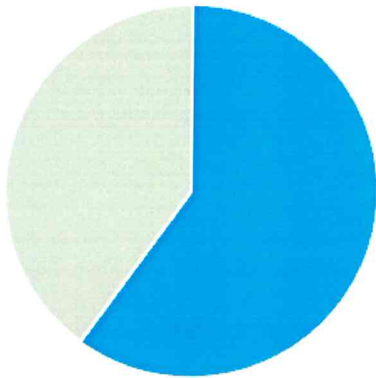
ACBA Appellate Practice Committee
Bench-Bar 2024 CLE

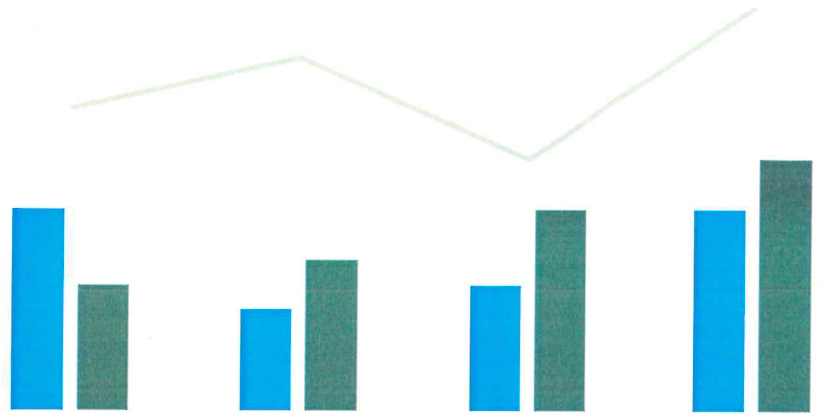
State Appellate Court Update

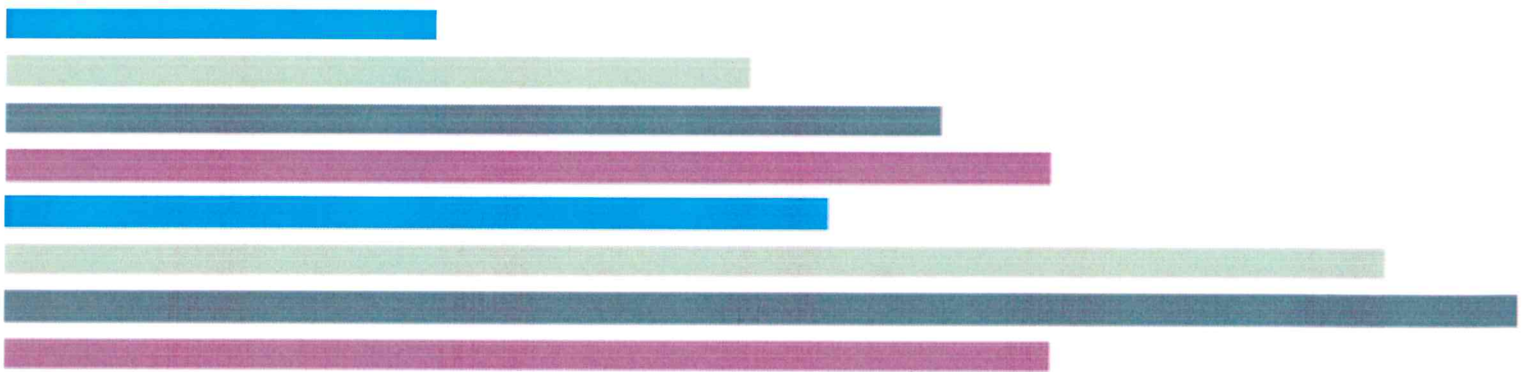
Guests:
Hon. David N. Wecht, Supreme Court of Pennsylvania
Hon. Victor P. Stabile, Superior Court of Pennsylvania
Hon. Patricia A. McCullough, Commonwealth Court of Pennsylvania

Moderator:
Corrie Woods, Esq., Chair, Appellate Practice Committee

2022 Caseload Statistics of the Unified Judicial System of Pennsylvania







AOPC RESEARCH

SUPREME COURT OF PENNSYLVANIA

ANDREA B. TUOMINEN
COURT ADMINISTRATOR OF PENNSYLVANIA

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Director

Andrew Ginder, MPA
Assistant Director

Yan Liu, M.S.
Senior Statistical Analyst

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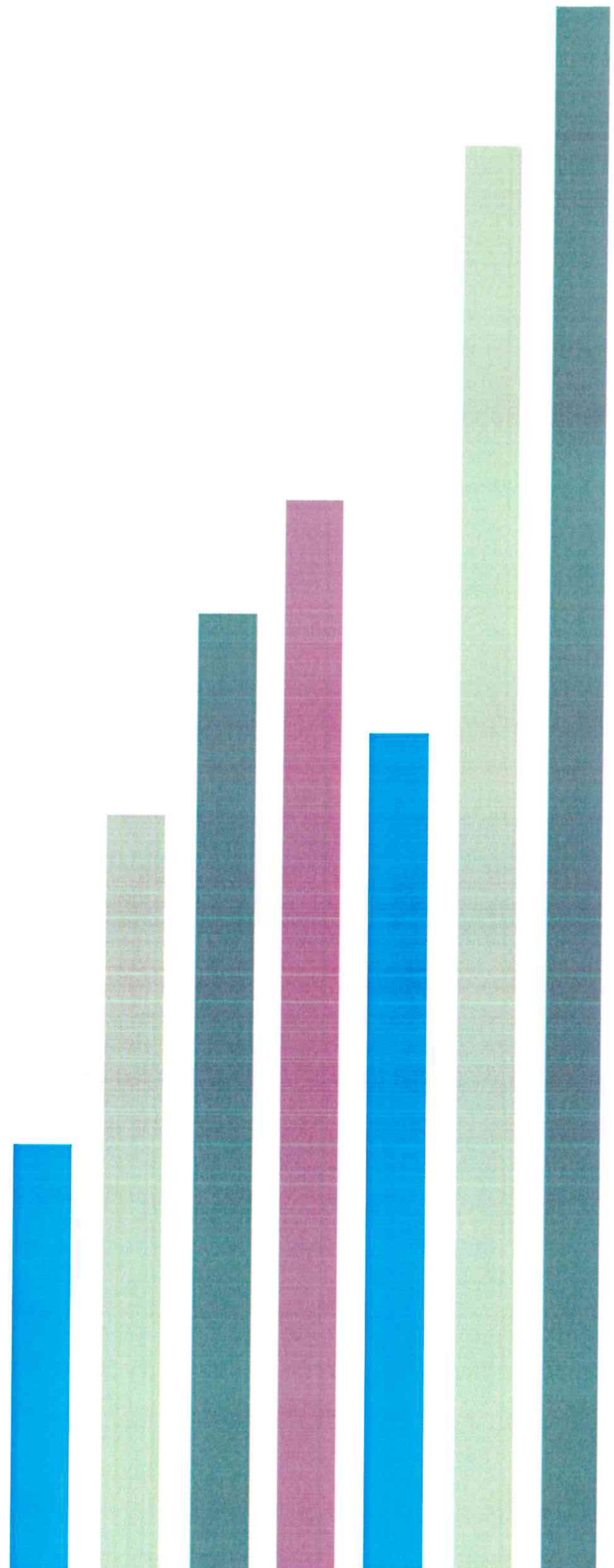
Data Scientist

Amanda Pereira
Research Assistant

Please visit the AOPC website for data updates, data corrections, and data from prior years.

www.pacourts.us

The Appellate Courts



Supreme Court of Pennsylvania

Appeals, Allocaturs and Petitions

Number Filed and Pending: January 1, 2022 through December 31, 2022

Appeal Docket	
Direct Appeals	
Capital Cases	10
Number from Commonwealth Court	89
Number from Common Pleas Court	1
Number Transferred from Commonwealth and Superior Courts	4
Total Direct	**104**
Certification Granted	1
Appeals by Granted Allocatur	87
Appeals by Granted Fast Track Allocatur	4
Appeals by Granted Miscellaneous	0
Total All Appeals	**196**
Appeals Pending as of 12/31/22 (includes prior years)	155
Allocatur Docket	
Petitions for Allowance of Appeal	1,286
Petitions Pending as of 12/31/22 (includes prior years)	600
Miscellaneous Docket	
Petitions for Review	139
Original Jurisdiction (Mandamus, Habeas, Prohibition, Quo Warranto)	107
Petitions for King's Bench Review or Extraordinary Relief	46
Petitions for Certification of Questions of Law	1
Bd.Law Examiners	1
Total All Miscellaneous	**294**
Miscellaneous Pending as of 12/31/22 (includes prior years)	73
Ancillary Filings	
Capital	32
Appeal	584
Allocatur	875
Miscellaneous	505
Disciplinary Docket No. 3	54
Total All Ancillaries	**2,050**
Ancillary Pending as of 12/31/22 (includes prior years)	156

Supreme Court of Pennsylvania

Appeals, Allocaturs and Petitions

Adjudications: January 1, 2022 through December 31, 2022

	Per Curiam	Full Opinion	Summary	Single Justice	Discontinued/ Withdrawn	Total
Capital Docket	**0**	**4**	**0**	**0**	**2**	**6**
Appeal Docket (Excluding Capital)	**58**	**60**	**0**	**0**	**9**	**127**
Direct Appeals:						
From Commonwealth Court	43	15	0	0	9	67
From The Court of Common Pleas	0	0	0	0	0	0
Transfers from Superior & Comm. Courts	0	0	0	0	0	0
Other Types of Appeals:						
Where Certification was Granted Appeals	0	0	0	0	0	0
from Allocatur Grants	15	44	0	0	0	59
Appeals from F.T. Alloc. Grants Appeals	0	1	0	0	0	1
from Miscellaneous Grants Plenary	0	0	0	0	0	0
Jurisdiction Assumed	0	0	0	0	0	0
Allocatur Docket	**1,374**	**0**	**16**	**0**	**21**	**1,411**
Miscellaneous Docket	**275**	**1**	**0**	**1**	**4**	**281**
Petitions for Review	129	0	0	1	2	132
Original Jurisdiction	102	0	0	0	0	102
King's Bench Matters	42	1	0	0	2	45
Certification-Questions of Law	1	0	0	0	0	1
Bd. Of Law Examiners	1	0	0	0	0	1

