concerns the ultimate adjudicative fate of litigated controversies, the trial courts outweigh the appellate courts by at least nine to one.[30]

Although the trial judge is a decision-making and decision-influencing officer, Burton Laub maintains that

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[29] Bernard L. Shientag, "The Personality of the Judge," in Handbook for Judges, p. 68.

[30] Harry Jones, "The Trial Judge--Role Analysis and Profile," in The Courts, The Public, and The Law Explosion, p. 131.

he must also be an "active counsellor to the defendant." He argues that the judge's function is changing and that he now plays a dominant role in all trial cases.

> It has been characteristic that economic changes have carried with them changes in the public concept of the role of the trial judge. As various economic eras came and went, the nisi prius no longer occupied his original early American position as a passive observer who only came to life when the time arrived to change the jury; he first became an umpire or moderator in battles of wits between counsels, and from that estate moved to the position of governor of the trial. More recently, in criminal trials at least, trial judges have become active counsellors to, if not counsel for, the defendant. . . . The period when a judge could lead a life of refined indolence has long been passed. He must now become a dominant personality and a factor to be reckoned with in every case. Indeed, . . . he must become the effective flywheel of society, keeping it from racing into suicide.[31]

Even though the role has changed and is changing, the importance of the trial judge within the judicial system is apparent. He is the "cornerstone" of our judicial system. Jones maintains: "The trial judge is the parish priest of our legal order. . . . The trial judge is the key man in our system of adjudication. In the great bulk of litigated cases he is by far the most important and influential participant. . . ."[32] Perhaps Harold Medina

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[31]Burton R. Laub, "The Judge's Role in a Changing Society," Judicature, LIII, No. 4 (November, 1969), 140-141.

[32]Jones, in The Courts, The Public, and The Law Explosion, pp. 125-129.

sums up the "duty" of the trial judge best when he states that he "is to be at all times in control of the trial."[33]

Judicial Communication

The area of judicial communication will be viewed from two perspectives: (1) the role of oral communication and (2) the specific research studies in the field of judicial communication. From these perspectives, the profile of the state trial judge will become more apparent.

Role of Oral Communication

Legal writers have continually made the case that trial judges should strive to be effective communicators. Charles Stafford, in discussing the impression that a judge may leave with a litigant, emphasizes the importance of oral communication. He advises the judge to be concerned with what is being communicated from the judge to the public.

> What you say and do and the dignity with which you treat him will leave an indelible impression upon him, his family, friends, witnesses, and even jurors and spectators. If you multiply this by your annual case load, the impact of your conduct upon the judicial system becomes apparent.[34]

Perhaps Harry Jones, Cardozo Professor of Jurisprudence at the Columbia University School of Law, makes

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[33]Harold Medina, "The Trial Judge's Notes; A Study in Judicial Administration," Cornell Law Quarterly, XLIX (1963), 7.

[34]Charles F. Stafford, "You Create the Judicial Image," Trial Judges Journal, V, No. 2 (April, 1966), 20.

the best statement for the importance of trial judges being effective communicators when he states:

> Top flight trial judges have always been able to establish close working relations with their juries, but this achievement requires that the judge be possessed of unusual talents of communication, talents not widely shared by members of the legal profession. The high art of charging a jury furnishes a good illustration of the point at hand. . . . Sensitivity to jury relations and skills at communication are among the qualities that are most imperative for effective service as a trial judge. It is regrettable that these attributes are taken account of as infrequently as they are in professional and public discussions of the qualifications of the judicial office.[35]

Jury instructions, sentencings, and oral decisions are three areas continually mentioned as being important by writers who discuss the importance of oral communication for trial judges. These three areas are discussed separately in the following pages.

Jury Instructions

One of the areas where the judge needs to demonstrate effective communication is in dealing with the jury. He has the responsibility of educating the jurors, conditioning them to their responsibility, and guiding them in the performance of their duties as jurors. Harold Medina is of the opinion that "the most important function of the trial judge is what the British call the judge's 'summing up,' and

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[35]Jones, in The Courts, The Public, and The Law Explosion, pp. 134-135.

what we Americans call the judge's 'charge' or his instructions to the jury."[36]

Albert Oppido advocates face-to-face oral communication as a solution to the problem of jurors being uncertain as to their duties and obligations.

> To help restore the bewildered jurors' confidence in courts, trial judges must earn the respect of jurors. . . . A partial remedy is to address the jury before opening arguments and after swearing. If the judge explains the jury's duties and outlines the trial procedure, jurors will be better able to perform their task. . . . this writer is aware that handbooks are distributed to jurors to acquaint them with their function. Judge E. Barrett Prettyman of the District Court of Appeals has stated: printed handbooks for jurors given them in advance . . . are no substitute for the live, face-to-face, instruction and explanation from the judge on the bench.[37]

Harry Hannah stresses the same argument.

> The great criticism of the jury system, we believe, arises out of the failure of the trial judge to explain clearly to the jury its duty and obligation. Too often there is a failure to explain to the jurors in simple and clear English the rules of law applicable to the particular case.[38]

Jones makes the strongest argument concerning the importance of oral communication in jury instructions when

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[36]Medina, Cornell Law Quarterly, 8.

[37]Albert A. Oppido, "Orientation of the Jury in Criminal Cases," Trial Judges' Journal, V, No. 4 (October, 1966), 7.

[38]Harry I. Hannah, "Jury Instructions: An Appraisal by a Trial Judge," University of Illinois Law Forum (1963), p. 630.

he asserts that top flight judges have unusual communication skills. He emphatically argues:

> Professional excellence on a trial court of general jurisdiction means at least: 1) wide ranging analytical power comparable to that of the qualified internist in medical practice; 2) mastery or the intellectual capacity to achieve mastery, of the intricacies of legal procedure and evidence; 3) unusual discernment in dealing with facts and weighing conflicting testimony; and 4) unusual skill at communication with jurymen and witnesses.[39]

Writers seem to agree that oral communication is important in the area of jury instructions. The judge must have the ability to explain the instructions to the jury in a manner in which the jury can understand. The legal terms must be made clear to the jury because an error of law can effect an irremediable miscarriage of justice.

Sentencing

Another area where the communication of the judge is of extreme importance is in the sentencing of the defendant. It is not only important what the judge says when sentencing the defendant, but it is also important how he says it. The defendant needs to feel that the judge is sentencing him not out of bitterness toward him, but because of the facts against him. In other words, the defendant needs to feel that he has been treated fairly and impartially. During the sentencing, the judge must be

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[39] Jones, in The Courts, The Public, and The Law Explosion, p. 143.

aware of what he is communicating to the defendant during the sentencing procedure because it will make a lasting impression upon the defendant.

> The judge's attitude and manner at sentencing may be as important as the sentence itself. The effect of even the wisest of sentences can be completely undone if it is not imposed with confidence, dignity, understanding, and impartiality.[40]

Not only does the sentencing procedure leave a lasting impression upon the defendant, but it also may leave a lasting impression upon the observers in the courtroom. Their respect for the judicial process may hinge upon how well the trial judge handles the sentencing of a litigant especially if the litigant is a close friend or a relative. "The impression that prevails in society concerning justice or injustice of our legal system depends almost entirely on the propriety, efficiency, and humaneness of court functioning. . . ."[41]

Oral Decision

The third area discussed in the literature concerning judicial communication is the oral decision. In handing down an oral decision, the judge is relying extensively upon his ability to communicate orally with the litigants.

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[40] Ivan Lee Holt, Jr., "The Judge's Attitude and Manner at Sentencing," Trial Judges' Journal, VI, No. 3 (July, 1967), 7.

[41] Jones, in The Courts, The Public, and The Law Explosion, p. 125.

Many are arguing that the oral decision is a procedure that more judges should consider because it would help to keep their docket more current.

> The oral decision gives the judge a unique opportunity to communicate with the litigants and to explain to them in simple, plain language the reasons for his action. Perhaps he cannot make them happy with it, but he can make them understand it and thus enhance the therapeutic effect of the trial. . . . The wide use of the oral decision has not solved all of my problems. It has helped me to keep my docket current and enabled me to leave even losing litigants with the conviction that their case has been promptly and understandably concluded.[42]

The oral decision could become more popular because it is an effective method for keeping the dockets current. If it is used more extensively in the future, then the oral communication of the trial judges becomes even more important, and judges will need to be more effective communicators in that regard.

Specific Research

Only two studies were found that dealt in any way with the communication of judges. These two studies are reviewed in the following pages.

The first study consisted of two surveys conducted in 1965--one at the 1965 session of the National College of State Trial Judges in Boulder, Colorado, and the other

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[42] Robert O. Lukowsky, "The Case for the Oral Decision," Trial Judges' Journal, IV, No. 1 (January, 1965), 3.

at the annual meeting of the National Conference of State Trial Judges in Miami Beach, Florida. The questionnaire called for two forms of answers to the question, "What qualities best equip a lawyer to become a trial judge?" In the first question, the judges were asked to assume the role of advisors to authorities who desire to show which of the qualities in a list of twenty-three are most important and which least important in choosing a trial judge. The twenty-three attributes had been derived from literature on judicial qualifications and from Maurice Rosenberg's conversations with lawyers and judges and his three years of experience as a member of a judicial selection committee in New York City. The judges were asked to respond to each item as "very important," "slightly important," or as "irrelevant."

The second question followed the list of twenty-three attributes and asked the judges to write in additional "important attributes" for a lawyer under consideration for the trial bench.

Results of the survey indicated that in answer to the first question the newly appointed judges and the veteran judges, with minor exceptions, agreed not only on which qualities were the most and least important, but also on the order of the ranking of the attributes.

The six highest qualities were: (1) moral courage, (2) decisiveness, (3) reputation for fairness and uprightness, (4) patience, (5) good health, physical and mental, and (6) consideration for others. The six lowest ranking qualities were, with one being the lowest: (1) past honorable partisan political activity, (2) higher earnings in practice than as a judge, (3) active in civic and community affairs, (4) experience in supervision of subordinates, (5) well above average law school record, and (6) active in professional associations and work.

