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The Dual Role of a Chief Justice.

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THE DUAL ROLE OF A CHIEF JUSTICE

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I. INTRODUCTION

Type in the word "judge" on any internet search engine and more than 120,000,000 results pop up. Judge Judy and Judge Joe Brown are located prominently near the top of the list. A search for the term "appellate judge" garners a mere 7,450,000 results. Between these two ends of the spectrum is the response for the term "chief justice"—33,100,000 results the last time I checked. The images that instantly appeared were all of United States Supreme Court Chief Justice John Roberts, including one image of him in a full feather headdress—clearly a questionable satirical digital creation.

Social scientists might offer insightful conclusions about the significance of these search results. But as a practical matter, these results indicate to me that appellate courts largely operate in relative obscurity with little observation by the public, and perhaps with little concern as well. Notwithstanding the growing trend of high-dollar judicial election campaigns, many citizens do not know what appellate judges and appellate courts do.

Faced with the reality of obscurity and the ever-present potential of failed reelection campaigns, appellate judges work each day to fulfill the mission of appellate courts: they must efficiently resolve the legal disputes presented in appeals from lower court decisions with written opinions that are well reasoned, thoroughly researched, and intellectually honest. It is the responsibility of the chief justice to promote that core mission with all justices at the court, thereby working to best serve the legal needs of the

citizens, even when the citizenry is in the dark about appellate courts and justices.

This article is intended to provide some insight into the responsibilities of a chief justice. The chief justice's role is clearly one of leadership, and varying styles of leadership produce varying scenarios at different courts. An effective chief justice is adept at wearing more than one hat because there are dual roles that a chief justice undertakes: administrative leadership and judicial leadership.[1] This article will address these roles through a review of Texas cases that have addressed internal court disputes and a review of general operating principles that govern procedures at the Fourth Court of Appeals—where I have served for the past two decades.

II. THE DUAL LEADERSHIP ROLES OF A CHIEF JUSTICE

While serving as an associate justice on the Fourth Court of Appeals, I had the opportunity to work with three chief justices before assuming that role: Chief Justice Alfonso Chapa, Chief Justice Phil D. Hardberger, and Chief Justice Alma L. López. As a briefing attorney, I also had the opportunity to observe Chief Justice Carlos Cadena in action and to work with Chief Justice Blair Reeves, who was an associate justice at the time. After I was appointed to the court as an associate justice, I had the pleasure of working with both Chief Justice Cadena and Chief Justice Reeves again when they sat as visiting judges on the court. Working with each of these chiefs was invaluable, but it would be an overstatement to say that working with and observing five chief justices completely prepared me for the position. Although I learned from the leadership styles of each of these former chiefs, leading a court as the chief justice is far different from being led.

A. *The Chief Justice's Administrative Role*

In Texas, the administrative role of a chief justice of an intermediate appellate court is generally defined in section 22.223 of the Texas Government Code, as follows:

> (a) The chief justice of each court of appeals, under rules established by the court, shall convene the court en banc for the transaction of all business

1. *See* David W. Craig, *First Among Equals: The Chief Justice of Any High Court Has a Twofold Burden—Presiding Over the Court's Determination of Case Law and Providing Management Support for That Function*, PA. LAW. Sept.–Oct. 1996, at 46, 48 ("[T]he chief justice, as first among equals, must lead, encourage and inspire in the performance of . . . tasks for the sake of the unified goal.").

other than the hearing of cases and may convene the court en banc for the purpose of hearing cases.

(b) When convened en banc, a majority of the membership of the court constitutes a quorum and the concurrence of a majority of the court sitting en banc is necessary for a decision.[2]

In this section of the paper, I will compare the Fourth Court's consensus approach to addressing administrative issues with the approach taken by another appellate court, which ultimately gave rise to litigation.

1. Convening Meetings

a. *In re Yates*[3]

In *In re Yates*, five of the nine justices of the Fourteenth Court of Appeals filed a petition for writ of mandamus in the Texas Supreme Court.[4] The petition raised two separate complaints.[5] The first complaint involved the chief justice's refusal to "submit for an en banc vote all requests from a Justice seeking en banc consideration of a case."[6] With regard to this complaint, the Texas Supreme Court noted that "Rules 41.2(c) and 49.7 of the Texas Rules of Appellate Procedure" governed the en banc submission of a case to the court of appeals.[7] The court further noted that these rules allowed a justice to directly request a vote from the other justices regarding whether to consider a case en banc, and did not require the submission of an en banc request to the chief justice before such a vote could be taken.[8] The five justices did not complain that the chief justice refused to permit a justice to request a vote or refused to allow en banc consideration if a majority of the court voted in favor of it.[9] Instead, their complaint was premised on the belief that a request for a vote had to be submitted to the chief justice, who would then decide

2. *See* TEX. GOV'T CODE ANN. § 22.223 (West 2004) (establishing rules for each Texas Court of Appeals).

3. *In re* Yates, 960 S.W.2d 652 (Tex. 1997) (orig. proceeding) (per curiam).

4. *Id.* at 652.

5. *See id.* at 653 (stating two complaints from the justices of the Houston Court of Appeals).

6. *See id.* at 652 (requesting a vote from the entire bench rather than a panel of judges).

7. *See id.* at 652–53 (identifying the Texas statutes that are appropriate to govern a case in which an en banc review is sought); *see also* TEX. R. APP. P. 41.2(c), 49.7 (exploring the technicalities of en banc courts and how en banc decisions should be decided).