Note: *Numbers of cases by dispositions type. In regards to opinions, 65 cases were disposed of by 45 opinions

Disciplinary Matters (DD3 - Disciplinary Docket 3)

Per Curiam	87
Full Opinion	3
Other - Administrative Closures	10
Total	**100**

Attorney Reinstatement Docket	59
Total Disciplinary	**170**

Disciplinary Matters by Type:

Disbarments	17
Disbarments on Consent	7
Reinstatements on DD3 Docket	11
Suspensions	27
Inactive	3
Order Denying PPA	2
Order Granting, Rule 213	2
Order	4
Temporary Suspension	10
Referred to Disciplinary Board	1
Probation	1
Orders Denying Joint Petition	1
Orders Granting Joint Petition	0
Administrative Closures	20
Withdrawn	1
Reinstatements Denied DD3	4

Ancillary Filings

Disposed by Docket Type:

Capital	29
Appeal	561
Allocatur	920
Miscellaneous	494
DD3	44
Total	**2,048**

SUPREME COURT

Allocatur Docket	The docket for petitions seeking discretionary review of decisions by the intermediate appellate courts (i.e. the Commonwealth Court in its appellate capacity or Superior Court).
Ancillary Petition	A petition filed on an open docket seeking relief apart from the requested relief on the merits (e.g., a petition for an extension of time to file a response).
Capital Case	A case wherein a capital sentence has been imposed by a court of common pleas.
Direct Appeal	An appeal directly to the Supreme Court from the trial court that is authorized by the constitution or statute.
Disciplinary Matter	A matter that involves attorney disciplinary cases as prosecuted by the Office of Disciplinary Counsel.
King's Bench Review	A discretionary review undertaken by the Supreme Court of a matter pending in a lower tribunal. Such review can be by way of petition or by the Court's own initiative.
Opinion	The Court's disposition of a case containing a written explanation of its rationale.
Petition for Allowance of Appeal (PAA)	An appeal which seeks to invoke the Court's discretionary jurisdiction to appeal.
Per Curiam	Translate as "By the Court" and refers to an action of the whole court as opposed to an opinion or order by an individual Justice or Justices.
Petition for Review	Petitions filed seeking review of a government agency or lower court. They are filed under Rule 123 or under Chapter 15 of the Pennsylvania Rules of Appellate Procedure.
Rule 213 Order	Refers to the Rule of Disciplinary Enforcement 213 governing the Supreme Court's enforcement of a subpoena in a disciplinary proceeding.
Single Justice	One justice, typically the Chief Justice, enters an order or will direct that an order be issued for certain types of cases such as changes of venue.
Summary Disposition	The Court's disposition of a case without seeking brief or argument; occurs when the right of the applicant is clear and the Court's decision needs little or no explanation.
Supreme Court Original Jurisdiction	The limited jurisdiction described in the Judicial Code at 42 Pa.C.S. § 721, which includes habeas corpus, action in mandamus and prohibition directed to courts of inferior jurisdiction, and actions in quo warranto.

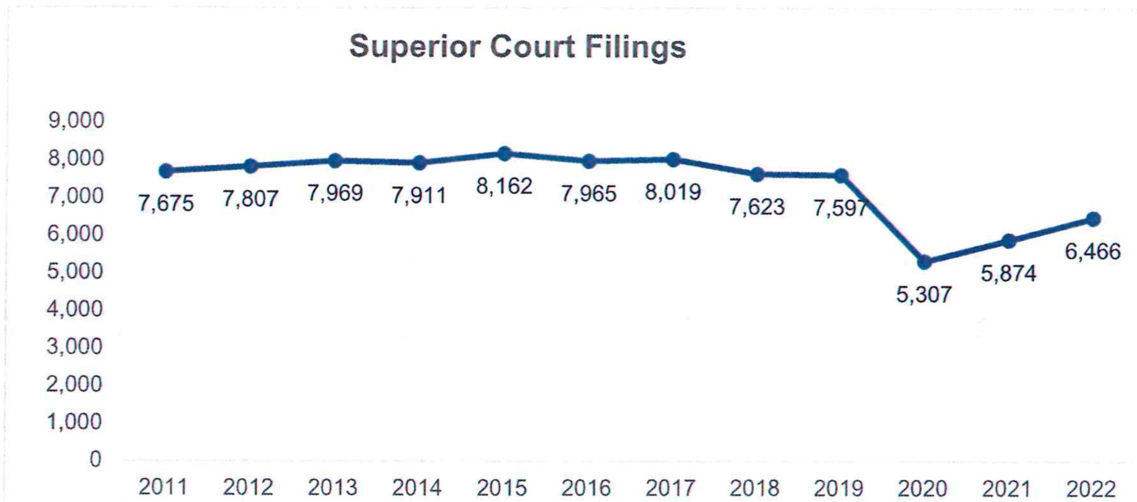
2022 Superior Court of Pennsylvania

Appeals Pending, Filed & Concluded

	Total	Civil	Criminal
Appeals Pending 1/1/22	3,996	1,391	2,605
New Appeals Filed in 2022	6,466	2,623	3,843
Appeals Concluded in 2022	5,979	2,620	3,359
By Filed Decision	3,876	1,503	2,373
By Order or Discontinuance	2,103	1,117	986
Appeals Pending 12/31/22	4,483	1,394	3,089

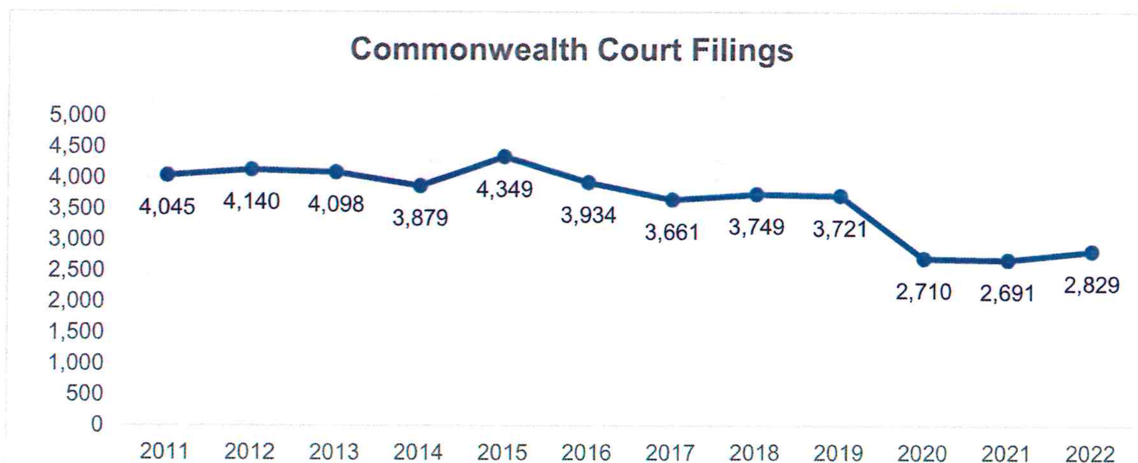
Opinions Filed

	Total	Civil	Criminal
Published Opinions 2022	224	115	109
Non-Published Opinions 2022	2,795	974	1,821
Total	3,019	1,089	1,930



2022 Commonwealth Court of Pennsylvania

CASES PENDING 1/1/22		**5,244**
CASES FILED IN 2022		**2,829** *
Original Jurisdiction	635	
Appeals from Common Pleas Court	676	
Appeals from Administrative Agencies	827	
Appeals under Fiscal Code	661	
Discretionary Appeals	25	
Combined Original/Appellate Matters	1	
Miscellaneous	0	
Insurance Insolvency Actions	4	
CASES DISPOSED IN 2022		**2,539**
Majority Opinions	740	
Consolidated Cases	9	
Stipulation for Judgment	525	
Withdrawn/Dismissed/Remanded	986	
Transferred	76	
Other	10	
Single Judge Dispositive Orders/Opinions	193	
CASES PENDING 12/31/22		**5,534**



* Certain miscellaneous and dual jurisdiction cases are excluded.

Suggestions for Advocacy in the Supreme Court of Pennsylvania

DAVID N. WECHT
JUSTICE
SUPREME COURT OF PENNSYLVANIA

The Supreme Court of Pennsylvania

The Pennsylvania Supreme Court provides **discretionary review** by grant of a petition for allowance of appeal over final orders issued by the Superior or Commonwealth Courts.

- 42 Pa.C.S. § 724

The Supreme Court of Pennsylvania

Because review is discretionary, in briefs and at oral argument:

- Know your audience
- Know the rules
- Know the law
- Know the scope of the grant
- Know what you want

Writing Appellate Briefs – Follow the Rules

"This is paperwork for a single case. Why ever do they call it a 'brief'?"

- Statement of jurisdiction (Pa R.A.P. 2114)
- Order or other determination in question (Pa R.A.P. 2115)
- Statement of the scope and standard of review (Pa R.A.P. 2111)
- Statement of the questions involved (Pa R.A.P. 2116)
- Statement of the case (Pa R.A.P. 2117)
- Summary of the argument (Pa R.A.P. 2118)
- Argument (Pa R.A.P. 2119)
- A short conclusion stating the precise relief sought
- Trial court opinion
- Intermediate appellate court opinion
- Know, and follow, the rules: 14-point font, don't be argumentative in your factual and procedural history, provide record citations for everything, etc…

The Tipsy Coachman Doctrine

The pupil of impulse, it forc'd him along,
His conduct still right, with his argument wrong;
Still aiming at honour, yet fearing to roam,
The coachman was tipsy, the chariot drove home.

- Oliver Goldsmith, *Retaliation*

"It is well settled that this Court may affirm the decision of the [intermediate appellate] court on any basis, without regard to the basis on which the court below relied."

Shearer v. Naftzinger, 747 A.2d 859, 861 (Pa. 2000)

Harmless Error

"A defendant is entitled to a fair trial but not a perfect one."