In answer to the second question, the leading responses were compassion, patience, humility, integrity, and common sense.[43]

It is important to note that the judges focused upon personal characteristics rather than upon what the person had done. The attributes selected as the top six tended to look at what a person _is_ rather than what he had achieved.

Maurice Rosenberg in discussing the survey stated:

> Although neither group of judges comprise a scientifically drawn sample, there is no reason to doubt that their answers reflect in a general way the views of the more than 3,000 judges who preside over the major state trial courts in this country.[44]

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[43] Maurice Rosenberg, "The Qualities of Justice--Are They Strainable?," _Texas Law Review_, XLIV, No. 6 (June, 1966), 1066-1072.

[44] _Ibid._, p. 1066.

In the second study Robert Carp studied the communication network of trial judges and found: (1) that federal and district judges have ample sources of communication to interact significantly with one another; (2) that these judges use the communication channels almost without exception for intra-circuit communication; and (3) that intra-circuit communication is used as a means to socialize, to discipline, and to provide mutual support for the members of the circuit.[45] These findings supported Carp's hypothesis:

> Variances in the judicial behavior of United States trial judges from circuit to circuit can be largely accounted for because for these federal district judges, the circuit is a semi-closed system, a system within which there is considerable interaction among its members of one system [circuit] and another.[46]

The area of judicial communication is in need of specific research. With only two studies available, and those only indirectly concerned with judicial communication, it seems apparent that Speech Communication scholars should begin work in this area. The area of judicial communication should no longer be neglected.

When the profile of the state trial judge is viewed in totality, it becomes obvious that he is the key person

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[45] Robert A. Carp, "The Scope and Function of Intra-Circuit Judicial Communication: A Case Study of the Eighth Circuit," Law and Society Review, VI, No. 3 (February, 1972), 405-426.

[46] Ibid., p. 422.

within the judicial system. The "action" is at the trial level; therefore, he is the center of the organization.

CHAPTER III

METHODOLOGY

As was stated in Chapter I, the purpose of this study is to prepare a list of critical requirements for the oral communication of state trial judges. In addition to the major purpose of the study, three specific objectives were mentioned. They are:

(a) To identify the general areas of oral communication that the state trial judge utilizes in accomplishing his assigned tasks.

(b) To identify the areas of oral communication in which the state trial judge needs to be effective.

(c) To identify the areas of oral communication in which the state trial judge seems to be ineffective.

This chapter deals with the research technique used to collect the data for the list of critical requirements. Also included is an analysis of the processing of the data once it was gathered.

Background of the Critical Incident Technique

The "Critical Incident Technique" emerged from several studies which were conducted during the early and mid-1940's. These studies were conducted by the Aviation Psychology Program of the United States Army Air Forces.

The problem at that time was to develop a better procedure for the selection of air crews. Flanagan, in his definitive article concerning the critical incident technique, listed several studies which served as the bases for the technique.[1] These studies were designed to find answers to the following questions: (1) What were the reasons for pilots being eliminated from flight school? (2) Why had so many bombing missions failed? (3) What qualities were necessary for leadership in combat? (4) What causes disorientation while flying in combat missions? (5) How could the cockpit of the fighter airplane be improved?[2] In these studies, a systematic method for collecting descriptions of behavior, for analyzing the data, and for formulating the results was used.

In 1947 many of the psychologists who had been in the Aviation Psychology Program, including Flanagan, moved to the newly established nonprofit scientific and educational organization called the American Institute for Research. There the technique was given its present name and formally developed.[3]

In the spring of 1947, two important studies were completed which firmly established the "Critical Incident

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[1]John C. Flanagan, "The Critical Incident Technique," Psychological Bulletin, LI, No. 4 (July, 1954), 328-329.

[2]Ibid.

[3]Ibid., p. 329.

Technique" as a systematic method for collecting descriptions of behavior. In the first study H. O. Preston determined the critical requirements for the work of a United States Air Force Officer. Flanagan states: "In this study, many of the procedural problems were first subjected to systematic tryout and evaluation."[4]

The second study was conducted by Thomas Gordon. He was trying to determine the critical requirements for airline pilots. Various sources were used to collect the critical incidents. The sources included interviews with pilots, accident reports, flight check records, and training records.[5] From the results of the study, it was shown which components of pilot's job are most critical from the standpoint of effectiveness and safety. An objective flight check was formulated from the data, and it was considered to be a reliable procedure for arriving at an overall evaluation of pilots.[6]

As a result of these early studies involving the United States Air Force, the technique developed by Flanagan has been used to analyze various job related problems in many areas. Industry, education, and health and community services have been three areas to use the technique

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[4]Ibid., p. 330. [5]Ibid.

[6]Thomas Gordon, "The Development of a Method of Evaluating Flying Skill," Personnel Psychology, III (1950), 75-82.

extensively. In an unpublished bibliography, Grace Fivars has cited over 600 studies using the "Critical Incident Technique."[7] These studies have established critical requirements for secondary school principals,[8] junior high school principals,[9] private secretaries,[10] junior college business instructors,[11] industrial arts supervisors,[12] nursing instructors,[13] rehabilitation

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[7]Grace Fivars, "The Critical Incident Technique: A Bibliography" (unpublished bibliography: American Institute for Research, 1972).

[8]Ruth D. Bradford, "Critical Requirements of the Secondary-School Principalship Based Upon an Analysis of Critical Incidents Observed and Reported by Superintendents, Principals and Teachers" (unpublished Ed.D. dissertation, University of Arkansas, 1958).

[9]Robert F. Wilkens, "Critical Requirements of Junior High Principals as Determined by an Analysis of Critical Incidents" (unpublished Ed.D. dissertation, Colorado State College, 1968).

[10]Eugene John Kosy, "The Critical Requirements for Private Secretaries Based Upon an Analysis of Critical Incidents" (unpublished Ph.D. dissertation, The University of Wisconsin, 1959).

[11]Eugene Allen Farrar, "Critical Requirements in Inservice Education for Junior College Business Instructors as Determined by Critical Incident Analysis" (unpublished Ed.D. dissertation, University of Southern California, 1962).

[12]John Malmo McRobbie, "Identification of Strengths and Weaknesses of Occupational Tasks Performed by California Supervisors of Industrial Arts, as Determined by Analysis of Critical Incidents" (unpublished Ed.D. dissertation, Colorado State College, 1963).

[13]Virginia Zimmer Barham, "Identifying Effective Behavior of the Nursing Instructor Through Critical Incidents" (unpublished Ed.D. dissertation, University of California, Berkeley, 1963).

counselors,[14] Idaho extension agriculture agents,[15] cooperative extension agents,[16] and industrial foremen.[17]

The critical incident technique has also been used to collect information for the study of teacher-pupil relations,[18] to reveal causal factors in terms of errors and/or unsafe conditions which lead to industrial accidents,[19] and to analyze communication factors which make for success or failure in customer relations.[20]

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[14]Cornelia Cox Lounsbury, "A Study of Critical Requirements for Rehabilitation Counselors in Metropolitan New York" (unpublished Ed.D. dissertation, New York University, 1967).

[15]Fred Ernest Kohl, "A Critical Incident Study of Idaho Extension Agricultural Agents" (unpublished Ph.D. dissertation, The University of Wisconsin, 1968).

[16]Fred J. Peabody, "An Analysis of Critical Incidents for Recently Employed Michigan Cooperative Extension Agents with Implications for Training" (unpublished Ph.D. dissertation, Michigan State University, 1968).

[17]William Tacey, "Critical Requirements for the Oral Communication of Industrial Foremen" (unpublished Ed.D. dissertation, The Pennsylvania State University, 1960).

[18]Robert Duane Peterson, "A Critical Incident Study of Elementary School Teacher-Pupil Relations in Washington State" (unpublished Ed.D. dissertation, University of Washington, 1963).

[19]William Eugene Tarrants, "An Evaluation of the Critical Incident Technique as a Method for Identifying Industrial Accident Causal Factors" (unpublished Ph.D. dissertation, New York University, 1963).

[20]Warren Alan Wandling, "A Critical Incident Study of Communication Factors Which Make for Success or Failure in Personal Selling" (unpublished Master's Thesis, The University of Kansas, 1960).

William Tacey conducted a study which attempted to use the critical incident technique to arrive at critical requirements in oral communication. The study centered around the oral communication of industrial foremen. The critical incidents were secured from members of middle management of three U.S. Steel Corporation Mills. The primary consideration in selecting respondents was that they might have had sufficient opportunity within the previous year to witness foremen at their work, whether in talking to superiors, subordinates or others. From the list of critical incidents, three broad areas of critical requirements were developed along with several sub-areas: (1) communication with foremen's superiors, (2) communication with subordinates, and (3) communication with other foremen.[21]

In the studies using the critical incident technique, three methods for obtaining the incidents were used. The methods were: (1) questionnaires[22,23,24]

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[21]Tacey, 1960.

[22]James William Smith, "Critical Requirements for an Effective State Consultant of Business Education as Determined by Analysis of Critical Incidents" (unpublished Ed.D. dissertation, Colorado State College, 1965).

[23]Maxine Hazel Robbins, "An Analysis of Critical Incidents in Administration Reported as Affecting Professional Actions of Teachers" (unpublished Ed.D. dissertation, Indiana University, 1959).

[24]Barham, 1963.