8. *See Yates*, 960 S.W.2d at 653 ("[N]either rule prohibits a justice from requesting a vote from other justices, nor does either rule require the chief justice of a court of appeals to submit en banc requests from other justices to a vote of the full court . . . .").

9. *See id.* (distinguishing petitioners' complaint from a violation of the Texas Rules of Appellate Procedure).

whether to call for a vote.[10] Because the rules did not contain such a requirement, the justices could not establish an abuse of discretion or a violation of the law by the chief justice's refusal to submit a request for a vote.[11] Absent such a showing, the supreme court concluded that the justices were not entitled to mandamus relief with regard to their first complaint.[12] As the court explained:

> A chief justice cannot prevent a case from being heard en banc against the will of a majority of the court, and he or she cannot prevent a vote of the court from being taken on whether to hear a matter en banc, but he or she is not obliged to agree to the taking of a vote or to participate in it.[13]

The justices in *Yates* also presented a second complaint, which related to the chief justice's refusal to "permit a concurrence of a majority of the Justices sitting en banc to establish rules for, and implement, the en banc transaction or delegation of all business of the Court other than the hearing of cases."[14] The court initially cited section 22.223 of the Texas Government Code.[15] The court then noted that the Fourteenth Court of Appeals had no rules established for the convening of "the court en banc for the transaction of all business other than the hearing of cases."[16] Absent any such rules, the court held that the chief justice had no duty to convene the court en banc.[17] Although the five justices further argued that the chief justice had refused to agree to any such rules, the court stated that the chief justice did not have a "duty to agree to rules."[18] On the other hand, the court also noted that the chief justice could not prevent the "adoption of rules by a majority of the court[;]" however,

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10. *See id.* ("Relators do not contend that respondent has refused to permit en banc consideration of a case when a majority of the court has voted for it, only that respondent refuses to acquiesce in calling for a vote.").

11. *See id.* (clarifying the rules and ruling unfavorably for the respondents).

12. In order for the five justices to obtain relief, they were required to "show that [the chief justice had] either violated his duty or abused his discretion." *See id.* at 652–53 (reviewing the standard of mandamus before applying it to the facts of this case).

13. *See id.* at 653 (explaining the proper application and interpretation of the rules regarding an en banc decision).

14. *See id.* at 652 (requesting permission to conduct the court's daily business, not just hear cases).

15. *See id.* at 653 (relying on statutory interpretation); *see also* TEX. GOV'T CODE ANN. § 22.223 (West 2004) ("The chief justice of each court of appeals . . . *shall* convene the court en banc for the transaction of all business other than the hearing of cases and *may* convene the court en banc for the purpose of hearing cases." (emphasis added)).

16. *See Yates*, 960 S.W.2d at 653 (interpreting the statute permissively).

17. *See id.* ("[T]he chief justice has no duty under this statute to convene the court en banc, although the statute does not prohibit the chief justice from doing so.").

18. *See id.* (relieving the chief justice of any mandatory duty).

"nothing in the record establishe[d] that he [had] done so."[19] In concluding that the chief justice did not abuse his discretion or violate any law by refusing to convene the court for the transaction of business absent any rules requiring him to do so, the court felt the need to add the following:

> We feel constrained to add, charged as we are with the responsibility for the efficient administration of the Judicial Branch, TEX. CONST. art. V, § 31, and for determining whether rules proposed by a court of appeals are appropriate, TEX. R. APP. P. 1.2(a), that the justices of a court of appeals, including the chief justice, should make every effort to work together in disposing of cases and in transacting all the court's other business, with due respect both for the office and experience of the chief justice and for the will of the majority.[20]

b. The Fourth Court's Experience

Since I began my tenure on the Fourth Court as an associate justice, the chief justice has routinely convened meetings of the justices to transact the court's business. Although the chief justice prepares an agenda for these meetings, each justice may add items to the agenda for court discussion. Fortunately, the Fourth Court has never needed to pursue a lawsuit to force a chief justice to convene meetings.

When *In re Yates* was issued, however, the Fourth Court took note of it. In view of its holding, the justices undertook the drafting and adoption of internal operating procedures (IOPs). After a draft of the IOPs was prepared, the justices met and a consensus was reached with regard to revisions and approval. The court's first set of IOPs was adopted on September 10, 2001. Because the court frequently encounters changes in procedure, new issues, and new concerns, the court's IOPs are a fluid document, and the latest amendments to our IOPs were adopted on May 7, 2013.[21]

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19. *See id.* ("Once rules are established by a majority of the court, it falls to the chief justice by statute to convene the court en banc to transact the court's business . . . .").

20. *See id.* (stressing the importance of the chief justice's role in promoting a conducive environment for deciding cases and fulfilling the duties of the honorable position).

21. *See* FOURTH CT. APP., INTERNAL OPERATING PROCEDURES FOR THE HANDLING OF CASES (17), at 19 (2013) (guiding the Fourth Court of Appeals by establishing procedures for issues that may arise in the course of daily business). *See generally* Cynthia Keely Timms et. al., *The Process: Internal Operating Procedures of the Texas Appellate Courts*, APP. ADVOC., Special Ed., Feb. 2005, at i, ii (comparing internal operating procedures of Texas appellate courts).