Lutwak v. United States, 344 U.S. 604, 619 (1953)

In criminal cases:

- Error was harmless beyond a reasonable doubt
- No reasonable possibility that the error might have contributed to the conviction

In civil cases:

- Error must not have been prejudicial to the complaining party

Writing Appellate Briefs - Style

- Write clear, concise sentences (with few dependent clauses)
- Brevity can be a weapon of persuasion BUT, every brief should be self-contained
  - Justice should not have to read the Superior Court opinion or your Superior Court brief to discern what, specifically, you have argued or what kind of relief you want
- Cite to the most directly applicable case early
- Do not explain well-accepted points of law at length
- Careful proofreading (ideally by another person)
- Use active, not passive, verbs
- Limit adjective use

Writing Appellate Briefs - Style

- Overuse of “clear,” “obvious,” or “well established” may suggest the opposite
- Avoid jargon when plain English is just as clear
- Do not use terms of art unless those terms are fully defined and explained
  - An experienced practitioner who deals in the linguistic peculiarities of a certain area of the law may be well-versed, but the Justices may be less familiar
  - This is especially true of administrative agency appeals, which sometimes have a language all their own
- Tell the reader where she is going before you take her there

KEEP IT
SIMPLE

Writing Appellate Briefs - Style

Do not disparage courts, judges, lawyers, and other professionals. This only makes *you* look bad. If the trial or intermediate appellate court ruled against your client, it probably does not "defy logic," "torture the truth," or "maim justice." It certainly isn't the greatest travesty since Joan of Arc. It more likely means that some reasonably bright and decent people happened to disagree with you. You are having an intellectual debate. Anything that sinks below that can only hurt your client and does not belong in a brief.

Writing Appellate Briefs

"One final caveat is appropriate. Defendant asked for and was mercifully granted leave to file an oversized brief by this court. The brief was desultory in nature; in general a poorly written product with numerous typographical errors. It was obviously never edited by a caring professional. As a panel of judges already overburdened with cases and paper, we find it insulting to have to dutifully comb through a brief which even its author found little reason to give such attention. We condemn this type of shoddy professionalism."

United States v. Devine, 787 F.2d 1086, 1089 (7th Cir. 1986).

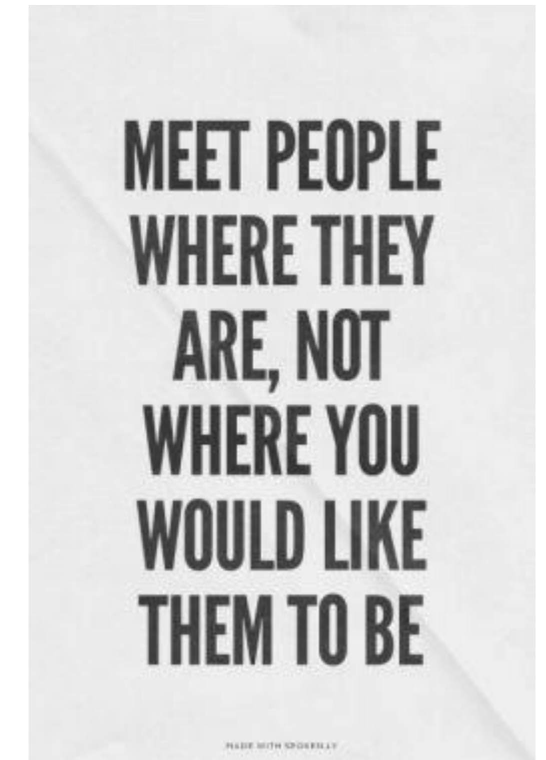
Writing Appellate Briefs – Argument Development

- Limit the issues
- Prioritize the issues (start with the most compelling)
- Address each of the "questions presented" in the argument section of your brief
- Identify the controlling authority
- If yours is a case of first impression, tell the court what other jurisdictions have done
- Acknowledge and explain weaknesses in your case
- When issue preservation is in dispute, make sure you cite to the record to demonstrate everywhere you have preserved the issue
- Do not argue facts unless, of course, your argument is that the record does not support the trial court's factual findings
- Do not inject new facts into the case that were not found, relied upon, or considered by the trial court. You make your fact record in the trial court. You cannot reinvent or improve it in the appellate forum.

Writing Appellate Briefs – Argument Development

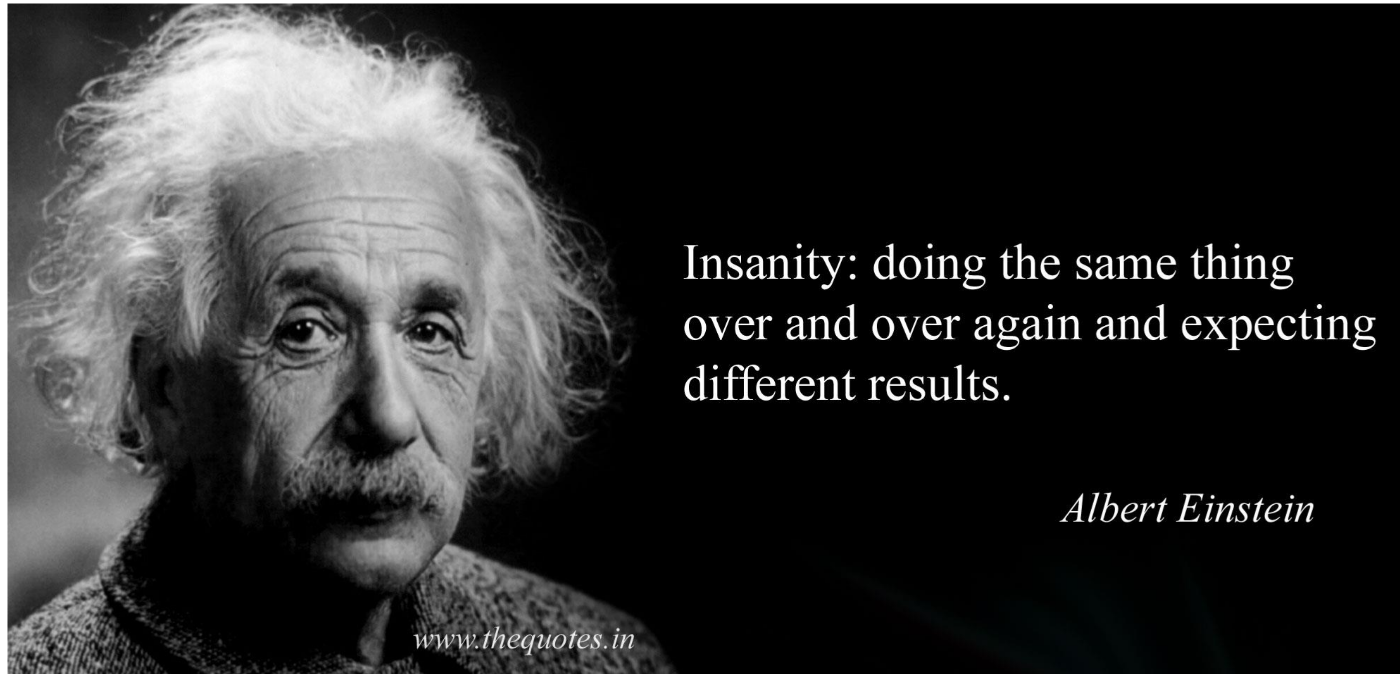
- Pay attention to the order granting argument, especially the scope of a limited grant!
  - Do not wander off into ancillary issues you pursued below that have no direct bearing on the issue granted. Remember, in the intermediate appellate court, you were looking for a *ruling*.
  - Before the Supreme Court, you want a capital-H *Holding*. Even though *your* duty is only to your client, do not forget that the *Justices* have a different duty.
    - Why did the Supreme Court take the case?
    - What rule of law might the Court choose to articulate?
- The Supreme Court took the case to consider one or more questions of law, which may involve examination and even modification of precedents and principles. The Court inevitably must consider global ramifications that might ensue. If your goal is to get a ruling for your client, you have to ask what will maximize the chances that your audience will rule in your client's favor.

That means meeting the Court on its own terms!



Writing Appellate Briefs – Argument Development

"Appellate work is most assuredly not the recycling of trial level points and authorities."
- *In re Marriage of Shaban*, 88 Cal.App.4th 398 (2001).



Oral Argument

- Have a theme that ties your case together
- Try to be an intellectual peer of the judges. Know the law. Show why a better reading of the law compels a result in your client's favor.
- Get right to the point. Express your strongest argument first, and do it with clarity and coherence.
- Don't argue your weak issues
- This may be your last chance to affect the court's decision – Justices vote on your case after leaving the bench
- Justices are engaging in a discussion with you, and with each other
- Listen and read the Justices' questions and body language
- Answer the question that was actually posed (not the one you wish you were asked), and do so directly and immediately
- Observe the court's reaction to the other side's arguments

Paul sensed the appellate panel was not going to let him keep the trial court's award of punitive damages.

Oral Argument - Demeanor

- Do not risk your credibility
- Do not be afraid to pause briefly before answering a question
- Do not be defensive and do not display annoyance
- Save the drama for your jury argument. Just talk to us about the law.
- Be willing to concede your weak points
- Make eye contact with the entire panel throughout
- Do not ignore or “write off” any jurists

Oral Argument – Timing

- Avoid spending too much time reciting the facts of the case
- The judges have already read the briefs
- You have the judges' highest level of attention during the first few minutes
- Never interrupt a judge
- If you have made all your points, do not make them again. Offer to respond to questions. Do not be afraid to thank the Court and sit down.

There is as much wisdom in knowing when to keep quiet as in knowing when to speak up. Use your voice wisely.

Appellate Advocacy

Justice David N. Wecht
Supreme Court of Pennsylvania

Overview

- **The Basics**
  - Pennsylvania's appellate courts
  - Appealable and non-appealable orders
  - Common progression of an appeal
  - Waiver
- **Writing Appellate Briefs**
  - What must be included in an appellate brief?
  - How to write briefs that persuade
  - What are judges looking for in an appellate brief?
- **Oral Argument**

The Basics

The Supreme Court

The Supreme Court has exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases:

(1) Matters prescribed by general rule

(2) The right to public office

(3) Matters concerning the qualifications, tenure, right to serve, of any member of the judiciary

(4) Automatic review of sentences relating to review of death sentence

(5) Supersession of a district attorney by an Attorney General or by a court or where the matter concerns the supervision, administration, or operation of an investigating grand jury

(6) Matters concerning the power of the Commonwealth to create or issue indebtedness

(7) Matters where the court of common pleas has held invalid as repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of the Commonwealth, any provision of the Constitution of, or of any statute of, the Commonwealth

(8) Matters where the right to practice law is drawn in direct question

42 Pa. C.S. § 722.

The Supreme Court

The Pennsylvania Supreme Court provides discretionary review by grant of a petition for allowance of appeal over final orders issued by the Superior or Commonwealth Courts.