(2) interviews[25,26] and (3) a combination of both questionnaires and interviews.[27,28]

Critical Incident Technique

The "Critical Incident Technique" is the method selected to obtain the critical requirements for the oral communication of state trial judges. A method was needed which would report direct observations rather than report opinions, hunches, or estimates about the incidents. Flanagan points out that "the essence of this new procedure is to establish the critical requirements of a job or activity through direct observation by participants in . . . the job or activity."[29]

In selecting a technique to obtain a list of critical requirements certain criteria should be considered:

> The defined technique (1) must be specifically applicable . . ., (2) must be capable of being expressed in precise or unambiguous terms, (3) should contain requirements that are genuinely important, (4) must be adequately comprehensive in scope, and (5) must not rely solely on the subjective opinions of those from whom data are sought.[30]

The critical incident technique meets the criteria suggested by Tacey in obtaining a list of critical requirements.

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[25] Kosy, 1959.

[26] Tarrants, 1963.

[27] McRobbie, 1963.

[28] Tacey, 1960.

[29] John C. Flanagan, "Critical Requirements: A New Approach to Employee Evaluation," Personnel Psychology, II (Winter, 1949), 425.

[30] Tacey, 1960, p. 44.

The technique is also designed to study the behavior of the individual. Flanagan states:

> The critical incident technique consists of a set of procedures for collecting direct observations of human behavior in such a way as to facilitate their potential usefulness in solving practical problems and developing broad psychological principles. The critical incident technique outlines procedures for collecting observed incidents having special significance and meeting systematically defined criteria.[31]

Therefore, the purpose of the critical incident technique is to collect representative samples of observed behavior. Flanagan argues that this technique in terms of behavior is "the only source" of data regarding critical requirements for the job.

> It should be emphasized at this point that observations of the behavior of the individual, or of the effectiveness of this behavior in accomplishing the desired results in a satisfactory manner, constitute not just one source of data but the only source of primary data regarding the critical requirements of the job in terms of behavior. Neither outstanding ability nor unsatisfactory ability can exist independently of a series of observed behaviors.[32]

One of the major features of the technique is that it records actual observable events or happenings; it emphasizes the collection of facts as perceived rather than of opinions. Ghisilli and Brown point out the following difference between opinion and fact.

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[31]Flanagan, Psychological Bulletin, 327.

[32]Flanagan, Personnel Psychology, 421.

> The scientist predicates all his judgments and evaluations on fact. A fact is defined broadly as being any occurrence, happening experience, or phenomenon. One of its many important characteristics is that it is impersonal. This means that a fact, although dependent upon human observation, is independent of any particular observer. A fact can safely be used without knowing its discoverer, as contrasted with an opinion, which can be used wisely only when the qualification of the person expressing it are known. Facts are the backbone of the scientific method.[33]

The critical incident technique is not only a scientific method, but it is an instrument which is also systematic.

> . . . differentiation items can be collected and then grouped into classes (representing general aspects) afterwards. This is the case with the critical incident [sic] technique recently developed by Flanagan [The American Institute for Research] . . . it is essentially a qualitative or appraisal technique, and the analysis is something of an accessory element. . . . These incidents are not in themselves an analysis of the traits required of the worker. The analysis of the job comes from the categories which are set up to classify the incidents. If these categories are made with a view to the essential activities of the work to be done (and they are likely to be), then the resulting instrument will be systematic in this respect.[34]

Therefore, the critical incident technique is a method that observes actual behavior in a scientific and systematic manner.

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[33]Edwin E. Ghiselli and Clarence W. Brown, Personnel and Industrial Psychology (New York: McGraw-Hill Book Co., 1955), p. 5.

[34]Carter V. Good and Douglas E. Scates, Methods of Research: Educational, Psychological, Sociological (Appleton-Century-Crofts, 1954), p. 359.

Three advantages of the critical incident technique are mentioned in most of the literature. (1) Only simple types of judgments are required of the observer. (2) Reports from only qualified observers are included. (3) All observations are evaluated in terms of an agreed upon statement of the activity.[35]

(4) Still another advantage of the critical incident technique is its flexibility; by adapting the technique to any specific situation or context observable, behaviors can be collected. It does not consist of a single rigid set of rules governing data collection. Flanagan states:

> . . . it should be thought of as a flexible set of principles which must be modified and adapted to meet the specific situation at hand.[36]

(5) The fifth advantage of the critical incident technique is that it is both a reliable and valid method. Andersson and Nilsson conducted several studies in the reliability and validity of the technique in a Swedish grocery company. The technique was used in analyzing the job of store managers for the company. They concluded:

> The material collected seems to represent very well the behavior units that the method may be expected to provide. After a relatively small number of incidents had been classified, very few new behavior categories needed to be added. . . . According to the results of the studies reported

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[35] Flanagan, Psychological Bulletin, 341.

[36] Ibid., p. 335.

> here on the reliability and validity aspects of the critical incident technique, it would appear justifiable to conclude that information collected by this method is both reliable and valid.[37]

Thomas Gordon sums up the advantages of the "Critical Incident Technique" in the following manner:

> It is common practice in most job analysis approaches to collect long lists of job requirements, after which it is necessary to submit them to experts (usually psychologists, supervisors, top management) for judgment of their relative importance on the job. The critical requirements approach; however yields at the onset only the critical requirements, and it relies more upon the participants on the job for the judgment, of which is critical or upon actual records of situations where behavior has been critical.[38]

The Sample

The sample included 270 state trial judges attending the National College of the State Judiciary at the University of Nevada, Reno, Nevada during the summer of 1972. These judges were attending one of the four-week summer seminar sessions at the college. There were two four-week sessions during the summer with 139 state trial judges attending the first session and 131 attending the second session. Forty-eight of the fifty states were represented by one or more judges at the college during

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[37] Bengt-Erik Andersson and Stig-Göran Nilsson, "Studies in the Reliability and Validity of the Critical Incident Technique," Journal of Applied Psychology, XLVIII, No. 6 (1964), 402.

[38] Thomas Gordon, "The Airline Pilot's Job," Journal of Applied Psychology, XXXIII (1949), 126.

the summer sessions. This sample included all the state trial judges represented at the two four-week summer sessions.

The Questionnaire

A critical incident questionnaire, accompanied by a letter from the Dean of the National College, was given to all the state trial judges who attended the two four-week summer sessions. These questionnaires were placed in the mailbox of each judge the second week of each session. The second week was chosen because it was assumed that the judges were now oriented to school and would be more likely to complete and return the questionnaire. In his letter, the Dean asked that the judges return the completed questionnaire as soon as possible. Each judge was asked to report two effective and two ineffective incidents of oral communication which he participated in or observed during the past year.

A copy of the questionnaire is included on the following pages.

INSTRUCTIONS FOR THE QUESTIONNAIRE

What we want to learn from you in this study are concrete examples of what state trial judges have done while communicating orally. What examples in oral communication were particularly effective or ineffective during the past year?

Following is a list of rules which syould be observed:

1. Please use no actual names.
2. Do not sign the questionnaire.
3. * Describe actual critical incidents.
4. Report only incidents that occurred the past year.
5. Give concrete details.
6. Report at least two examples of effective oral communication incidents and two examples of ineffective oral communication incidents.

*NOTE: A critical incident is defined in the following manner:

> By an incident is meant any observable human activity that is sufficiently complete in itself to permit inferences and predictions to be made about the person performing the act. To be critical, an incident must occur in a situation where the purpose or intent of the act seems fairly clear to the observer and where its consequences are sufficiently definite to leave little doubt concerning its effects.[1]

[1]John C. Flanagan, "Critical Incident Technique," Psychological Bulletin, Vol. 51, No. 4 (July 1954) p. 327.

FIRST EFFECTIVE INCIDENT

The incident concerning oral communication should be outstandingly effective or successful.

Describe exactly what was said on this specific occasion.

Give concrete details

Use the back of the page if additional space is necessary.

1. When and where did the incident occur?

2. Describe the incident in detail.

3. What was there about the oral communication in the incident that made it effective?

FIRST INEFFECTIVE INCIDENT

The incident concerning oral communication should be outstandingly ineffective or unsuccessful.

Describe exactly what was said on this specific occasion.

Give concrete details

Use the back of the page if additional space is necessary.

1. When and where did the incident occur?

2. Describe the incident in detail.

3. What was there about the oral communication in the incident that made it ineffective?

The initial response to the questionnaire was very poor. After both sessions had been completed and after having waited an additional two weeks for the questionnaires to return, a decision was made to write the judges again, urging their cooperation. At the time of the second letter, forty questionnaires had been returned.

The September 20th letter contained another copy of the questionnaire, with a stamped, self-addressed envelope. The response was encouraging, with twenty-four additional questionnaires returned. Sixty-four questionnaires, or 23.5 percent, had now been returned.

Even though the percentage of the return was much better now and even though it compared quite favorably with the percentage of returns found in other studies using the critical incident technique, a decision was made to write one more letter to the judges, asking for their cooperation. In order to take a different approach, the letter of November 21, 1972, was kept light and humorous. The approach of Christmas was mentioned and how a completed questionnaire would be a nice Christmas present. The response was gratifying. Thirty more questionnaires were received for a total of ninety-four or 34.8 percent of the questionnaires returned. These questionnaires provided a total of 268 critical incidents. The ninety-four returned questionnaires provided on the average 2.85

critical incidents per questionnaire. Even though it took a great deal of encouragement, the response was good. One judge wrote, "You are a persistent cuss"; however, he did fill out the questionnaire!

The Interview

Twenty-five judges were interviewed during the summer while at the National College. Thirteen were interviewed the first session and twelve the second session. The interviews were used to supplement the questionnaires. In the interview the judges were asked to report one specific incident of effective and one of ineffective oral communication in which he participated during the last year.

A copy of the interview guide is included on the following page. This guide was used in all twenty-five interviews.