2. Judicial Turnover

a. *In re Castillo*[22]

On March 7, 2006, Justice Erlinda Castillo lost her bid for reelection to a primary challenger for a seat on the Thirteenth Court of Appeals.[23] A judges' meeting was held at the court on April 6, 2006; however, Justice Castillo was not in attendance.[24] At the meeting, the following decisions were made: (1) Justice Castillo would not be included on any panel assigned to hear appeals after May 31, 2006, which meant she would not be assigned to write any opinions in appeals heard after that date;[25] (2) Justice Castillo would be replaced on those panels by a visiting judge; (3) Justice Castillo would be assigned to original proceedings panels; and (4) Justice Castillo would serve as the court's motions judge from June of 2006 until the end of her term.[26] Displeased with these decisions, Justice Castillo filed a petition for writs of mandamus and prohibition in the Texas Supreme Court, requesting the court to mandate her inclusion on panel assignments and to prohibit the Thirteenth Court from replacing her with a visiting judge.[27] Justice Castillo argued that she had the "right to complete her term as justice on the court of appeals," and the decisions infringing on that right "violated the Texas Constitution, state statutes, and the court of appeals' administrative rules."[28]

After Justice Castillo filed her petition, a second judges' meeting was held on May 3, 2006, and Justice Castillo was in attendance.[29] The judges rescinded their prior decisions and agreed to allow Justice Castillo to be assigned to the court's panels for the summer and fall terms; however, Justice Castillo would not initially be assigned to draft majority opinions in the fall term.[30] The Thirteenth Court justified its decision to exclude

22. *In re* Castillo, 201 S.W.3d 682 (Tex. 2006) (orig. proceeding) (per curiam).

23. *Id.* at 682.

24. *Id.*

25. It is important to note that the six justices on the Thirteenth Court sit in two three-member panels that are assigned at random. *Id.* at 682 n.1.

26. *See id.* at 682–83 (noting that these decisions were referred to as an "exit plan" in the opinion).

27. *See id.* at 683 (indicating why Justice Castillo was displeased with the judges' decision to restrict her duties).

28. *See id.* (asserting that the exit plan was an infringement on Justice Castillo's rights).

29. *Id.*

30. *See id.* ("At this May 3 meeting, the court rescinded the April 6 plan and implemented a modified exit plan."). This same condition was imposed on Justice Hinojosa who faced an opponent in the November election. *Id.* at 683 n.3. Justice Castillo was permitted to "vote on cases heard by her panel; draft concurring or dissenting opinions in any cause in which she participated in the

Justice Castillo from the initial writing assignment based on its contention that she had a thirty-eight case backlog, and her remaining tenure on the court would be less than the approximate seven months the court typically takes to issue an opinion in a civil case.[31] The court further decided that if Justice Castillo completed her work on her existing cases by August 31, 2006, the court would assign her additional opinions to author on an ad hoc basis.[32]

Unlike *Yates*, where the court did not have internal rules governing the dispute, Justice Castillo relied on the court's administrative rules in arguing her position.[33] One of these rules provided that after panel membership was drawn, "[t]he Justices shall then randomly draw writing assignments."[34] The Texas Supreme Court disagreed that this rule gave Justice Castillo the right "to be assigned the initial drafting responsibility for majority opinions."[35] Although the rule provided for a random draw of writing assignments, it did not state that "all Justices" would draw.[36] In addition, a different rule permitted the rules to be temporarily suspended upon a majority vote of the en banc court.[37] Even if the rule required Justice Castillo to be included in the random draw for writing assignments, a majority of the court decided to suspend this rule at its meeting when it adopted its "modified plan."[38] Although noting that the modified plan might "not be the most prudent model for a court endeavoring to clear its docket," the Texas Supreme Court held that the judges acted within their discretion in adopting the modified plan because they had the discretion "to determine whether such a plan [would] maximize efficiency when

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decision; vote on motions for rehearing; participate in oral argument; participate in original proceedings and motions; and discuss cases with her fellow justices." *Id.* at 684. Finally, Justice Castillo could write a proposed majority opinion, which would become the court's opinion if another justice joined the opinion. *Id.*

31. *See id.* at 683 ("Justice Castillo hotly disputed this contention, noting that the thirty-eight matters assigned to her are a 'docket of current cases.'").

32. *In re* Castillo, 201 S.W.3d 682, 683 (Tex. 2006) (orig. proceeding) (per curiam).

33. *See id.* at 683–84 (requesting that the court be required to follow its internal administrative rules).

34. *See id.* at 685 ("All Justices, without exception, shall . . . randomly draw for panel membership . . . . The Justices shall then randomly draw writing assignments.").

35. *Id.*

36. *See id.* ("While Rule 6 provides that 'Justices' will randomly draw writing assignments, the rule neither states that 'all Justices' shall draw nor that its provisions may not be temporarily suspended.").

37. *See id.* (explaining that "[b]y majority vote of the Court *en banc*, these rules may be amended or temporarily suspended" (citation omitted)).