42 Pa. C.S. § 724.

The Commonwealth Court

The Commonwealth Court has exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following cases:

(1) Commonwealth civil cases
(2) Governmental and Commonwealth regulatory criminal cases
(4) Local government civil and criminal matters
(5) Certain private corporation matters
(6) Eminent domain
(7) Immunity waiver matters
(8) Direct appeals from government agencies

42 Pa. C.S. §§ 762, 763.

The Superior Court

The Superior Court handles such appeals from the Courts of Common Pleas as are not within the jurisdiction of the Commonwealth Court, and it exercises original jurisdiction **only** to the extent it is ancillary to its appellate jurisdiction (except in certain habeas matters).

42 Pa.C.S. §§ 741, 742.

When is an order appealable?

- If an order is final, it is appealable. Pa.R.A.P. 341.
- If an order is collateral, it is appealable. Pa.R.A.P. 313.
- If an order is within the set "*of right*" interlocutory orders, it is appealable (some of which may require special steps to be taken). Pa.R.A.P. 311.

When is an order appealable?

- For all other orders, there needs to be a determination by the court that:
    - “Immediate appeal would facilitate resolution of the entire case” Pa.R.A.P. 341(c); *Or*
    - That the order “involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the matter” 42 Pa.C.S. § 702(b).

Examples of Non-Appealable Orders

- Generally, pretrial orders are considered interlocutory and not appealable. ***Commonwealth v. Matis***, 710 A.2d 12, 17 (Pa. 1998).
- Order granting severance of criminal informations is not a final order. ***Commonwealth v. Smith***, 544 A.2d 943, 945 (Pa. 1988).
- Denial of pretrial habeas corpus petitions based on the insufficiency of evidence not appealable, absent a showing of exceptional circumstances. ***Commonwealth v. Hess***, 414 A.2d 1043, 1047-48 (Pa. 1980).
- Juvenile review order that maintains the status quo. ***In re M.D.***, 839 A.2d 1116, 1121 (Pa. Super. 2003).

Some collateral orders may be waived if not immediately appealed

- 1) the order must be separable from and collateral to the main cause of action;
- 2) the right involved must be too important to be denied review; and
- 3) the question presented must be such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa.R.A.P. 313.

Typical Progression of an Appeal

- Notice of appeal is filed
- Supersedeas is posted
- Civil docketing statement is issued
- 1925(b) statement is ordered
- Trial court opinion is issued and record is sent
- Briefs and reproduced record
- Argument
- Decision

Waiver

To get your case decided on the merits:

- Make a proper record in the trial court
- Ensure transmission of a complete record to the appellate court

"Before we set out, there's this little matter of a waiver."

The tipsy coachman doctrine

"It is well settled that this Court may affirm the decision of the immediate lower court on any basis, without regard to the basis on which the court below relied."

Donnelly v. Bauer, 720 A.2d 447, 454 (Pa. 1998).

The tipsy coachman

The pupil of impulse, it forc'd him along,

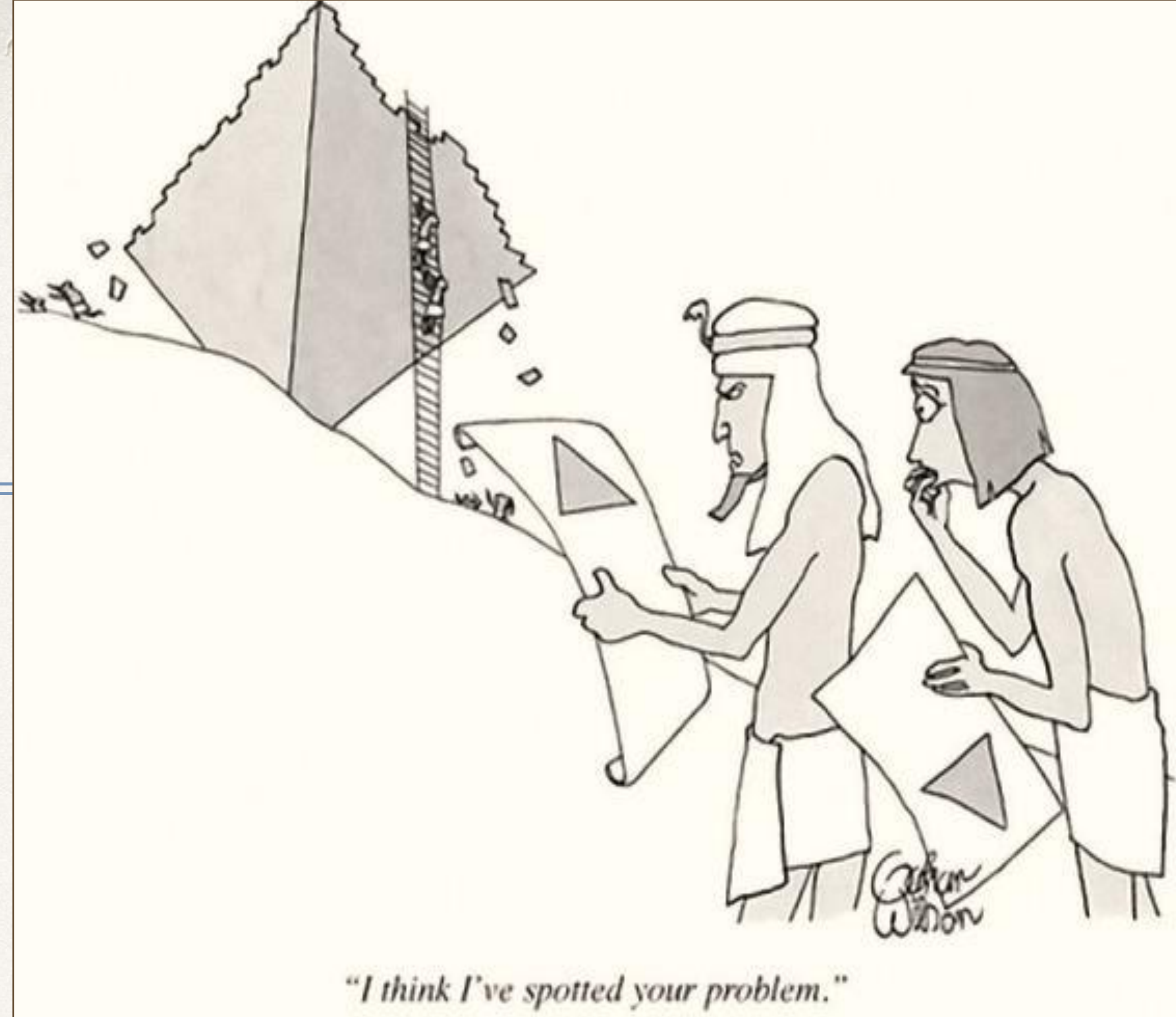
His conduct still right, with his argument wrong;

Still aiming at honour, yet fearing to roam,

The coachman was tipsy, the chariot drove home.

Oliver Goldsmith, *Retaliation*

Harmless Error


“I think I’ve spotted your problem.”

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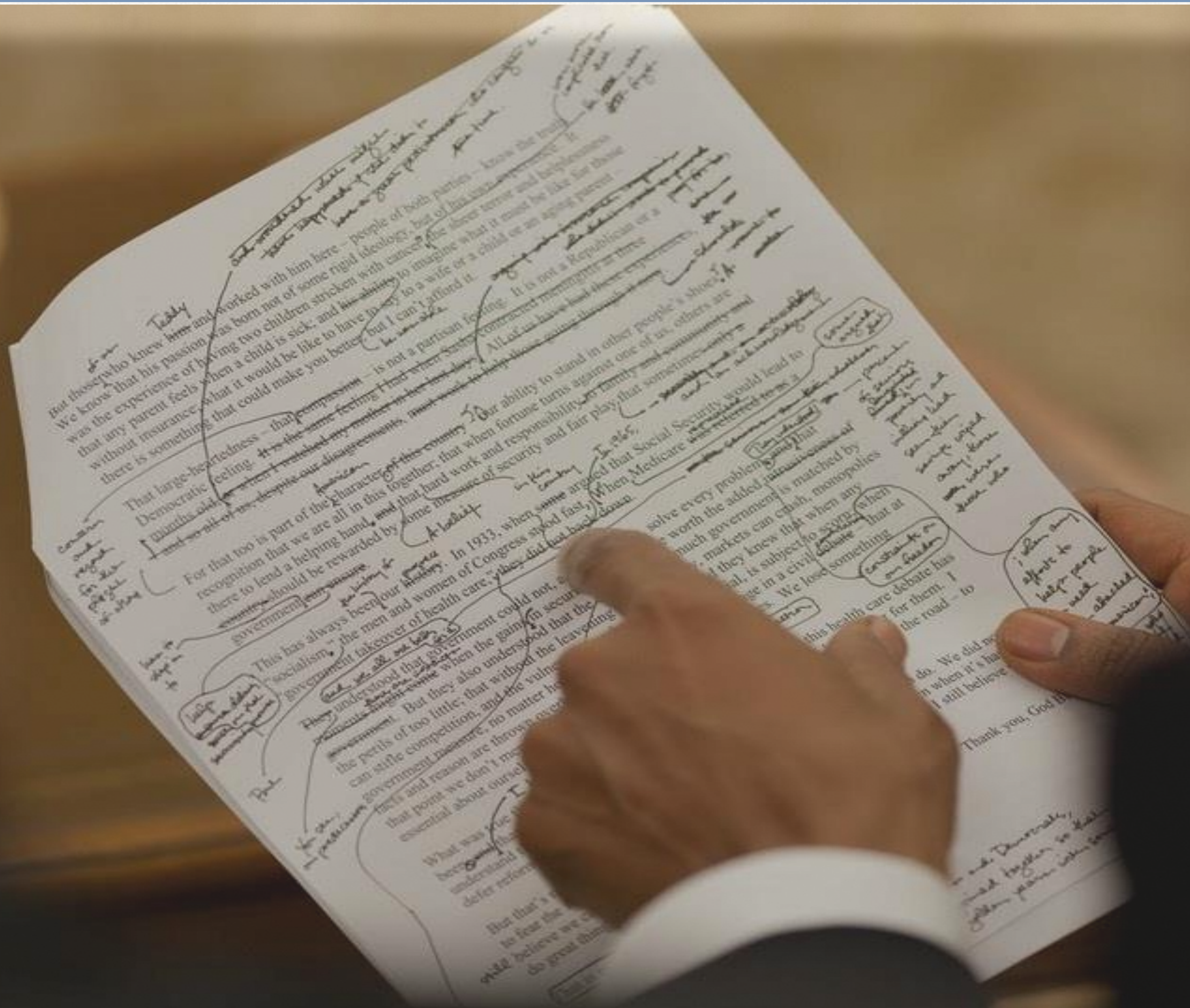
Writing appellate briefs



Contents of briefs

Appellant's Brief:

- Statement of jurisdiction (Pa R.A.P. 2114)
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Style

- Write clear, brief sentences (with few dependent clauses)
- Brevity can be a weapon of persuasion
- Cite to the most directly applicable case early
- Do not explain well-accepted points of law at length
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- Limit adjective use
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- Avoid jargon when plain English is just as clear
- Tell the reader where he is going before you take him there

Argument Development

- Limit the issues
- Prioritize the issues (start with the most compelling)
- Address each of the “questions presented” in the argument section of your brief
- Identify the controlling authority
  - If yours is a case of first impression, tell the court what other jurisdictions have done
- Acknowledge and explain weaknesses in your case

“Appellate work is most assuredly not the recycling of trial level points and authorities.”