INTERVIEW GUIDE (30 minute interview)

I. Background Information

A. How long were you an attorney before you became a state trial judge?

B. How long have you been a state trial judge?

C. Have you had any formal oral communication training?

1. If yes, what did the training consist of?

2. If yes, has such training been helpful in your present position--how?

3. If not, would such training have been helpful in your present position--how?

II. Experience with Oral Communication

A. Do you consider oral communication more important in the court room than in the judge's chambers?

B. Explain your view concerning the previous question.

C. Describe an effective oral communication incident in which you participated or observed within the last year.

D. Describe an ineffective oral communication incident in which you participated or observed within the last year.

Thirty minutes was the time allotted for each interview. The respondents were given complete leeway in reporting the incidents. Notes were taken during the interview. Immediately after the interview, the notes were transcribed onto 4x6 note cards for future reference. A total of forty-seven critical incidents were derived from the interviews.

The Analysis

From the 94 questionnaires and 25 interviews, 315 usable critical incidents were reported. Even though the number of usable critical incidents was somewhat smaller than was expected, the number seemed sufficient to proceed with the analysis. Flanagan's procedure for determining whether or not additional incidents were needed was applied. His procedure is:

> . . . to keep a running count on the number of new critical behaviors added to the classification system with each additional 100 incidents. For most purposes, it can be considered that adequate coverage has been achieved when the addition of 100 critical incidents to the sample adds only two or three critical behaviors.[39]

Flanagan also argues that as few as 50 to 100 incidents may be sufficient in certain studies. He states: "If the activity or job being defined is relatively simple, it may be satisfactory to collect only 50 to 100 incidents."[40]

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[39] Flanagan, Psychological Bulletin, 343.

[40] Ibid.

In the study concerning the reliability and validity of the critical incident technique, Andersson and Nilsson concluded: "After a relatively small number of incidents had been classified, very few new behavior categories needed to be added."[41] Therefore, there are two reasons why 315 incidents seemed adequate for this study. (1) After the first 200 incidents were classified, few new categories were added. (2) A relatively small part of the judge's total behavior was being studied. This study was concerned with the communicative aspects of the judge's behavior. It did not specifically deal with other areas of his behavior such as his ability to make decisions and his ability as an administrator. In other words, this study was concerned with only one area of the judge's total role as a state trial judge; therefore, fewer incidents were needed for this study.

The same procedure was used in analyzing all data whether it was obtained by interview or questionnaire. Each questionnaire was numbered as it was returned. The critical incidents were circled, and the number of incidents in each questionnaire was placed under the assigned questionnaire number for easy reference.

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[41] Andersson and Nilsson, Journal of Applied Psychology, 402.

Screening the Critical Incidents

Each incident was analyzed in terms of the following criteria: (1) actual behavior was described and reported, (2) the observer must have observed the incident, (3) the observer must have determined if the incident was effective or ineffective, (4) the observer must have reported where the incident took place, (5) the incident must have occurred within the past year, and (6) the details of the incident must have been reported.

Negative action or inaction was counted as behavior of the judge, since the actual behavior was to be described. For example, such incidents as, "The judge failed to define the word 'service' to the jury," were counted as what the judge did.

There were an additional nineteen incidents reported in the questionnaires and three in the interviews which did not meet the prescribed criteria. These incidents, therefore, were not counted in the total number of usable incidents.

The following three examples illustrate why several incidents were not counted.

Example 1

A. When and where did the incident occur?
Courthouse, 1972.

B. Describe the incident in detail.

> I watched two attorneys in action. I thought one attorney had the evidence while the other seemed to be more persuasive. The attorney which seemed to have the weaker evidence seemed to identify with the jury. The jury voted in favor of the one with the weaker evidence--if I had been judging, I would have gone for the other position.

This incident failed to meet two criteria: (1) actual behavior was described and reported and (2) the details of the incident must have been reported. In this instance, the investigator had no way of knowing what made the one attorney more persuasive or how the attorney identified with the jury. The description was general without any specific details with which to show a critical incident.

Example 2

> A. When and where did the incident occur?
> 1972, District Court
>
> B. Describe the incident in detail.
> An associate in this court recently endeavored to remove from his courtroom what he termed "undesirable hippy-type individuals" because of their dress, slanderous oral outbursts, and general insolence and disesteem for the legal foundations of the court. Instead of charging these individuals with contempt of court charges and asking for their removal from the courtroom by the officer of the court, he mistakenly began an oral reprimand quite severe in nature and lengthy in duration. To this, the spectators retaliated with more loud yelling of obscene language and general disruption of court procedures to the extent that it required several uniformed policemen to clear the courtroom.

This incident was rejected for two reasons. It failed to satisfy the criterion (2) that the observer must have observed the incident. Through the wording of the incident it is not clear to the investigator if the judge

observed the incident or not. This incident was also rejected because of criterion (1) that actual behavior was described and reported. The respondent failed to specify what the judge had said in his oral reprimand of the spectators. This incident described a general happening in the courtroom without specifying what was said which triggered the disruption in the courtroom.

Example 3

A. When and where did the incident occur?
Court

B. Describe the incident in detail.
A Circuit Judge who has since retired would not grant a change of judges regarding a criminal trial after a jury was waived by the defendant. It so happened that the defendant's counsel was also counsel for this particular judge in a personal matter. The news media questioned this procedure and perhaps justly so because a judge should not permit himself to be placed in a situation where he could be accused of impropriety, etc. The matter proceeded with a bench trial before this judge. The news media "played the case up" and tried it in the newspapers, etc. The news articles indicated the defendant was guilty without any doubt. There were, of course, oral communications made by the State's Attorney that were likewise derogatory as far as the judge was concerned. This together with the other comments gave so-called credibility to the adverse publicity. The judge, however, took the matter under advisement and finally just before his retirement entered a short docket entry acquitting the defendant. There was much more adverse publicity. The judge at no time made any statement or attempted to clarify his position.

This incident failed to satisfy criterion (5) that the incident must have occurred within the past year. Based upon the incident, the investigator cannot be sure when the

incident occurred. The incident also failed criterion (6) that the details of the incident must have been reported. The respondent did not report what the State's Attorney actually said in his oral communication concerning the conduct of the judge.

These three examples of the critical incidents that were rejected are typical of the twenty-two. Several of the incidents failed to meet more than one of the criteria set forth in determining the acceptability of the incident. All of the incidents that were rejected failed to meet at least one of the criteria.

Abstracting the Behaviors

After having screened the incidents in terms of meeting the prescribed criteria, the usable incidents were re-read for the purpose of abstracting the specific behavior. The interview notes were carefully re-read to be sure that no incidents had been overlooked.

After the data had been carefully studied, the specific behaviors were placed on 4x6 inch note cards. The effective ones were written in black and the ineffective ones were written in red. The purpose of this procedure was to facilitate the handling of the cards during their classification.

Classifying the Behaviors

The behaviors were separated into "effective" and "ineffective" groups. Each group of behaviors was then analyzed to discover the major areas of classification.

The frame of reference used to establish the major areas was one which would assist in identifying the communication behaviors utilized by the state trial judge. The selection of the major areas was oriented toward where the critical incident took place. The major areas were within the courtroom, within the chambers, and with the community. The previously mentioned communication behaviors were then grouped within the appropriate major areas.

The selection of categories under the major areas was oriented toward to whom the communication behavior was directed. The categories were oriented toward the interpersonal relationship of the communicative acts. These categories included the attorneys, the defendants, the jury, the witnesses, and the spectators.

To insure consistency in the classifications, the cards were resorted several times. The cards were left alone for two weeks and then classified again. To insure even more consistency, two readers were asked to place the behaviors in the different classifications. The readers placed the behaviors essentially in the same major areas as did the investigator. In regard to the categories,

one reader was in agreement in 96 percent of the incidents classified. The second reader was in agreement in 93 percent of the incidents classified.

In setting up the areas and categories, the investigator tried to choose an obvious classification system, with as small a degree of arbitrariness and chance as possible. From this classification, the critical requirements were derived.

Chapter IV will present the list of critical requirements obtained through the use of the critical incident technique. Also additional data derived from the questionnaires and interviews will be presented.

CHAPTER IV

RESULTS

List of Critical Requirements

The major purpose of this study was to prepare a list of the critical requirements for the oral communication of state trial judges. As the first step in the preparation of the list of critical requirements, 315 usable critical incidents were collected by means of questionnaires and interviews. After the incidents had been studied carefully, the specific behaviors were abstracted and placed on 4x6 inch note cards. The behaviors were then grouped under "effective" and "ineffective" headings. Each group of behaviors was then analyzed to discover the major areas of classification. Under the major areas the categories were placed, and for each category the classes of activities contained in them were listed. To insure some consistency in the classification, the cards, after two weeks, were mixed and resorted again. Also two readers were asked to place the behaviors within the classification system. There was a high degree of agreement between the two readers and the investigator.

The second step in the preparation of the list of critical requirements was the examination of the behaviors in each class. A general statement which embraced each of

the behaviors in the class was then formulated. The statements varied according to the inter-relationships of the behaviors. These statements are the critical requirements for the oral communication of state trial judges as derived from this research project. Following are listed the seventy-seven critical requirements in this study.