38. *See id.* (acknowledging the court's suspension of the rule that would have allowed Justice Castillo to be included in the draw for writing assignments at the May 3 meeting).

faced with one (and possibly two) outgoing justices during the last few months of their terms."[39] The court did note, however, that "there may be circumstances in which a court's suspension of its internal rules constitutes a clear abuse of discretion."[40] The court concluded its opinion with the following remarks, signaling that the judges took the right action in modifying their original plan:

> It is not uncommon for justices on a collegial court to harbor differences of opinion on administrative or substantive matters. Proceedings like these are rare but may occasionally be necessary to ensure that a justice is able to perform the duties appertaining to the office. We express no opinion on the validity of Justice Castillo's challenge to the original plan, which presented separate issues about the role of a justice on an appellate court. In this case, however, the court withdrew its previous plan, and we find the substitute to be within the court's discretion.[41]

b. The Fourth Court's Experience

The Fourth Court has an internal operating procedure that expressly governs situations when a justice is appointed or elected to replace a sitting justice.[42] "On cases set for submission on briefs and those already submitted on briefs," IOP 8(j)(i) provides that the "newly-appointed or elected justice replaces the justice whose place the newly-appointed or elected justice has assumed."[43] "On cases set for submission with oral argument," IOP 8(j)(ii) provides that the "newly-appointed or elected justice replaces the justice whose place the newly-appointed or elected justice has assumed only if (a) oral argument has not yet been heard or (b) oral argument has been heard but the other two justices assigned to the case cannot agree on a judgment."[44] This IOP has efficiently served the court in transitioning a single justice.

In January of 2013, however, the Fourth Court encountered a situation

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39. *See id.* (supporting that while the Texas Supreme Court may not agree to the efficiency of the plan of the Thirteenth Court, it holds that it is within the court's discretion).

40. *See id.* ("While there may be circumstances in which a court's suspension of its internal rules constitutes a clear abuse of discretion, it does not appear, under the circumstances presented here, that the Thirteenth Court clearly abused its discretion or refused to perform a non-discretionary duty.").

41. *Id.* (citing O'Connor v. First Court of Appeals, 837 S.W.2d 94, 97 (Tex. 1992)).

42. *See* FOURTH CT. APP., INTERNAL OPERATING PROCEDURES FOR THE HANDLING OF CASES (2), at 1 (2013) ("The seniority of a justice is determined by the date the justice joined the court. If two or more justices join the court on the same date, their seniority relative to one another will be determined by lot.").

43. *Id.* (8)(j)(i), at 10.

44. *Id.* (8)(j)(ii), at 10.

that the IOP did not fully address, when three new justices were elected to replace sitting justices. Some appeals, set for submission, were assigned to a panel that consisted of the three justices who lost their elections. Fortunately, the court was able to construct a plan that was agreeable to all of the justices, and the caseload transition proceeded smoothly.

Transitions on appellate courts necessarily occur when new judges join the courts. As noted by two former appellate judges in Delaware:

> Unlike law firms, who hire attorneys with the expectation that they will be a good "fit," judges are never selected by reference to the group dynamics as a whole. Each judge—and his or her distinct personality—is thrust upon the Court, without regard to whether he or she will fit in or adapt to the vast assortment of characters that already comprise the Superior Court bench.
>
> Notwithstanding all of these variables, without exception, every new member of the Superior Court is welcomed, accepted, and embraced with warmth and collegiately. When we first joined the Court, the more senior members of the Bench went out of their way to assist us in making the transition and we, in turn, had several opportunities to ease the overwhelming burden that other new judges faced.
>
> Given this rather haphazard mixture of personalities and perspectives—and the big egos that generally distinguish those who aspire to be judges—it may surprise some to learn that the bond among the judges of the Superior Court is a powerful one.
>
> The exchange of ideas at Superior Court judges' meetings is often spirited and, at times, sharp. Nevertheless, regardless of how vehemently the differences of opinions were expressed, the dinners following our meetings could not have been more enjoyable or collegial.[45]

Having been through my share of transitions in my twenty-year tenure, I join many of these sentiments. Every effort is made to welcome every new justice to the court, and where possible, assistance is provided to ease the new justice's transition with his or her caseload. Even when the personalities have been vastly distinct, the judges have all managed to work together for the good of the court. One of the keys to a smooth and successful transition is the existence of operating rules that can govern or guide the process. The most significant key is the willingness of the chief justice to assume a leadership role that continues to promote the core mission of appellate courts—efficient and thoughtful resolution of legal appellate decisions. Even the administrative decisions at play in the face of judicial turnover provide a chief justice with the opportunity to lead and

45. Joseph R. Slights, III & Peggy L. Ableman, *The Superior Court: A View from the Bench*, DEL. LAW., Summer 2013, at 20, 22–23.

to promote a culture of service and excellence that rises above the personalities of the individual judges.

3. Funding: A Chief Justice's Ongoing Administrative Challenge

One of the biggest challenges for any appellate court chief justice in Texas, and possibly in every state for that matter, is obtaining the funding necessary for the court's operations. In Texas, the appellate courts are required to submit a budget request to the legislature for funding every biennium.[46] In this regard, appellate courts are treated the same as all other state agencies. The chief justices must then attend hearings and answer questions regarding the funding necessary for the third independent branch of government to fulfill its constitutional responsibilities.[47] It is a very humbling experience.

Fortunately, this challenge became easier when the fourteen intermediate appellate courts of Texas joined together with a plan for "similar funding for same-size courts."[48] Under this plan, the chief justices of the fourteen courts of appeal reach a consensus on the overall budget the different size courts will need. For example, a pro forma budget is developed for courts with nine justices, six justices, three justices, etc. Each court's budget request to the legislature is then based on these pro forma budgets. When the appellate courts are placed on the agenda for legislative hearings, the legislative committees understand this unified approach presented by the chair of the Council of Chief Justices. The Council is composed of the fourteen intermediate appellate court chief justices. Having served as chair of the Council, I appreciate the compromises that the appellate courts make in accepting this unified approach; and I give much credit to the chief justices, who must convince their judicial colleagues that the unified approach best serves the entire judiciary.