–*In re* Marriage of Shaban, 88 Cal.App.4th 398 (2001).

Waiver

- A brief must contain a developed argument augmented by citation to pertinent authorities. Pa.R.A.P. 2119(a).

- Issues not included in your concise statement of the errors complained of on appeal are waived. Pa.R.A.P. 1925(b)(4).

- A Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all. ***Commonwealth v. Dowling***, 778 A.2d 683, 686-87 (Pa. Super. 2001).

Be mindful of limits upon appellate courts

- Consider the court's standard and scope of review
- Appellate courts are often bound by the facts found by the court below
- Appellate courts generally cannot raise issues *sua sponte*

Oral Argument

Oral Argument

- Have a theme that ties your case together
- Try to be an intellectual peer of the judges. **Know the law**.
- Don’t argue your weak issues
- This may be your last chance to affect the court’s decision
  - Appellate judges often vote on your case after leaving the bench

Be prepared to listen

- Appellate judges are engaging in a discussion with you, and with each other
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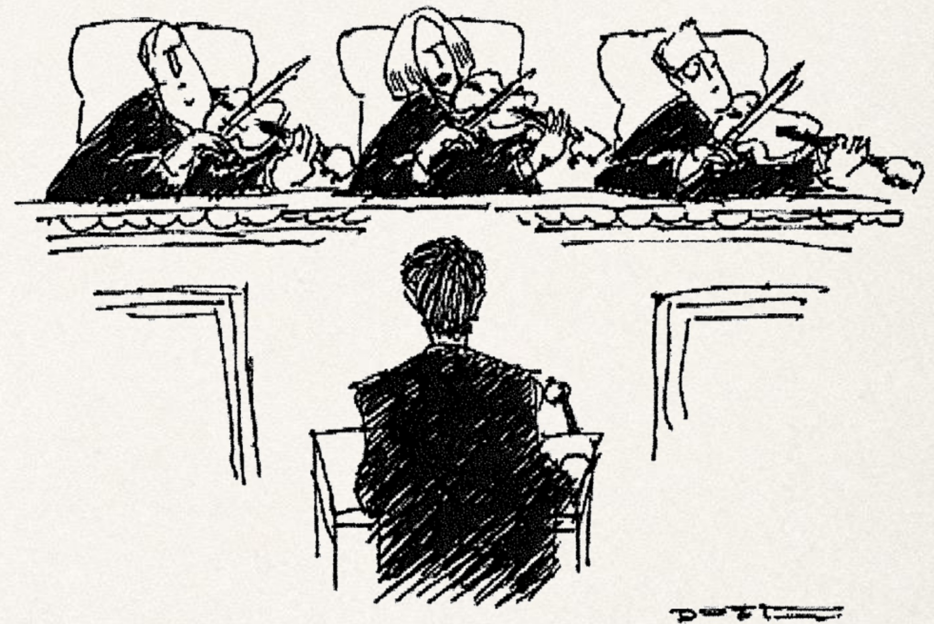
- The appellee should particularly note the court's reaction to appellant's arguments



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Demeanor

- Do not risk your credibility
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- Do not be defensive
  - Be willing to concede a point that hurts your case
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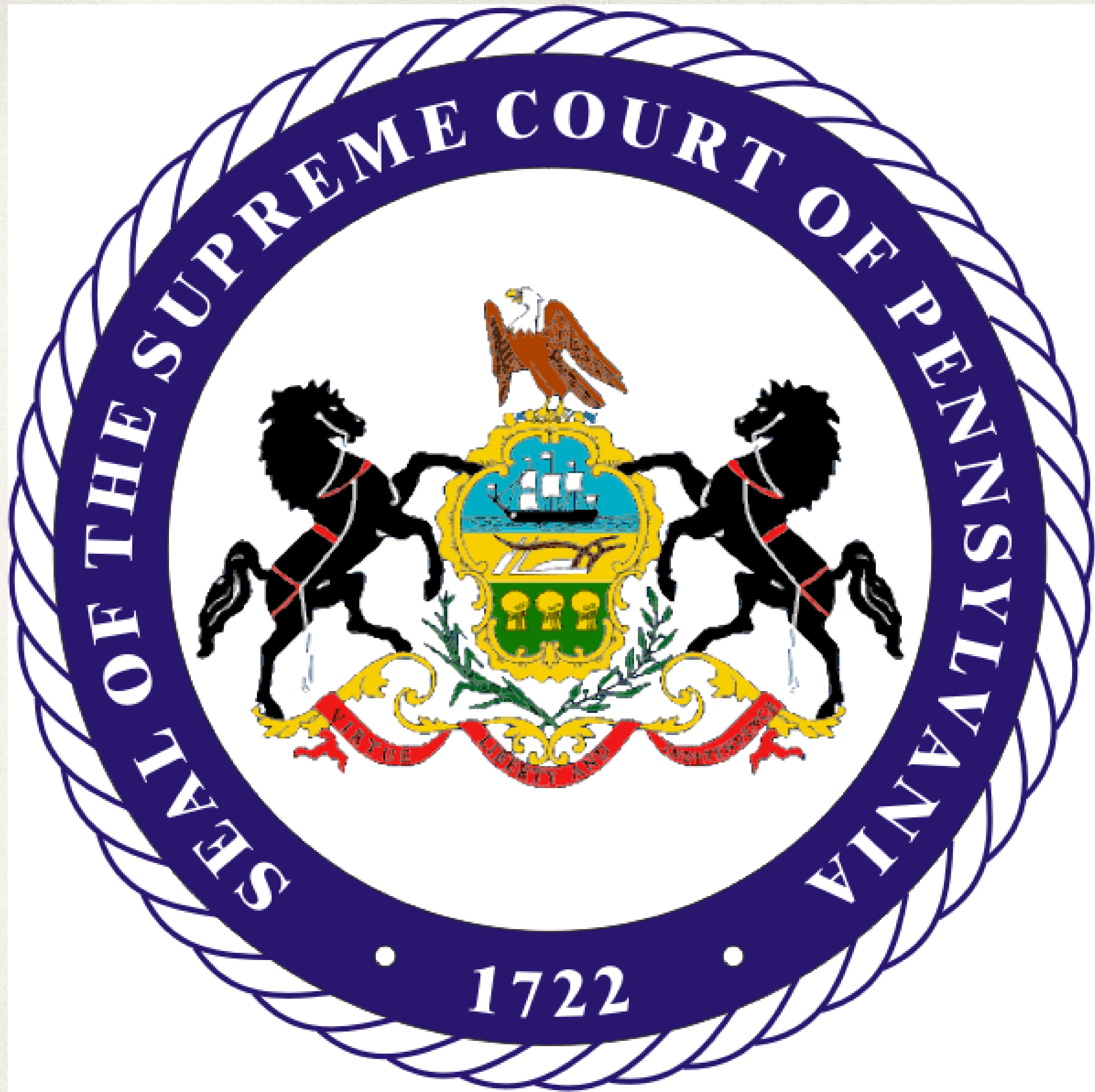
Timing

- Avoid spending too much time reciting the facts of the case
  - The judges have already read the briefs
- You have the judges' highest level of attention during the first few minutes
  - Jump straight into the most important points
- When you are asked a question, address it immediately

Q&A


SEAL OF THE SUPREME COURT OF PENNSYLVANIA
1722
VIRTUE LIBERTY AND INDEPENDENCE

Appellate Rules Changes (June 2023 – May 2024)

- Rules 105, 107, 903
    - Provides additional interpretive rules for interpreting Rules of Appellate Procedure
- Rules 1101, 1112, 1123, 1311, 1514, 1602, 1925, 2542, 3307, 3309, 3781, 4002 (updating postal forms for purposes of service rules)
- Rule 1115
    - Adds requirement of statement of place of raising or preservation of issues specifying stage and manner below or explanation as to why preservation is not required
    - Adds that failing to comply with requirements of rule is itself sufficient reason to deny allocatur
    - Revises “clearness” to “clarity”
- Rule 1512
    - Implements Criminal History Record Information Act Vis-à-vis Petitions For Review

See also Pa.R.J.A. 104-115 (adopting interpretive principles for statewide rules of procedure)

2023

ANNUAL REPORT OF STATISTICS
SUPERIOR COURT OF PENNSYLVANIA

April 2024

JUDGES OF THE SUPERIOR COURT

President Judge Jack A. Panella
President Judge Emeritus John T. Bender
Judge Mary Jane Bowes
Judge Anne E. Lazarus
Judge Judith Ference Olson
Judge Victor P. Stabile
Judge Alice Beck Dubow
Judge Deborah A. Kunselman
Judge Carolyn H. Nichols
Judge Mary P. Murray
Judge Maria C. McLaughlin
Judge Megan King
Judge Daniel McCaffery
Judge Megan Sullivan
President Judge Emeritus Correale F. Stevens
Judge James G. Colins
Judge Dan Pellegrini