	Effective	Ineffective	Total
Area I. Oral Communication of the State Trial Judge within the Courtroom.	(107)	(116)	(223)
A. Oral Communication with the Attorney or Attorneys.	(12)	(10)	(22)
1. Assures the attorneys that he will not use his position as a power position to get his way.	2	3	5
2. Maintains a sense of humor when attorneys become upset with him.	2	0	2
3. Avoids orally attacking, humiliating, or belittling an attorney in the courtroom.	6	5	11
4. Asks the attorneys to refrain from using easily misunderstood questions--for example, "Is it not true that you did. . . .?"	2	2	4
B. Oral Communication with the Jury.	(13)	(38)	(51)
1. Avoids the temptation of merely reading the instructions to the jury.	0	4	4
2. Avoids rapidly reading the jury instructions.	0	6	6
3. After having read the jury instructions, he explains the instructions in as non-legal language as possible.	2	4	6

	Effective	Ineffective	Total
4. Uses examples that the jury understands.	3	0	3
5. Avoids assuming that the jury understands such words as "party," "service," and "request," and explains the definition that he is using.	2	2	4
6. Avoids using words that are too stylized, too legalistic, too ambiguous, and too long.	1	7	8
7. Closely observes the jury while orally giving the jury instructions so that any questions may be answered.	1	2	3
8. Stresses the concept "beyond a reasonable doubt" to the jury.	0	10	10
9. Calms the jury when an emotional outburst occurs in the courtroom.	2	1	3
10. Assures the jury that he is concerned with their welfare.	2	2	4
C. Oral Communication with the Defendant or Defendants.	(57)	(55)	(112)
1. Assures the defendant that he is interested and cares for his welfare.	3	1	4
2. Impresses upon the defendant the responsibility of probation.	8	1	9

		Effective	Ineffective	Total
3.	Reminds the defendant that the judge is available for counsel.	2	0	2
4.	Establishes rapport with the defendant through various appeals: identifies cultural differences, age, social status, etc.	3	9	12
5.	Isolates factors that will motivate the defendant.	4	5	9
6.	Speaks calmly and slowly with carefully selected words when warning the defendant about any more violations.	6	2	8
7.	Uses facial expression and tone of voice to transmit the idea to the defendant.	3	7	10
8.	Makes careful observations before forming opinions concerning the defendant.	2	2	4
9.	Avoids embarrassing the defendant by having him spell words, define or explain terms, or by asking him his level of education.	2	7	9
10.	Avoids verbally abusing the defendant.	1	5	6
11.	Avoids assuming that the meaning of words is similar between the judge and the defendant.	6	3	9
12.	Avoids emotional responses to a belligerent defendant.	7	3	10

	Effective	Ineffective	Total
13. Listens to the defendant.	4	2	6
14. Willingly admits a mistake if one is made.	2	0	2
15. Asks factual questions that need only short answers.	4	8	12
D. Oral Communication with the Witness or Witnesses.	(5)	(8)	(13)
1. Avoids the temptation to publicly chastise a witness.	1	3	4
2. Recesses court and calmly advises the witness to consult with his attorney in order to avoid contempt of court proceedings.	1	2	3
3. Places the witness at ease while on witness stand.	0	2	2
4. In questioning the witness, uses short, direct questions.	3	1	4
E. Oral Communication with the Spectators.	(20)	(5)	(25)
1. Explains the reasons for his decision of change of venue.	6	1	7
2. Explains reasons for sentencing and probation.	3	0	3

	Effective	Ineffective	Total
3. Recesses trial and calmly states that if anyone found dressed improperly when the trial resumes will be removed from the courtroom--allows the offender to leave without embarrassment.	2	0	2
4. Firmly but pleasantly discusses the rules of the courtroom.	2	1	3
5. Avoids reprimanding and embarrassing spectators in the courtroom who seem to have a different life style.	4	1	5
6. Avoids using abusive language in retaliation for abusive language.	3	2	5
Area II. Oral Communication of the State Trial Judge within the Judge's Chambers.	(36)	(24)	(60)
A. Oral Communication with the Attorney or Attorneys.	(10)	(8)	(18)
1. Discusses with the attorneys his thoughts and opinions on how he runs his court in order to insure a more smoothly run trial.	3	0	3
2. Discusses the approach each attorney will take during the trial.	1	1	2
3. Instructs the attorneys to <u>listen</u> to the other's point of view.	2	0	2

	Effective	Ineffective	Total
4. Suggests that the attorneys work out their disagreement over the point of law rather than the judge arbitrarily making the decision.	1	2	3
5. Advises the attorneys when necessary that their oral attacks upon the witness are ineffective.	1	3	4
6. Discusses with the attorneys if the charge to the jury is acceptable to both parties.	1	1	2
7. Discusses with the attorneys his views concerning plea bargaining.	1	1	2
B. Oral Communication with Prospective Jurors and Selected Jury.	(19)	(2)	(21)
1. Discusses with prospective jurors their role and importance in the judicial system.	2	0	2
2. Explains to prospective jurors the basic nature of the case.	3	0	3
3. After a case has been settled without going to trial, the judge speaks to prospective jurors and explains to them that their time was not wasted because their mere presence helps to settle cases.	2	0	2
4. Even though the new jury has been given handbooks to read, the judge discusses with them their duties and responsibilities.	3	0	3

	Effective	Ineffective	Total
5. Encourages the jurors to ask him questions that he perhaps has not answered.	1	1	2
6. Explains the differences between civil and criminal cases.	2	0	2
7. Assures them that he will look after their welfare.	1	0	1
8. Sets forth in skeleton form what the attorneys for the respective parties are going to present and in what order they are going to present their proofs to the jury.	2	0	2
9. In order to give the jury an appreciation for the court, explains to them the volume of business that the court has.	1	0	1
10. Uses as little legal jargon as possible when talking to the jury.	2	1	3
C. Oral Communication with the Defendant or Defendants.	(4)	(5)	(9)
1. Counsels with those that seem willing to listen.	1	2	3
2. Serves as peacemaker in marital problems.	2	0	2
3. Shows a sense of concern in "father-son," "father-daughter" talks with young defendants.	1	1	2

	Effective	Ineffective	Total
4. Assures the defendant that he is willing to listen to his problems.	0	2	2
D. Oral Communication with the Press.	(3)	(9)	(12)
1. Explains to the press that the jury will not be sequestered during a particular trial.	1	2	3
2. Discusses with the press and mutually decides that the press will not publish anything that occurs out of the presence of the jury.	0	2	2
3. Explains to the press the guidelines for the case.	1	1	2
4. Avoids the temptation of arbitrarily making decisions for the press.	0	1	1
5. Discusses with the press the duties of his office and how cooperation is needed.	1	1	2
6. In cases of strained relationships between press and court, initiates the action to solve the problem by calling a meeting between the two groups.	0	2	2
Area III. Oral Communication of the State Trial Judge within the Community.	(32)	(0)	(32)
A. Oral Communication with Service Organizations and Service Clubs.	(19)	(0)	(19)

	Effective	Ineffective	Total
1. Keeps the prepared part of the speech short and to the point.	6	0	6
2. Casts the speech into "You be the judge" style.	3	0	3
3. Uses examples to make his point that much of the criticism of a judge is unfounded.	5	0	5
4. Outlines procedures and guidelines for sentencing--gives fictional case and has the audience do the sentencing--then gives his own sentence and discusses the disagreements between his decision and the decisions of members of the audience--many times the audience is more lenient than the judge--discusses this problem also.	3	0	3
5. Identifies with the audience through the use of age and experience.	2	0	2
B. Oral Communication with High School and College Students.	(13)	0	(13)
1. Identifies with the audience through and honest and candid approach.	2	0	2
2. Quickly opens the format for questions from the audience--audience participation holds the interest of the group.	3	0	3

	Effective	Ineffective	Total
3. By answering questions, shows his own humanness in trying to solve his own problems.	1	0	1
4. Relates situations that the group can identify with.	2	0	2
5. Uses language understandable to the audience.	3	0	3
6. Maintains a sense of dignity without seeming aloof.	2	0	2

Additional Data Derived from the Questionnaires and Interviews

The additional data that was derived from the questionnaires and interviews are divided into the following three areas: (1) the frequency of the critical incidents within the classification system, (2) the frequency as to who was the source or who initiated the critical incidents, and (3) the supplemental data gathered through the interviews.

Frequency of the Critical Incidents

There was a sizeable difference pertaining to the frequency of reported incidents which were classified within the major areas. Slightly over two-thirds of the total incidents reported fell within the major area of oral communication within the courtroom. This major area accounted for 223 of the incidents or 71 percent of the total incidents compared to 60 incidents or 19 percent within the major area of the judge's chambers and 32 incidents or 10 percent within the major area of communication with the community.

Among the eleven categories, the greatest number of incidents reported were the communication incidents with the defendants within the courtroom. Of the incidents reported, 112 or 50 percent concerned communication with the defendant. The second highest number of incidents

reported were with the jury. This category comprised 51 incidents or 23 percent of the total within the major area of the courtroom.

The state trial judges reported more effective (175) incidents than ineffective (140) incidents; however, in the major area of the courtroom more ineffective than effective incidents were reported. One hundred and sixteen ineffective incidents or 52 percent compared to 107 effective incidents or 48 percent were given. This was due mainly because of the category dealing with the jury where 38 ineffective incidents or 74 percent compared to 13 effective incidents or 26 percent were reported. The other two major areas were comprised of more effective than ineffective incidents. (See the major area of communication with the community where no ineffective incidents were reported.)

Tables 1-4 report the frequency of the incidents within the three major areas and eleven categories.

TABLE 1

CRITICAL INCIDENT DATA FOR STATE TRIAL JUDGE'S ORAL COMMUNICATION WITHIN THE MAJOR AREAS AND FOR THE TOTAL STUDY

Major Areas	Number of Incidents	Percent of Total Incidents	Incidents by Type		Percent of Incidents by Type	
			Effective	Ineffective	Effective	Ineffective
Communication within the Courtroom	223	71	107	116	48	52
Communication within the Chambers	60	19	36	24	60	40
Communication with the Community	32	10	32	0	100	0
Total Study	315	100	175	140	56	44

Note: Percentage figures have been rounded to the nearest whole number.

TABLE 2

CRITICAL INCIDENT DATA FOR STATE TRIAL JUDGE'S ORAL COMMUNICATION WITHIN THE COURTROOM

Categories	Number of Incidents	Percent of Major Area	Incidents by Type		Percent of Incidents by Type	
			Effective	Ineffective	Effective	Ineffective
With the Attorney(s)	22	10	12	10	55	45
With the Jury	51	23	13	38	26	74
With the Defendant(s)	112	50	57	55	51	49
With the Witness(es)	13	6	5	8	38	62
With the Spectators	25	11	20	5	80	20
Major Area Total	223	100	107	116	48	52

Note: Percentage figures have been rounded to the nearest whole number.