B. *The Chief Justice's Judicial Role*

Although a chief justice's administrative role is crucial for the efficient operation of the courts, the chief justice's judicial role calls upon the chief

46. *See* TEX. GOV'T CODE ANN. § 401.0445(b)(3) (West 2013) (requiring budget reports from the governor to show "the amounts required by the various agencies and the amounts recommended by the governor for each of the years of the biennium").

47. *See id.* § 401.043(c) ("In this section, 'state agency' means a board, commission, department, or other agency in the executive or judicial branch of state government.").

48. *See* Ct. App., Fourth Ct. App., Legislative Appropriations Request for Fiscal Years 2014 and 2015, § 1.A, p. 1 (Aug. 9, 2012) (remarking on the funding to implement the "similar funding for same-sized courts" initiative and the benefit this would bring to the appellate process).

to fully respect the role each associate judge has on the court and to uphold each justice's right to vote on the court's decisions. The chief justice must balance this basic respect for judicial colleagues against the more mundane dry realities of a court's statistical performance measures.

A review of the Fourth Court's performance during the 2012–2013 fiscal year helps to understand the factors at issue for a chief to consider. Likewise, review of a situation where a court lost sight of an associate justice's right to voice her opinion provides further insight into the dynamics at an appellate court. Finally, the unique challenges presented by en banc or full court review are considered.

1. Managing the Fourth Court's Statistics

Present-day concepts of efficient judicial administration rely on measureable events. Chief justices realize that one of the primary indicators of how well a court is performing its judicial function is measured by statistics. In short, chief justices employ statistical analysis to help determine how well their courts function. Although statistics are never perfect, they provide a starting point for reviewing the court's performance.

a. Performance Measures

During the 2012–2013 fiscal year, the Fourth Court disposed of 879 cases. The average time between the filing of a notice of appeal in the trial court and the disposition of that case at the Fourth Court was seven months. The seven justices of the court performed this work, with the assistance of a professional legal staff, within the confines of legislatively mandated performance measures.[49]

The Texas Legislature has established three performance measures by which appellate court performance is analyzed. The first of these measures, called the "Clearance Rate," is a comparison of the number of filings to the number of dispositions.[50] The Clearance Rate for the Fourth Court for the fiscal year ending August 31, 2013 was 95.34%. The second performance measure reviewed by the legislature is the percent of cases under submission for less than one year.[51] Submission occurs when both

49. C.J. CATHERINE STONE, THE FOURTH COURT OF APPEALS: FISCAL YEAR 2012–2013 REVIEW 1.

50. GOV'T § 72.083 (West 2005).

51. *See id.* § 72.084 ("A court of appeals shall annually report to the office: (1) the number of cases filed with the court during the reporting year; (2) the number of cases disposed of by the court during the reporting year.").

parties have filed their briefs and the case is set on a docket for a panel's consideration either on briefs or with oral argument. One hundred percent of the Fourth Court's cases were under submission for less than one year during the 2012–2013 fiscal year, and all cases were disposed of within six months or less of the submission date.[52] The final performance measure is the percent of cases filed, but not yet disposed for less than two years. During the court's 2012–2013 fiscal year, 99.76% of the cases in the Fourth Court were disposed of within two years of filing.[53]

2. Respecting Each Justice's Voice

a. *O'Connor v. First Court of Appeals*[54]

In *O'Connor v. First Court of Appeals*, Justice Michol O'Connor, an associate justice of the First Court of Appeals, sought a writ of mandamus requesting the Texas Supreme Court to order the clerk of the First Court to file her opinion dissenting from the denial of a motion for en banc consideration.[55] In the lawsuit that gave rise to Justice O'Connor's mandamus proceeding, the plaintiff sued a physician for medical malpractice.[56] The plaintiff appealed a summary judgment granted in favor of the physician to the First Court.[57] Although the appeal was assigned to a panel of three justices to decide, the court's customary practice was to circulate the panel's proposed opinion to the full court for comment.[58] When the proposed opinion was circulated, Justice O'Connor circulated a written motion requesting that the case be submitted for en banc hearing; however, a majority of the justices voted to deny the motion.[59] When the panel opinion was issued, Justice O'Connor informed the court that she planned to dissent from the denial of her motion for en banc consideration with a written opinion.[60] The clerk of the court, however, was instructed not to file the dissent after a majority of

52. C.J. CATHERINE STONE, THE FOURTH COURT OF APPEALS: FISCAL YEAR 2012–2013 REVIEW 1–2.

53. *See* FOURTH CT. APP., ACTIVITY FOR THE FISCAL YEAR ENDED AUG. 31, 2013, http://www.courts.state.tx.us/pubs/AR2013/toc.htm (confirming that 99.8% of cases were disposed of within two years of their filing in the Fourth Court of Appeals for the fiscal year).

54. O'Connor v. First Court of Appeals, 837 S.W.2d 94 (Tex. 1992).

55. *Id.* at 95.

56. *Id.*

57. *Id.*

58. *See id.* ("In accordance with the court's customary practice, a proposed opinion was eventually circulated to all members of the court for comments.").