EXECUTIVE ADMINISTRATOR

Jennifer Traxler, Esquire

DEPARTMENT HEADS

Benjamin Kohler, Esquire
Prothonotary

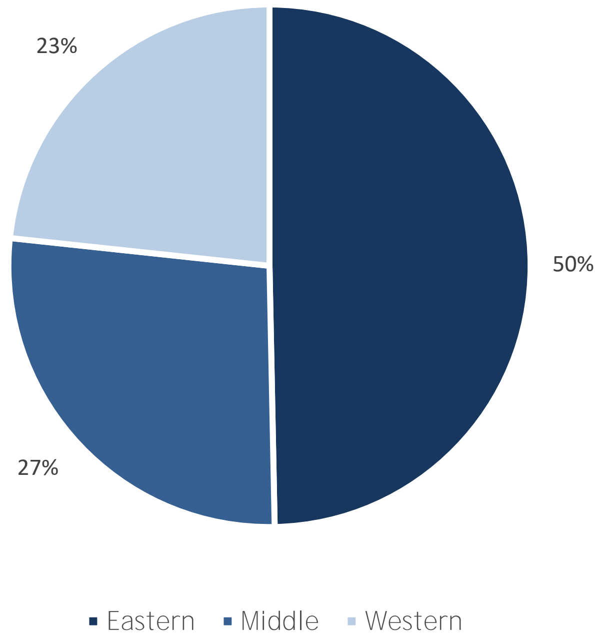
Philip H. Yoon, Esquire
Chief Staff Attorney - Legal

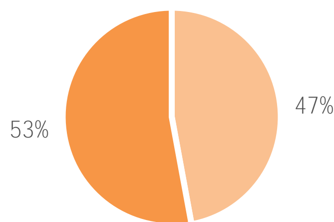
Catherine Shelly, Esquire
Chief Staff Attorney - Operations

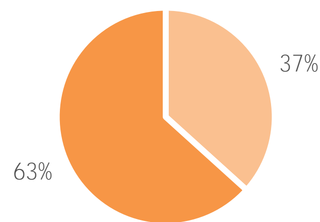
Peter F. Johnson, Esquire
Legal Systems Coordinator

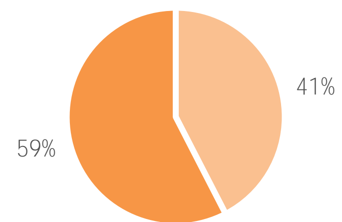
Dolores Bianco,
Reporter

Appeals by District in 2023



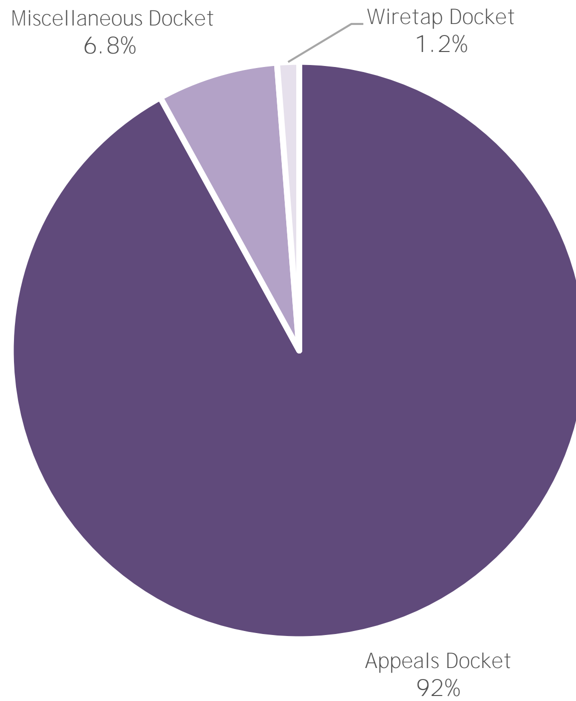




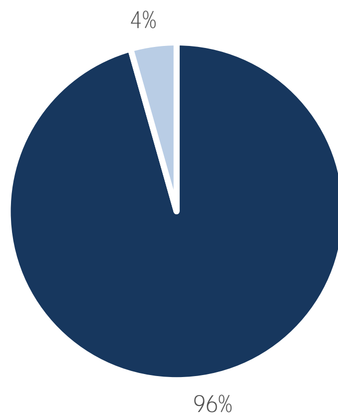


	Civil	Criminal	Total
Eastern	1,523	1,711	3,234
Middle	645	1,113	1,758
Western	622	895	1,517
Total	2,790	3,719	6,509

Cases by Docket Type in 2023

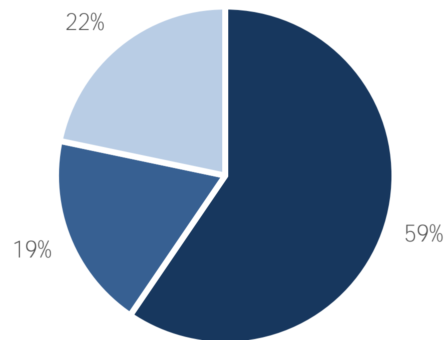


Wiretap Docket by Docketing District in 2023



▪ Eastern ▪ Western

Miscellaneous Docket by District in 2023

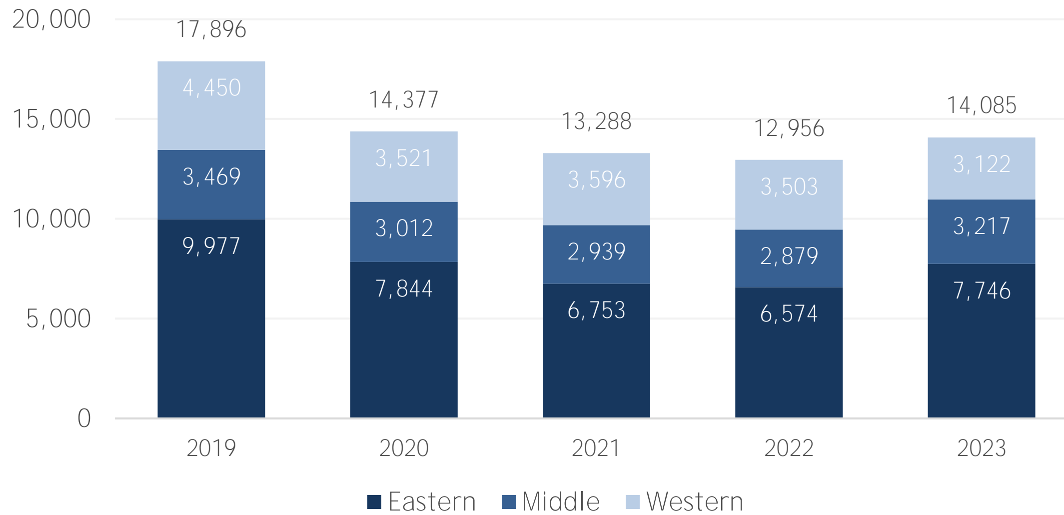


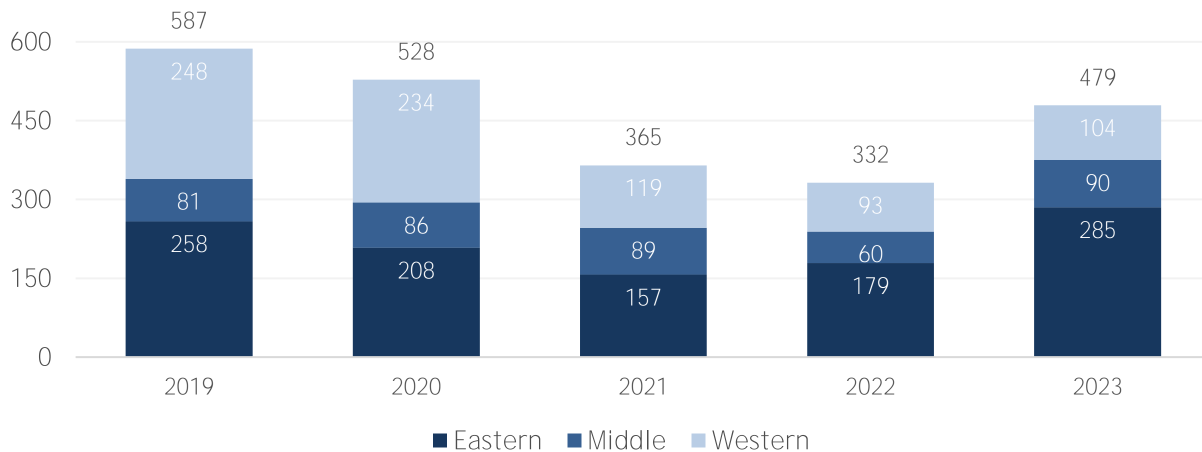
▪ Eastern ▪ Middle ▪ Western

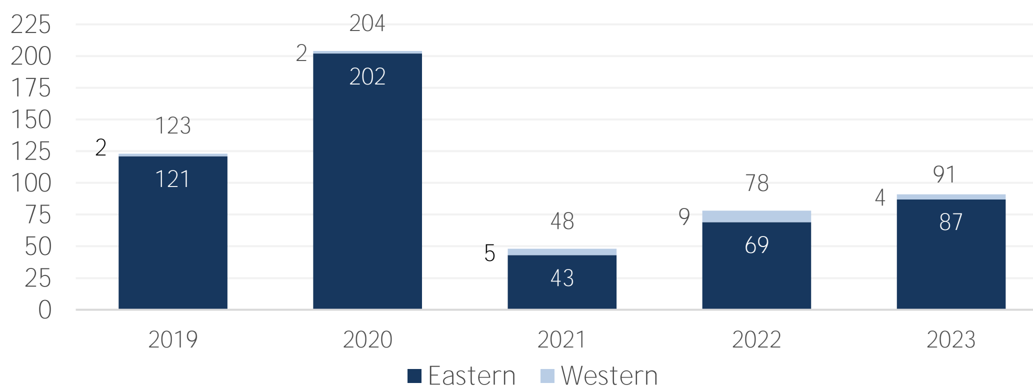
	Miscellaneous Docket	Wiretap Docket	Appeals Docket	Total
Eastern	285	87	3,234	3,606
Middle	90	†	1,758	1,848
Western	104	4	1,517	1,625
Total	479	91	6,509	7,079

*Miscellaneous dockets are comprised of filings unrelated to active docketed appeals, such as Petitions for Permission to Appeal.