TABLE 3

CRITICAL INCIDENT DATA FOR STATE TRIAL JUDGE'S ORAL COMMUNICATION WITHIN THE JUDGE'S CHAMBERS

Categories	Number of Incidents	Percent of Major Area	Incidents by Type		Percent of Incidents by Type	
			Effective	Ineffective	Effective	Ineffective
With the Attorney(s)	18	30	10	8	56	44
With Prospective Jurors or Selected Jury	21	35	19	2	90	10
With the Defendant(s)	9	15	4	5	44	56
With the Press	12	20	3	9	25	75
Major Area Total	60	100	36	24	60	40

Note: Percentage figures have been rounded to the nearest whole number.

TABLE 4

CRITICAL INCIDENT DATA FOR STATE TRIAL JUDGE'S ORAL COMMUNICATION WITH THE COMMUNITY

Categories	Number of Incidents	Percent of Major Area	Incidents by Type		Percent of Incidents by Type	
			Effective	Ineffective	Effective	Ineffective
With Service Organizations and Service Clubs	19	59	19	0	100	0
With High School and College Students	13	41	13	0	100	0
Major Area Total	32	100	32	0	100	0

Note: Percentage figures have been rounded to the nearest whole number.

Source of the Critical Incident

Because of the nature of the questionnaires and interviews, each respondent had the opportunity of providing an equal number of effective and ineffective critical incidents. Each respondent was also given the opportunity to report incidents in which he participated or observed. In reading the data, the investigator was able to determine if the judge was the source of the critical incident. In other words, it could be determined who initiated the critical incidents.

The incidents can be placed in a 2x2 table with the following categories: (1) the judge as the source of effective incidents, (2) the judge as the source of ineffective incidents, (3) someone other than the judge as the source of effective incidents, and (4) someone other than the judge as the source of the ineffective incidents. Table 5 more clearly presents the data.

The investigator was interested to see if the difference in the number of incidents in each category was significant. The X^2 was chosen as the test for analyzing the data. Siegel states:

> Frequently research is undertaken in which the researcher is interested in the number of subjects, objects, or responses which fall in various categories. . . .
>
> The X^2 test is suitable for analyzing data like this. The number of categories may be two or more. The technique is of the goodness-of-fit type in that it may be used to test whether a significant

TABLE 5

CRITICAL INCIDENT DATA FOR STATE TRIAL JUDGE'S ORAL COMMUNICATION WHEN THE JUDGE OR OTHERS ARE THE SOURCE OF THE CRITICAL INCIDENT

	Source		
	Judge	Others	Total
Effective Incidents	161	14	175
Ineffective Incidents	98	42	140
Total	259	56	315

difference exists between an observed number of objects or responses falling in each category and an expected number based on the null hypothesis.[1]

The X^2 tests whether the observed frequencies are sufficiently close to the expected ones to be likely to have occurred under the null hypothesis. Using the null hypothesis, it can be determined if the difference in the number of incidents which fall in each category is significant in this study.

Stating the null hypothesis: H_o: there is no difference in the expected number of incidents in each category, and any observed differences are merely chance variations to be expected in a random sample. Table 6 gives the results of the X^2 test.

The null hypothesis was rejected at the .001 level in all areas but one. The null hypothesis was rejected at the .05 level in the area which reported the difference between the total number of effective and ineffective incidents. The questionnaire was structured so that a judge could report two effective and two ineffective incidents.

From the data several observations may be noted. (1) The judge focused upon himself as the source of most critical incidents involving oral communication. (2) Of the effective incidents reported, he viewed himself as

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[1]Sidney Siegel, Nonparametric Statistics for the Behavioral Sciences (New York: McGraw-Hill Book Co., Inc., 1956), pp. 44-45.

TABLE 6

SUMMARY OF THE RESULTS USING THE X^2 TECHNIQUE

Difference	X^2 score	Significant at the .05	.02	.01	.001
Between total effective and ineffective incidents reported.	3.88	x			
Between total "judge as source" and "other as source" incidents reported.	130.82				x
Between effective incidents reported as to "judge as source" or "other as source."	123.48				x
Between ineffective incidents reported as to "judge as source" or "other as source."	22.40				x
Between effective and ineffective incidents when the "judge" is the source.	15.32				x
Between effective and ineffective incidents when "other" is the source	14.00				x

the source in 161 effective incidents compared to 14 effective incidents reported when he was not the source. (3) Of the total incidents reported involving someone else as the source of the incident, the judge perceived more (46) of those incidents as being ineffective compared to 14 effective incidents. In other words, when he was the source of the incident, he tended to view it as effective; when someone else was the source of the incident, he tended to view it as ineffective.

Supplemental Data Gathered Through the Interview

As a supplement to the questionnaire, twenty-five judges were interviewed during the summer sessions. Thirteen were interviewed the first session and twelve the second session. Each interview was for a period of thirty minutes. Following is a summary of the answers received from the interviews.

A. How long were you an attorney before you became a state trial judge?

The years that the judge had been an attorney varied considerably, from ten to twenty-seven years. The length of time could be divided into the following three categories:

20 years and over	-	3 judges
15 to 20 years	-	8 judges
10 to 15 years	-	14 judges

B. How long have you been a state trial judge?

Seventeen judges had served under ten years and eight judges had served over ten years. One judge had been on the bench only four months while the longest time on the bench was sixteen years. The National College has no restriction as to when a judge should attend the summer session. However, the policy is to encourage those judges with limited judicial experience to attend, because several of the courses are designed for the inexperienced trial judge.

C. Have you had any formal oral communication training?

Eighteen judges said that they had had formal training in oral communication. The formal training varied from a high school public speaking course to one individual who had debated in both high school and college and had also taken several public speaking courses in college. For the most part, the training had been limited to a specific course in either high school or college.

The seven judges who had no formal training did point out that they had been active in areas while in school which required them to speak to groups. This activity varied from speaking in front of class, oral reports, to speaking in front of a large group while running for an office in student government.

Those who had had formal training were quite positive in their view that the training had been helpful to them relative to their present position. Those who had no formal training were of the opinion that such training would have been useful.

D. Do you consider oral communication more important in the courtroom than in the judge's chambers?

All of the judges considered oral communication very important in both areas and several were hesitant to say which was more important. The easiest answer for them was to maintain that the two areas were equally important. However, when pressed, thirteen of the seventeen judges who had served on the bench under ten years considered the courtroom more important. Seven of the eight judges who had served over ten years considered the judge's chambers more important. There were two factors responsible for the disagreement: (1) The judges who thought the oral communication in the courtroom was more important stressed the point that here the judge is not only being viewed by the litigants in the case, but also by the public. What he says and does in the courtroom affects the image of the judicial system. This image surrounding the courtroom was the major reason given for choosing the courtroom. (2) The judge who has served longer was more concerned with the practical work that is done in the chambers. These judges

also seemed to have more administrative responsibility. This included being the head of several judges in the district. These judges made the point that many cases will not come to trial if the proper work is done in the chambers. It is interesting to note that even though several judges interviewed considered the judge's chambers more important, 71 percent of the total critical incidents reported in this study took place within the courtroom.

The apparent implications and conclusions that can be drawn from the results of this study will be presented in Chapter V.

CHAPTER V

SUMMARY AND CONCLUSIONS

Summary

In this study the critical incident technique was used to compile a list of critical requirements for the oral communication of state trial judges. The critical incident technique was selected because the essence of the technique is to "establish the critical requirements of a job or activity through direct observation. . . ."[1]

The research was conducted during the summer of 1972 at the National College of the State Trial Judiciary located on the campus of the University of Nevada, Reno, Nevada. A critical incident questionnaire was given to all the state trial judges (270) who attended the two basic four-week programs offered for the state trial judges by the National College. In addition, twenty-five judges were interviewed during the summer. The interviews were used to supplement the questionnaires. Ninety-four questionnaires were returned and with the twenty-five interviews a total of three hundred fifteen usable critical incidents were collected. Two hundred sixty-eight critical incidents were extracted from the questionnaires and

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[1]John C. Flanagan, "Critical Requirements: A New Approach to Employee Evaluation," Personnel Psychology, II (Winter, 1949), 425.

an additional forty-seven incidents were taken from the interviews.

The incidents were classified into three major areas and into eleven categories. From this classification, a list of critical requirements for the oral communication of state trial judges was formulated. The list contains seventy-seven critical requirements.

The list of critical requirements was classified under three general areas: (1) oral communication within the courtroom, (2) oral communication within the judge's chambers, and (3) oral communication with the community. The categories under these major areas included the people that the judge must communicate with when in the courtroom, the chambers, or the community. These people included the attorneys, the jurors, the defendants, the witnesses, the spectators, and the press.

The list of critical requirements, which was developed from factual reports of on-the-job communication behavior, provides a comprehensive identification of the oral communication of the state trial judge. The classification system denotes where the communication takes place and with whom the state trial judge communicates within that context. In positive terms, the critical requirements suggest ways for the state trial judge to become more effective in his oral communication within a given situation.

Conclusions

A general conclusion is that maintaining effective oral communication within the courtroom, within the judge's chambers, and with the community is a major concern of the state trial judge. The results of the study suggest six basic conclusions relating to the oral communication of state trial judges.

1. The oral communication of the state trial judge within the courtroom is functionally adequate, but operationally impeded by ineffective communication behaviors between judge and defendants, judge and jury, and judge and witnesses.

In order to maintain effective oral communication within the courtroom the judge is concerned with the following people: the attorneys representing both plaintiff and defendant; the jury, in cases of jury trials; the defendant or defendants; the witness or witnesses; and the spectators. Seventy-one percent of all the critical incidents reported were within the major area of the courtroom; however, of these incidents, only forty-eight percent were reported as effective.