59. *Id.*

60. *Id.*

the justices "voted to deny O'Connor leave to file the dissent."[61] In her mandamus petition, Justice O'Connor asserted that "a court of appeals has a duty to allow a nonpanel justice to file a dissent from the court's denial of a motion for en banc consideration."[62]

The Texas Supreme Court first noted that "Rule 90(e) of the Texas Rules of Appellate Procedure provides in part that '[a]ny justice may file an opinion concurring in or dissenting from the decision of the court of appeals.'"[63] The First Court responded that the rule permitted only a member of the panel deciding the case to file a dissent.[64] The Texas Supreme Court disagreed, noting that "a court of appeals is a single, unitary body, even though it may sit in panels."[65] Because an appellate court is an integral body, the court construed the words "any justice" in the rule as referring to any justice on the court.[66] Accordingly, the court held that "when a court of appeals votes against hearing a case en banc, any member of the court is entitled to file a dissent, regardless of whether the judge was on the original panel deciding the case."[67] Correspondingly, the appellate court has a non-discretionary duty to allow such a dissent to be filed.[68]

In reaching its holding, the Texas Supreme Court noted the salutary purposes served by any dissenting opinion, including a dissenting opinion to the denial of en banc consideration, which is "chiefly, promoting the uniformity and correctness of the court's decisions."[69] "As with any other dissent, the prospect of a dissenting opinion by a nonpanel member of the court of appeals 'heightens the opinion writer's incentive to get it right.'"[70] The court quoted United States Supreme Court Chief Justice Charles Evan Hughes who referred to a dissenting opinion as:

> [A]n appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly convert the error into which the dissenting judge believes the court to have been betrayed.[71]

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61. *Id.*
62. *Id.*
63. *Id.* (quoting TEX. R. APP. P. 90(e)).
64. O'Connor v. First Court of Appeals, 837 S.W.2d 94, 95–96 (Tex. 1992).
65. *Id.* at 96 (referring to TEX. R. APP. P. 79).
66. *Id.* (citing TEX. R. APP. P. 90(e)).
67. *Id.* at 97.
68. *Id.*
69. *Id.* at 96.
70. *Id.* (quoting Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH L. REV. 133, 144 (1990)).
71. *Id.* (quoting CHARLES EVAN HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1937)).

b. The Fourth Court's Experience

In its opinion in *O'Connor*, the Texas Supreme Court also noted that nonpanel justices had dissented "in at least one court of appeals[,]" citing a decision from the Fourth Court.[72] Therefore, the Fourth Court recognized Rule 90(e)'s mandate before the Texas Supreme Court's decision and even before adopting its IOPs. IOP 14(d) currently governs this issue and provides:

> Any participating justice may concur in or dissent to the grant or denial of a motion for reconsideration en banc or the grant or denial of a justice's request for consideration or reconsideration en banc on the court's own initiative, with or without an opinion. If a participating justice authors a concurring or dissenting opinion, the order granting or denying consideration or reconsideration en banc and the concurring or dissenting opinion should issue simultaneously. Upon request, a participating justice's concurrence or dissent shall be noted on the order granting consideration or reconsideration en banc.[73]

Although IOP 14(d) states that the order and the concurring or dissenting opinion should issue simultaneously, IOP 12(d) recognizes that the concurring or dissenting justice cannot hold the voice of the majority hostage for an unreasonable amount of time.[74] Accordingly, "[i]f a dissenting, concurring, or undecided justice holds a proposed majority opinion for more than thirty days from the date that justice receives the opinion for review, the authoring justice may call a conference to discuss issuance of the opinion."[75] After the conference, the authoring justice may then issue the majority opinion "with an appropriate notation, such as 'Dissent to Follow.'"[76] This variation on the rule is the flip side of the holding in *O'Connor*. Although the majority cannot prevent the voice of the dissent from being heard, neither can the dissent prevent the voice of the majority from being heard.

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72. *See id.* at 97 (justifying their interpretation that nonpanel judges are entitled to submit a dissent to the denial of en banc review by referencing prior examples (citing Molnar v. Engels, Inc., 705 S.W.2d 224 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.))).

73. FOURTH CT. APP., INTERNAL OPERATING PROCEDURES FOR THE HANDLING OF CASES (14)(d), at 17–18 (2013).

74. *See id.* at (12)(d), at 14 (discussing the measures an authoring justice may take if a "dissenting, concurring, or undecided justice" waits longer than a reasonable amount of time without issuing a response).

75. *Id.*

76. *Id.*

3. En Banc Challenges

Because en banc review is disfavored, disagreements often develop with regard to whether en banc consideration or reconsideration should be granted, and even the procedure followed in granting en banc consideration is sometimes questioned.[77] This section of the article will explore the unique challenges that can arise in en banc situations.

a. Tenor of Dissenting Opinions

As David W. Craig, a former judge in Pennsylvania, once commented, "[W]hen a member of a high court exercises rightful independence in issuing a dissenting or concurring opinion, the writer's fervor sometimes spawns an abusive attack upon the majority and its legal analysis or its view of the facts—an attack that therefore demeans the court itself."[78] Similarly, although former Chief Justice Tom Phillips recognized the useful benefits that can be served by a dissenting opinion, he also noted that "a dissent may do significant harm."[79] An example of this type of dissent was issued in *Ex parte Ellis*.[80]

i. *Ex parte Ellis*

In *Ellis*, two defendants petitioned the trial court for a pre-trial writ of habeas corpus requesting the court to dismiss an indictment "accusing them of accepting unlawful campaign contributions and money laundering."[81] After the district court denied relief, the defendants filed an accelerated interlocutory appeal of the trial court's order.[82] Before the panel's opinion was issued, one of the associate justices requested that the case be considered en banc, and then dissented from the court's denial of

77. *See* TEX. R. APP. P. 41.2(c) ("En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration.").