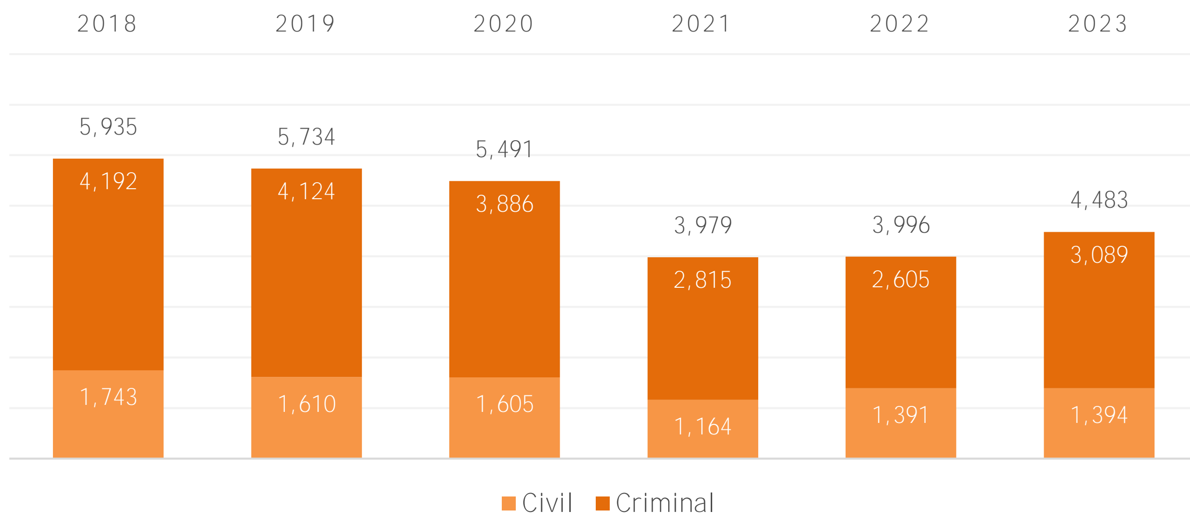
† Middle District wiretap applications are maintained in the Eastern District office.



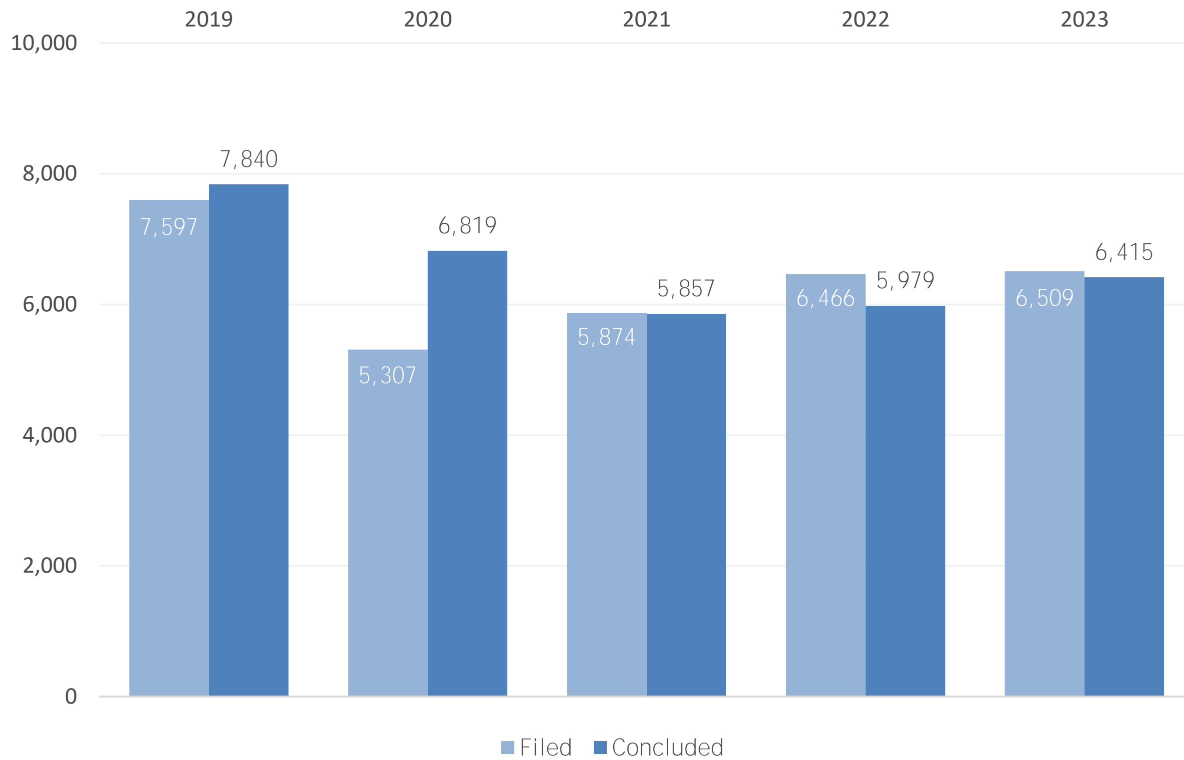




* Middle District wiretap applications are maintained in the Eastern District office.

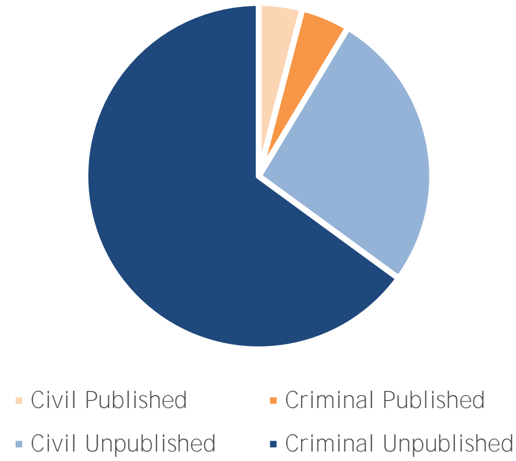


	2018	2019	2020	2021	2022	2023
Civil Appeals Pending 1/1	1,743	1,610	1,605	1,164	1,391	1,394
Criminal Appeals Pending 1/1	4,192	4,124	3,886	2,815	2,605	3,089
Total	5,935	5,734	5,491	3,979	3,996	4,483
Civil Appeals Pending 12/31	1,610	1,605	1,164	1,391	1,394	1,566
Criminal Appeals Pending 12/31	4,124	3,886	2,815	2,605	3,089	3,011
Total	5,734	5,491	3,979	3,996	4,483	4,577

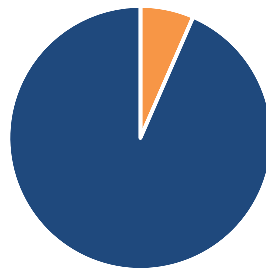


	2019	2020	2021	2022	2023
Civil Appeals Filed	2,939	2,014	2,533	2,623	2,790
Criminal Appeals Filed	4,658	3,293	3,341	3,843	3,719
Total	7,597	5,307	5,874	6,466	6,509
Civil Appeals Concluded	2,944	2,455	2,306	2,620	2,618
Criminal Appeals Concluded	4,896	4,364	3,551	3,359	3,797
Total	7,840	6,819	5,857	5,979	6,415