There are three problem areas involving the oral communication of the state trial judge within the courtroom. They are:

(1) The effectiveness of oral communication is hampered by ineffective communication behaviors in dealing

with the defendant or defendants. One hundred twelve or fifty percent of all critical incidents reported in the major area of the courtroom dealt with the judge's ability to communicate with the defendant. Forty-nine percent of the incidents in this category were reported as ineffective. Many of the ineffective incidents dealt with the inability of the judge to establish some sort of rapport with the younger defendants. One judge asked the question, "How do I reach these young people?" Hopefully, the critical requirements suggest ways of reaching all defendants regardless of age, sex, or ethnic background.

(2) The effectiveness of oral communication is hindered by ineffective communication behaviors associated with the jury. Of the fifty-one incidents reported, thirty-eight incidents or seventy-four percent were deemed ineffective. A majority of these ineffective incidents centered around the jury instructions. As pointed out in the list of critical requirements, the judge cannot assume that he is being understood when "reading" the instructions to the jury. This is an area in which the state trial judge apparently must become more aware of ways to help the jury better understand the instructions. This study supports the point, as expressed in the literature, that the instructions to the jury must be carefully presented to help assure more effective understanding of the instructions.

(3) The effectiveness of oral communication is hampered by ineffective communication behaviors associated with the witness or witnesses. Only six percent of the total incidents reported in the major area dealt with this category; however, of those incidents reported sixty-two percent were deemed as ineffective. A majority of the ineffective incidents reported dealt with the judge's inability to gain the confidence of the witness. The judge is concerned with the problem of trying to project an image of helpfulness to the witness and apparently feels the need to become more assuring in this relationship.

The state trial judge must focus more specifically upon these three problem areas within the courtroom for more effective oral communication. It would seem that because of the frequency of the incidents reported, the judge is aware of the importance of effective oral communication within the courtroom.

2. <u>The oral communication of the state trial judge within the judge's chambers is functionally adequate, but operationally hampered by ineffective communication behaviors between judge and press and judge and defendant.</u>

In order to maintain effective oral communication within the judge's chambers, the judge is concerned with the following groups of people: attorney or attorneys; prospective jurors and selected jury; defendant or

defendants; and the press. Sixty incidents or nineteen percent of the total incidents reported were grouped under this major area. Of these incidents, sixty percent were reported as effective. This figure may be somewhat misleading because in two of the four categories more ineffective than effective incidents were reported.

(1) The press seems to be the major problem area within the judge's chambers. Twelve or twenty percent of the incidents within the major area fell within this category. Seventy-five percent of these incidents were ineffective. The underlying problem in regard to press relations seems to be the failure of the judge to explain his reasons for handling a case a certain way. The critical requirements indicate that the state trial judge must assume an open approach when communicating to the press. The press's impression of the judge is sometimes transferred to the public through various communication media; therefore, the judge must be specifically concerned with his ability to communicate effectively with the press.

(2) The effectiveness of oral communication within the judge's chambers is hampered by ineffectively dealing with the defendants. Only nine incidents were reported in regard to the defendants within the judge's chambers, and of those nine incidents, five were reported ineffective. The state trial judge must give the impression that he is

willing to listen and to counsel the defendants that he communicates with within the chambers.

In the category dealing with prospective jurors or selected jury, twenty-one, or thirty-five percent, of the incidents within the major area fell within this category. Nineteen, or ninety percent, of these incidents were reported as effective. This category is noted because in the major area of the courtroom the judge when communicating to the jury reported more ineffective than effective incidents. In analyzing the differences between effective and ineffective incidents as reported in the two categories involving the same group of people, the courtroom may be the influencing factor. The idea that "communication is contextual" seems apparent within these two categories.

3. <u>The oral communication of the state trial judge with the community is functionally and operationally effective</u>.

In order to maintain effective oral communication with the community, the critical incidents reported centered around speeches given to two groups: service organizations or service clubs and schools (high school and college). The questionnaires, in which critical incidents concerning speeches to the community were reported, were generally prefaced by the respondent with the comment that more judges

should be speaking to the community regarding the judicial process and the judicial system. Thirty-two incidents or ten percent of the total incidents reported were grouped in this major area.

It is important to note that no ineffective incidents were reported in this major area. All thirty-two incidents were reported as effective. Perhaps this situation can be partially explained by the fact that the judges are all practicing attorneys and as such feel that their public communication is effective. Whatever the reason or reasons may be, the judges who reported critical incidents in this area were of the opinion that they had communicated effectively to the public. The oral communication within this major area is effective as perceived by the state trial judges.

4. As the source of the critical incident involving oral communication, the state trial judge perceives himself as being basically an effective communicator, and he perceives others as being ineffective communicators.

Of the 259 critical incidents involving the judge as the source, he reported 161 effective incidents or 62 percent of the incidents reported were effective when the judge initiated the incident. Of the fifty-six critical incidents involving someone other than the judge as the source, he reported fourteen effective incidents or

twenty-five percent of the incidents reported were effective when someone else was the source of the incident. Therefore, the judge perceived himself effective in sixty-two percent of the incidents, and others as effective in twenty-five percent of the incidents.

5. The oral communication of the state trial judge focuses upon the judge in his duties of adjudication.

In Chapter II the duties of the state trial judge were divided into those involving administration and those involving adjudication. It was pointed out that judges seem little concerned with the problems of administration. This study tends to support that view. The critical incidents center around the judge as an adjudicator. The incidents reported deal with problems within the courtroom and chambers. There were no incidents reported that dealt with the judge giving instructions to his secretary or the judge receiving instructions from the assignment judge. It would seem that judges reported critical incidents that involved the area of adjudication rather than the area of administration. The statement that the state trial judge is evaluated by his peers in terms of his effectiveness as an adjudicative official seems to be supported by this study because the critical incidents fell within the adjudicative area.

6. There are important communication factors which are interwoven throughout the critical requirements for the oral communication of state trial judges.

In analyzing the critical requirements for the oral communication of state trial judges, it becomes apparent that there are several communication factors that are repeated throughout the various categories. These "common threads" are discussed extensively within the following paragraphs. They are source credibility and message construction.

Source Credibility

The results of the study indicate that the judge is concerned with the impression that he is making on the receiver. The critical requirements within the three major areas focus upon such factors as establishing rapport with the receiver, giving assurance to the receiver, and discussing the receiver's problems. In other words, the judge seems unaware of the importance of the receiver in the communicative process.

Wenburg and Wilmot define source credibility as "the degree of believability or acceptability a receiver gives to a source."[2] The term corresponds roughly to the

[2]John R. Wenburg and William W. Wilmot, The Personal Communication Process (New York: John Wiley and Sons, Inc., 1973), p. 140.

image or the impression that a person holds toward a particular source. The source may be perceived to have high, low, good, or bad credibility. Mortensen states:

> Moreover, the impression is largely evaluative and general. . . . the scientific meaning of the term is closely tied to what persons perceive to be the characteristics of a source. Ordinarily, there is no one-to-one relationship between actual and perceived source characteristics.[3]

Aristotle referred to source credibility as the "ethos" of a person, which consisted of character, sagacity (intelligence), and good will.

From the many studies which have attempted to isolate credibility factors, two factors have emerged which seem to operate across many situations, many speakers, and many audiences. Mortensen refers to these two factors as "authoritativeness and trustworthiness."[4]

Authoritativeness

This credibility dimension is defined as one who is perceived as "reliable, informed, qualified, intelligent, valuable, and expert."[5] The critical requirements reflect this credibility factor. Whether the judge was communicating to the individuals in the courtroom, in the

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[3]C. David Mortensen, Communication: The Study of Human Interaction (St. Louis: McGraw-Hill Book Co., 1972), p. 143.

[4]Ibid., pp. 143-145.

[5]Ibid., p. 145.

chambers, or in the community, he was concerned with how the receiver perceived his authoritativeness. For example, in communicating with the attorneys in the courtroom, he "assures the attorney that he will not use his position as a power position in order to get his way," or when communicating to the jury in the chambers, he "explains the differences between civil and criminal cases."

Trustworthiness

This credibility dimension is defined as one who is perceived as "honest, friendly, pleasant, and selfless."[6] This credibility factor is also demonstrated throughout the critical requirements. The judge "assures" the defendant, the witness, the spectators, the press and the jury that he is concerned with their welfare. The receiver of his communicative act hopefully perceives him as a pleasant and honest man. For example, in speaking to the witness in the courtroom, he "places the witness at ease while on the witness stand," or in communicating with the press in the chambers, he "discusses with the press the duties of his office and how cooperation is needed." Many of the critical incidents reported reflected the judge's concern with the impression that he leaves on the receiver. His concern for authoritativeness and trustworthiness are reflected in the critical requirements.

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[6] Ibid.

Even though the judge's concern in source credibility is apparent, it depends upon the perception of the receiver.

Source credibility is dynamic, not a static, notion.

> It is subject to constant reevaluation and change. In fact, it changes from receiver to receiver, from time to time, from topic to topic, and from setting to setting.[7]

Message Construction

The source of the verbal message must construct that message. Mortensen refers to this as "verbal interaction."[8] Berlo expresses it as a determinant of effect.[9]

For the most part, speech communication scholars have focused upon the verbal message. According to Wenburg and Wilmot the message can be examined in at least four ways.

> Presently four major message elements have received extensive experimentation: (1) adaptation (the thing a source does in a message that makes the receivers believe the source is referring directly to them); (2) position (the side a source takes on a given issue); (3) types of appeals (the elements a source puts in a message to convince his receivers that they should do what he says); (4) organization

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[7]Wenburg and Wilmot, The Personal Communication Process, pp. 140-14.

[8]Mortensen, Communication: The Study of Human Interaction, p. 173.

[9]David K. Berlo, The Process of Communication (New York: Holt, Rinehart, and Winston, 1960), pp. 40-71.

> (the pattern of arrangement a source uses to make his message understandable and acceptable).[10]

In analyzing the critical requirements, at least two of the major message elements in message construction are found throughout the categories. The two are adaptation and types of appeal.