78. David W. Craig, *First Among Equals: The Chief Justice of Any High Court Has a Twofold Burden—Presiding Over the Court's Determination of Case Law and Providing Management Support for That Function*, THE PA. LAW., Oct. 1996, at 46, 47.

79. *See* Dall. Morning News v. Fifth Court of Appeals, 842 S.W.2d 655, 661 (Tex. 1992) (Phillips, C.J., separate opinion) (accepting the validity of dissenting in general, but remarking on the futility of dissenting to a court docket order).

80. *Ex parte* Ellis, 279 S.W.3d 1 (Tex. App.—Austin 2008), *aff'd*, 309 S.W.3d 71 (Tex. Crim. App. 2010).

81. *See Ellis*, 279 S.W.3d at 6 ("Ellis and Colyandro petitioned the district court for a writ of habeas corpus, seeking dismissal of the original prosecutions[.]").

82. *See id.* at 5 ("The trial court denied relief and these appeals followed.").

the request.[83] The "fervor" of the dissenting opinion appears to be the type of attack that could be viewed as demeaning to the court.

First, the dissenting opinion criticized the legal analysis of the majority opinion as being "overbroad and rife with dicta."[84] The dissenting justice further charged the panel with "refus[ing] to limit itself to the appropriate issues."[85] Finally, after asserting that the panel had "chosen to issue an advisory opinion," the dissenting justice stated:

> Unfortunately, the problems do not stop there, since not only has the panel included a staggering amount of dicta in its opinion, but in doing so has applied the reasonable-person standard in a manner that renders this important legal standard devoid of meaning and subject to the whims of the judiciary.[86]

In addition to attacking the majority's legal analysis, the dissenting opinion also attacked the length of time the panel took to issue its opinion.[87]

With regard to the role of a chief in this type of situation, Judge Craig remarked:

> All members of a truly collegial court ideally should join in discouraging abusive concurring and dissenting opinions that fling billingsgate at the majority's analysis. A private suggestion, to avoid public derision of the work of the court itself, may be better received, particularly by newcomers, if it comes from the chief justice. The office of the chief justice surely includes a duty to uphold the court's dignity as an institution, while an editorial comment from another justice may be regarded as merely self-defensive.[88]

ii. The Fourth Court's Experience

When en banc consideration or reconsideration is granted at the Fourth Court of Appeals, the issues on appeal are generally complex, and the seven justices are often divided on the merits of the issues presented on appeal. As a result, both a majority and dissenting opinion will generally be issued. Although the court generally has been successful in convincing

83. *See id.* at 30 (Henson, J., dissenting) ("Given the troubling procedural history of this case, I dissent from this Court's decision not to hear the case en banc.").

84. *See id.* at 31 (stating perceived flaws with the court's treatment of the case).

85. *See id.* at 32 ("[E]n banc review is necessary to assist this Court in issuing an opinion that complies with the requirements of appellate review.").

86. *Id.* at 33.

87. *See id.* at 31 ("[A] delay of over two years has precluded substantial justice to the parties, resulting in what can only be described as a de-accelerated appeal.").

88. David W. Craig, *First Among Equals: The Chief Justice of Any High Court Has a Twofold Burden—Presiding Over the Court's Determination of Case Law and Providing Management Support for That Function*, THE PA. LAW., Sept.–Oct. 1996, at 46, 47.

dissenting justices to tone down some overly fervent language in proposed dissenting opinions, a review of the case law would undoubtedly reveal some opinions that reach a level of fervor the court would wish to avoid. Especially in instances where a justice is new to the court, a chief justice can assist in guiding the new justice away from dissenting language that does more harm than good.

b. En Banc Procedures

In addition to the content of an en banc opinion, challenges also arise in navigating an en banc vote and opinion through the court. The Houston Court of Appeals addressed one of those issues in a published opinion.

i. *Polasek v. State*[89]

In *Polasek*, the Houston First Court of Appeals, sitting en banc, affirmed an appellant's conviction.[90] In a motion for rehearing, the appellant complained that he was not sent notice that the appeal was to be considered en banc.[91] The court noted that before a panel opinion issued, one of the justices requested en banc consideration of the appeal.[92] The court further noted that the request was in accordance with Rule 41.2(c) of the Texas Rules of Appellate Procedure.[93] Although the rule permits the court to vote to consider an appeal en banc, the court concluded that the "rules do not require notice to the parties of these internal operations of the court."[94] The court noted that an appellant would be able to raise any "objections to the process . . . upon issuance of the en banc decision."[95]

ii. The Fourth Court's Experience

Recognizing the challenges that accompany en banc review, the Fourth Court has adopted detailed IOPs dealing with this subject.[96] The procedures slightly differ depending on whether the en banc review is

89. Polasek v. State, 16 S.W.3d 82 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd).

90. *Id.* at 83.

91. *See id.* at 85 ("Appellant also complains that he did not receive notice that the case would be considered en banc.").

92. *See id.* ("What happened is that a member of the court requested en banc review before the panel opinion issued.").

93. *See id.* ("This procedure is authorized by [R]ule 41.2(c) of the Rules of Appellate Procedure[.]").

94. *See id.* (dismissing the appellant's argument that he was denied his constitutional rights).