Adaptation

In the critical requirements, the adaptation as to the choice of language, the tone of the speech, and the type of appeal was subject to the receiver, be the receiver a defendant, the jury, or a high school class. For example, the judge in communicating with the jury, closely observes the jury while orally giving the jury instructions so that any questions may be answered," or in communication to a high school or college group, he "quickly opens the format for questions from the audience--audience participation holds the interest of the group."

Types of appeal

Whatever the type of appeal that is used (emotional, ethical, or logical in Aristotle's terms), it is unreasonable to expect uniform effects of variously labeled appeals.

> Verbal appeals differ in degree and intensity as well as in kind: Some messages arouse a strong sense of guilt for example, while others prompt only a twinge of remorse or misgiving. Indeed, it is as

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[10] Wenburg and Wilmot, p. 157.

> much the range as it is the kind of appeals that makes the possible combinations virtually limitless.[11]

In the critical requirements, various appeals are used including the appeal to fear, appeal to age, appeal to social status, appeal to justness and honestness, appeal to one's own humanness. These appeals are found throughout the critical requirements.

According to Wenburg and Wilmot, there are other message variables besides the four that were mentioned earlier in this paper.[12] One of the variables is the "use of appropriate language." In the critical requirements, the language of the judge is continually mentioned whether to the defendant, the witness, or the jury. The receiver must understand the language being used if communication is to be effective. For example, in communication to the jury, the judge "avoids assuming that the jury understands such words as party, service, and request, and explains the definition that he is using," or in speaking to the defendant he "avoids assuming that the meaning of words are similar."

In the critical requirements two "important constituent elements" are apparent. The third element is the receiver. Since the critical requirements were derived

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[11] Mortensen, p. 174.

[12] Wenburg and Wilmot, pp. 168-169.

from critical incidents as reported by the judges, the third communication dimension is not as apparent in the critical requirements, simply because most of the incidents reported the judge as the source of the communicative act rather than as the receiver of the act.

Applications of the Findings

The present study provides a basis for analysis of the literature concerning the oral communication of judges. The findings of this study, when applied to the literature concerning judicial communication, support two of the areas as being important in the oral communication of judges. The two areas supported are jury instructions and sentencing. The third area of communication discussed in the literature, namely, the oral decision, is not supported in the findings in this study as being important.

The literature seemed to express the idea that the oral decision was being used to help keep the dockets current and was being used more extensively each year; however, in this study there were no critical incidents reported concerning the oral decision. There may be two reasons for this: (1) Judges are not using the oral decision as extensively as the literature suggests. Perhaps the oral decision is a personal bias of a few people who are trying to encourage the judge to use it and are overstating the popularity of the procedure. (2) Judges are

using the oral decision when cases are relatively unimportant and, therefore, they did not relate any critical incidents to the procedure.

This study may serve as an impetus toward the use of performance standards for judges. The findings could be used to develop specific items for proficiency testing and evaluation of judges. Actual incidents could be incorporated into performance tests in order to evaluate the ability of the judge to respond effectively in a given situation. This study has identified some of the "little differences that count" in the oral communication of state trial judges.

The findings could be used in communication seminars for judges. It would provide useful data for the instructors in such courses because the data could be used for discussion purposes centering around the communication behaviors that were found to be effective for judges in dealing with different situations. The data could be used for identifying various elements relating to the oral communication of judges. One specific finding which seems of particular importance to a communication seminar for judges is the area of public communication. As was pointed out previously, no ineffective incidents were reported in this area.

This study suggests that the critical incident technique is a valid one to use for the purpose of obtaining

critical requirements in oral communication. It can be assumed that fewer incidents may be reported and still a reliable study could be made. Because of this, the technique could be used effectively when only a limited amount of effort could be expended.

From the additional data derived in this study, the technique could be expanded and used for other purposes as well. For example, the critical incident technique could be used to explore the individual's perception of himself as to who initiates most of the critical incidents.

It would seem that other fields could find the method used in obtaining the critical requirements valuable to them. It would seem that other fields (business or otherwise) would be interested in the oral communication of their employees and that the critical incident technique is an effective way to obtain this data.

Suggestions for Further Research

The following suggestions, using the critical incident technique, are offered for further research:

(1) Critical requirements for the oral communication of judges with limited jurisdiction could be obtained.

(2) A comparison study between the appellate judges, trial judges, and judges of limited jurisdiction concerning oral communication would be valuable.

(3) A study in which the attorneys observe the judges and report the critical incidents seems worthwhile. The study would serve as a comparison to this study. Is there a difference when the observer and the participant in the incident are not the same person?

(4) It seems important to determine if the situation is the reason for the judge to view himself as the source of critical incidents, or is it the personality of the individual who becomes a judge that causes him to view himself as the initiator of most of the effective critical incidents.

(5) By using the format of this study for research in similar organizations, the findings could be tested, compared, and contrasted.

The area of judicial communication is in need of substantially more research. This study only provides an opening to that area.

APPENDIX

APPENDIX A

Q U E S T I O N N A I R E

Oral Communication of State Trial Judges

INSTRUCTIONS FOR THE QUESTIONNAIRE

What we want to learn from you in this study are concrete examples of what state trial judges have done while communicating orally. What examples in oral communication were particularly effective or ineffective during the past year?

Following is a list of rules which should be observed:

1. Please use no actual names.
2. Do not sign the questionnaire.
3. * Describe actual critical incidents.
4. Report only incidents that occurred the past year.
5. Give concrete details.
6. Report at least two examples of effective oral communication incidents and two examples of ineffective oral communication incidents.

*NOTE: A critical incident is defined in the following manner:

> By an incident is meant only observable human activity that is sufficiently complete in itself to permit inferences and predictions to be made about the person performing the act. To be critical, an incident must occur in a situation where the purpose or intent of the act seems fairly clear to the observer and where its consequences are sufficiently definite to leave little doubt concerning its effects.[1]

[1]John C. Flanagan, "Critical Incident Technique," Psychological Bulletin, Vol. 51, No. 4 (July 1954) p. 327.

FIRST EFFECTIVE INCIDENT

The incident concerning oral communication should be outstandingly effective or successful.

Describe exactly what was said on this specific occasion.

Give concrete details

Use the back of the page if additional space is necessary.

1. When and where did the incident occur?

2. Describe the incident in detail.

3. What was there about the oral communication in the incident that made it effective?

SECOND EFFECTIVE INCIDENT

The incident concerning oral communication should be outstandingly effective or successful.

Describe exactly what was said on this specific occasion.

Give concrete details

Use the back of the page if additional space is necessary.

1. When and where did the incident occur?

2. Describe the incident in detail.

3. What was there about the oral communication in the incident that made it effective?

FIRST INEFFECTIVE INCIDENT

The incident concerning oral communication should be outstandingly ineffective or unsuccessful.

Describe exactly what was said on this specific occasion.

Give concrete details

Use the back of the page if additional space is necessary.

1. When and where did the incident occur?

2. Describe the incident in detail.

3. What was there about the oral communication in the incident that made it ineffective?

SECOND INEFFECTIVE INCIDENT

The incident concerning oral communication should be outstandingly ineffective or unsuccessful.

Describe exactly what was said on this specific occasion.

Give concrete details

Use the back of the page if additional space is necessary.

1. When and where did the incident occur?

2. Describe the incident in detail.

3. What was there about the oral communication in the incident that made it ineffective?

INTERVIEW GUIDE (30 minute interview)

I. Background Information

A. How long were you an attorney before you became a trial judge?

B. How long have you been a state trial judge?

C. Have you had any formal oral communication training?

1. If yes, what did the training consist of?

2. If yes, has such training been helpful in your present position--how?

3. If not, would such training have been helpful in your present position--how?

II. Experience with Oral Communication

A. Do you consider oral communication more important in the courtroom than in the judge's chambers?

B. Explain your view concerning the previous question.

C. Describe an effective oral communication incident in which you participated or observed within the last year.

D. Describe an ineffective oral communication incident in which you participated or observed within the last year.

APPENDIX C

UNIVERSITY OF NEVADA, RENO

Department of Speech and Drama
Reno, Nevada 89507

September 20, 1972

Dear Judge:

This summer you were asked to complete and return an Oral Communication Questionnaire to me. A stamped self-addressed envelope was provided for your convenience. Many of you have not yet returned the questionnaire. It would be appreciated if you would take a few minutes of your time to complete and return it as soon as possible.

For those who have already completed and returned the questionnaire, again we thank you. For those who will complete and return it within the next few days, we also thank you.

I realize the questionnaire has probably been an inconvenience, but the information you have and will provide us is important in formulating future communication programs.

Sincerely,

/s/ Paul Page

Paul Page

APPENDIX D

UNIVERSITY OF NEVADA, RENO

Department of Speech and Drama
Reno, Nevada 89507

November 21, 1972

Dear Judge:

I can hear the "Oh no's" now as you open this letter--"Oh no! another form letter from Page" or "Oh no! will Page ever give up" or "Oh no, he wants me to return a questionnaire that I don't understand and could care less about." These comments are no doubt either being spoken or thought, except possibly your wording is even more colorful!

Approximately 20% or 60 judges that attended one of the four week summer sessions have filled out the oral communication questionnaire; however, we need many more of you to return it. Since the Christmas season is almost upon us--think of this deed (completing the questionnaire) as one of your good deeds for the season or perhaps think of it as a Christmas gift to me. Whatever your motivation may be for filling out the questionnaire, I would appreciate your completing it.

My Christmas present to you will be no more letters reminding you that I need your help. I assure you that this is the <u>last</u> reminder from Page. So that I no longer remain a nuisance, I look forward to hearing from you. Thank you for your cooperation.

Sincerely,

/s/ Paul Page

Paul Page

P. S. If you have misplaced, lost, or thrown away the questionnaire that you first received, I will gladly send you another oral communication questionnaire.

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