95. *Id.*

96. *See* FOURTH CT. APP., INTERNAL OPERATING PROCEDURES FOR THE HANDLING OF CASES (14), at 15–18 (2013) (offering guidelines for "En Banc Consideration or Reconsideration" under Rule 14).

requested on the court's own initiative or by motion. Unlike the Houston courts of appeals' approach, the IOPs require the court to notify the parties if en banc review is granted.[97] In addition, "[t]o ensure an adequate time for filing recusal motions, no en banc opinion may issue until twenty-one days after the date of the order granting consideration or reconsideration en banc."[98]

C. *The Key to the Performance of Both Roles: Consensus Building*

Whether a chief justice is confronting an administrative responsibility or a matter considered more traditionally judicial, effective leadership is key to success. Having viewed the different styles of several chief justices, my observation is that consensus-building leadership is most effective. An authoritarian style of leadership from the top down seems particularly ill-suited in a court with as many as a dozen confident, strong-willed, independently elected judges. Positive results are achieved when each judge is encouraged to participate and voice his or her opinion, and when the chief continues to promote the greater good of the entire court rather than the best interest of an individual judge. When each judge knows they will be offered an opportunity to voice their concerns and that the chief will listen and encourage the other judges to listen and respond to suggestions and concerns, then the culture of cooperation is developed. Consensus becomes the norm, and efficiency at the court seems to be the natural result.

D. *Future Areas of Special Importance for Chief Justices*

Like most areas of society, the judicial system is not static. Change occurs at a rapid pace, even within the relatively conservative ranks of the judiciary. Two areas are of significant importance to appellate courts.

1. The Importance of Oral Argument

When I first joined the Fourth Court, the court was required to hear oral argument whenever it was requested by the parties.[99] Currently, the

97. *See id.* (14)(b)(On the Court's Own Initiative)(iii), at 17 ("If on the court's own initiative a majority of the participating justices grant en banc consideration or reconsideration, the authoring justice of the panel opinion must prepare and circulate an order reflecting the court's vote; and the clerk of the court must mail a copy of the order to the parties or their attorneys in compliance with Rule 12.6, TEX. R. APP. P.").

98. *Id.* (14)(c)(vii), at 17.

99. *See* Polasek v. State, 16 S.W.3d 82, 84 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (quoting the aforementioned rule).

court can deny oral argument for several reasons, including a determination that "the decisional process would not be significantly aided by oral argument."[100] A court's "internal decision whether to grant, deny, or require oral argument [is] absolutely discretionary and unreviewable."[101] Although the granting of oral argument is now discretionary, the judges often hear complaints from appellate practitioners that oral argument is denied too often. During my tenure as chief, the court adopted new internal policies in response to these complaints. Current procedures require greater preliminary review by the justices to determine if oral argument will be granted. The new procedures have resulted in an increase in the number of oral arguments granted. Because appellate courts do operate in relative obscurity, oral argument is the best way for an appellate court to "reveal" itself in action.

A second change implemented during my tenure as chief has been to issue notices or advisories when the court wants the attorneys' focus on a specific issue, statute, or case during oral argument. This change was implemented after the suggestion was made by a speaker at a continuing education program. This procedure is used when the court is interested in hearing oral argument on only a single issue. This procedure is also used when the court has located a statute or case in its independent research that was not cited in the briefing. To date, all of the attorneys who have received these advance notices have been most appreciative and supportive of this process.

2. Technological Advances

As the court moves further into the realm of electronic filing and technology progresses even further, the possibility arises for a decrease in face-to-face interaction among the justices. Effective communication often requires the justices to be in the same room, engaged in an ongoing dialogue. As appellate courts rely more heavily on electronic filing and e-mail, there can be challenges to effective dialogue between judges, and thus challenges to efficient resolution of appellate cases. This concern is shared by other judges:

> Technology has made it easy for all of us to hold up in our offices each day without communicating on a personal basis with anyone. We can go about

100. TEX. R. APP. P. 39.1(d). Other bases on which oral argument can be denied include: "(a) the appeal is frivolous; (b) the dispositive issues or issues have been authoritatively decided; [and] (c) the facts and legal arguments are adequately presented in the briefs and record[.]" *Id.* R. 39.1(a)–(c).

101. *Polasek*, 16 S.W.3d at 84.

> our business without eye contact, personal conversation, or even experiencing the beneficial effects of laughter or a smile.
>
> If we could choose one reason to turn back the clocks by 12 years (besides reversing the aging process)[,] it would be to reduce the number of e-mails in favor of face-to-face or, at least, telephone contact. Perhaps we would even give up smart phones for an hour or two so that when we are in a meeting, we are focusing straight ahead rather than downward to send or receive a text or email.
>
> In the last 12 years technology has streamlined our tasks and organized our lives, but at great expense to the sociability and fellowship within the profession.[102]

As courts continue to embrace technology, the chief justice will play a large role in encouraging a strong focus on face-to-face meetings and conferences regardless of any technological advances on the horizon. Although a smiley icon can be inserted in an email, it just cannot replace the real thing.

III. CONCLUSION

Chief justices wear at least two leadership hats. If the court has adopted operating procedures that guide all the judges on the court, their leadership attire is a better fit. An effective chief justice is best able to keep the court on track in deciding the legal disputes on appeal if a consensus and collaborative style of leadership is employed. While the citizens served by appellate judges may not know who the judges are or what their job actually entails, an effective chief justice and a committed judiciary ensure the wheels of the judicial system turn smoothly. When that happens, we are all the beneficiaries.

102. Joseph R. Slights, III & Peggy L. Ableman, *The Superior Court: A View from the Bench*, DEL. LAW., Summer 2013, at 20, 23, 27.