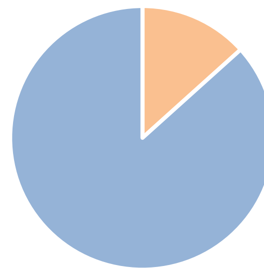
Decisions in 2023



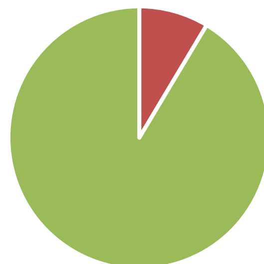
Criminal Decisions in 2023



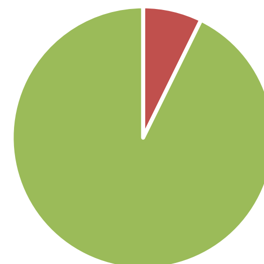
Civil Decisions in 2023

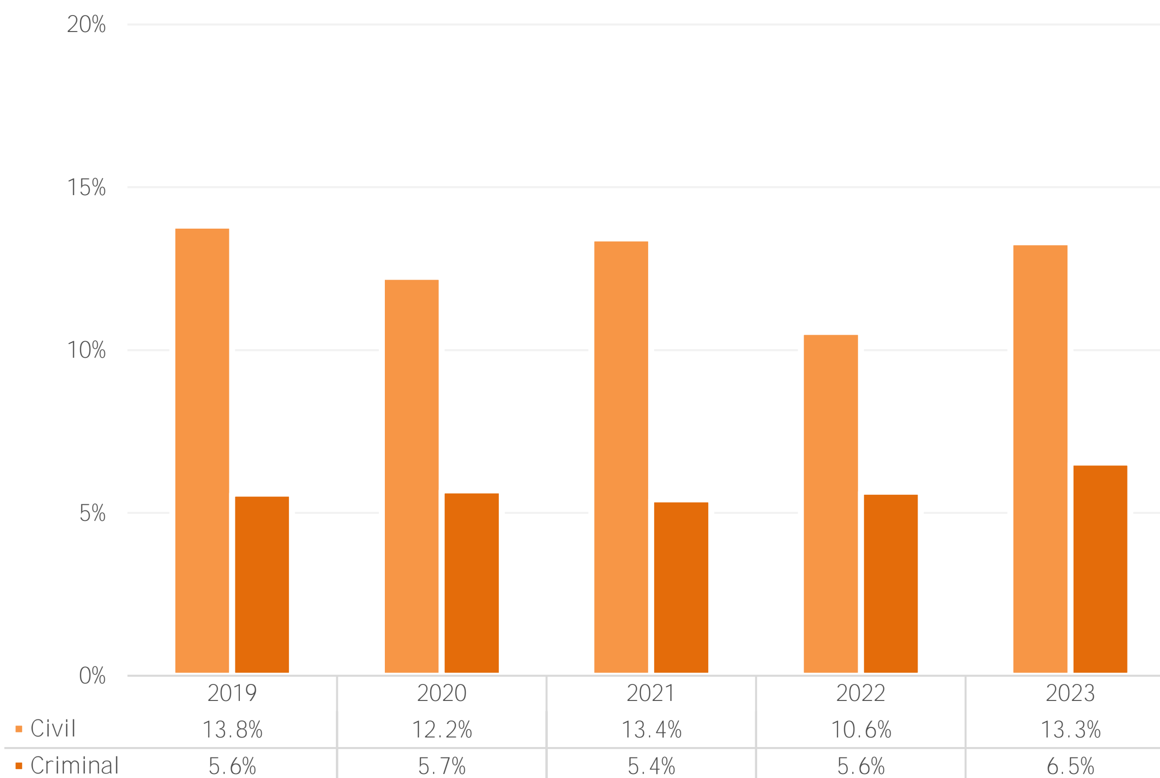


Total Decisions in 2023



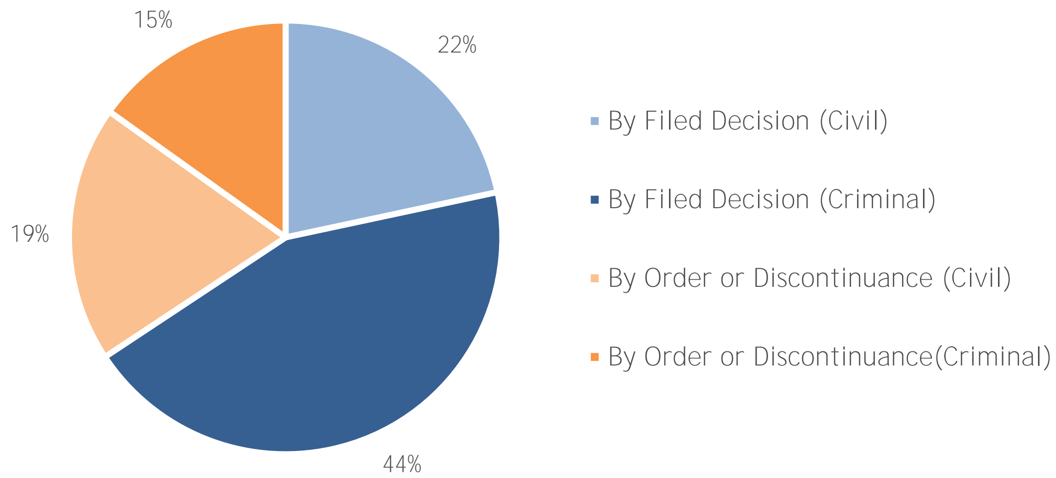
Average Since 2019

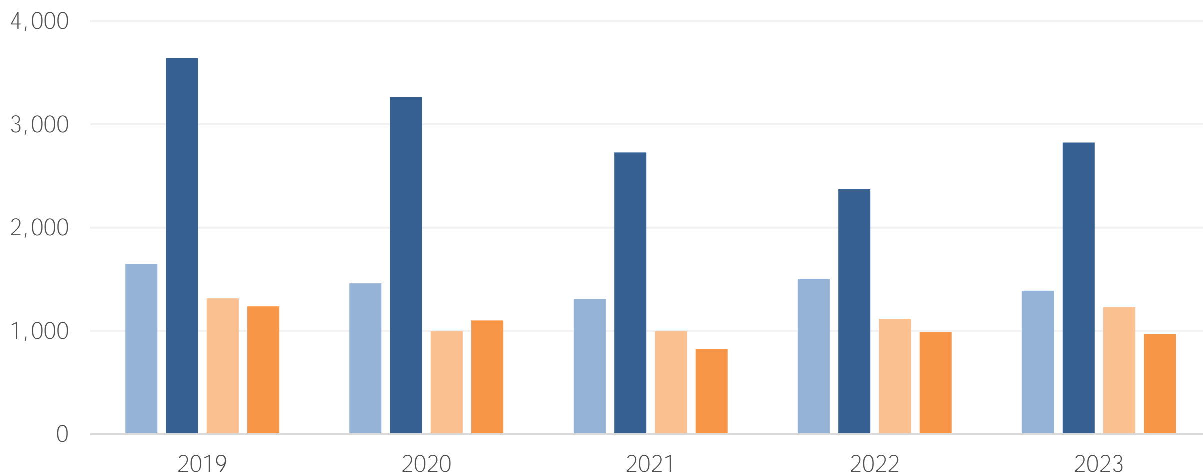




	2019	2020	2021	2022	2023
Civil Precedential	179	140	133	115	133
Criminal Precedential	191	160	123	109	149
Total Precedential	370	300	256	224	282
Civil Non-Precedential	1,116	1,003	857	974	866
Criminal Non-Precedential	3,227	2,652	2,150	1,821	2,127
Total Non-Precedential	4,343	3,655	3,007	2,795	2,993
Total Filed Decisions *	4,713	3,955	3,263	3,019	3,275

* **The total of filed decisions was calculated by totaling this Court's published opinions, opinions** *per curiam*, memorandum decisions, and judgment orders.

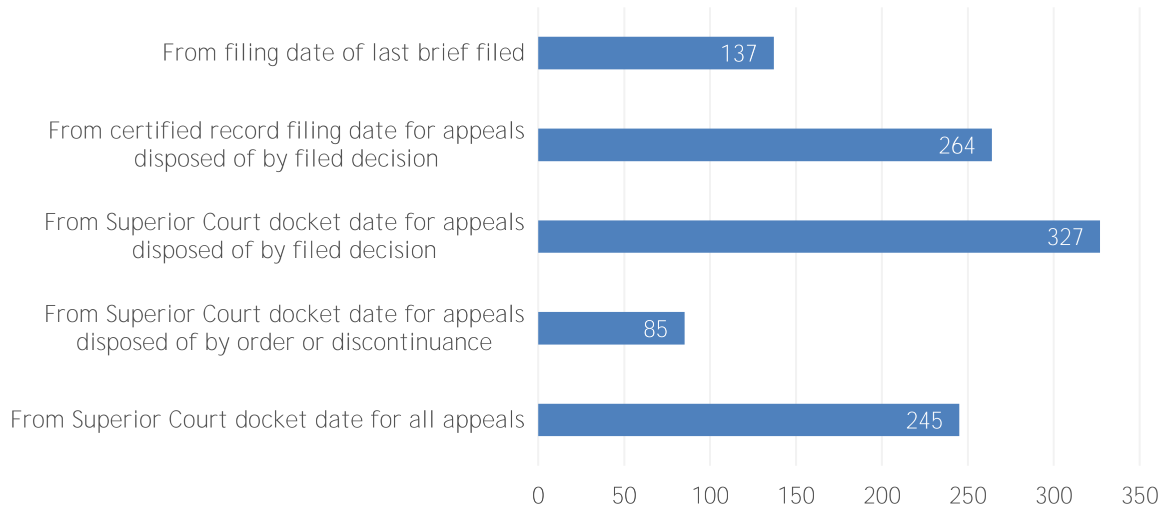


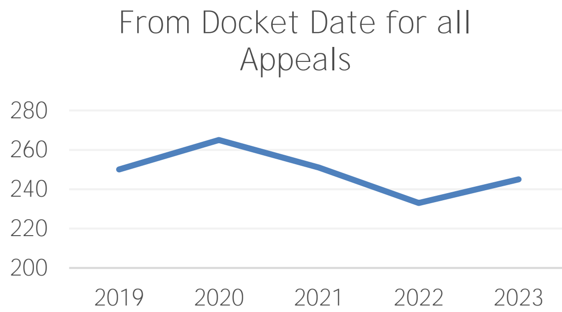


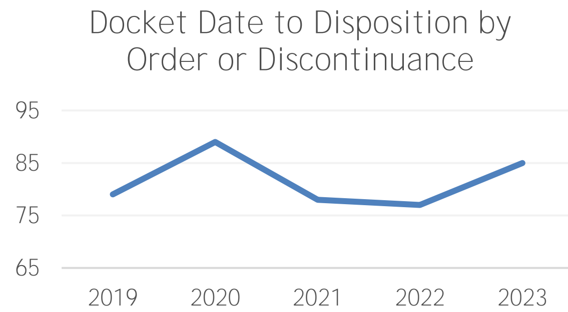
	2019	2020	2021	2022	2023
Filed Decision (Civil) ●	1,646	1,459	1,309	1,503	1,389
Filed Decision (Criminal) ●	3,644	3,264	2,727	2,372	2,826
Filed Decision Total *	5,290	4,723	4,036	3,876	4,215
Order or Discontinuance (Civil) ●	1,314	996	997	1,117	1,229
Order or Discontinuance (Criminal) ●	1,236	1,100	824	986	971
Order or Discontinuance Total	2,550	2,096	1,821	2,103	2,200
All Dispositions	7,840	6,819	5,857	5,979	6,415

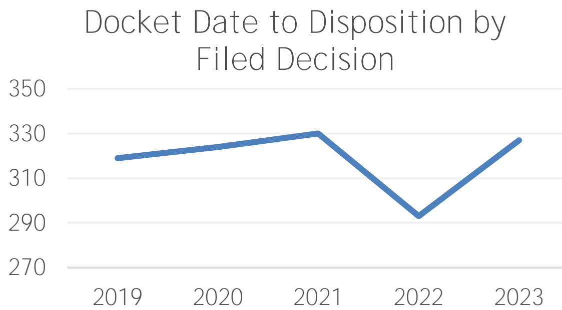
* The filed decision total here differs from the total on Page 8 because it accounts for consolidated decisions and reflects the total number of appeals decided by written decision.

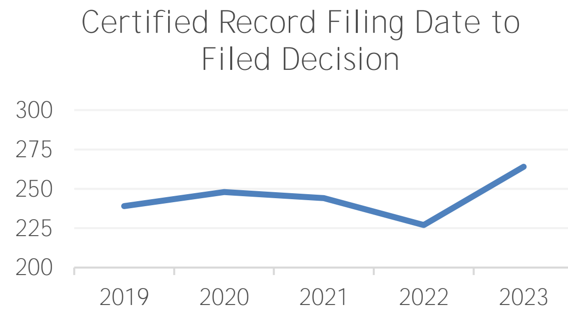
Median Number of Days to Disposition for Appeals Concluded in 2023

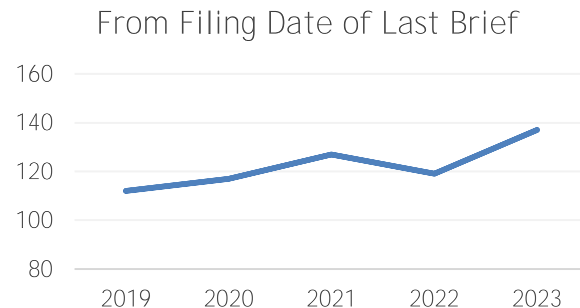


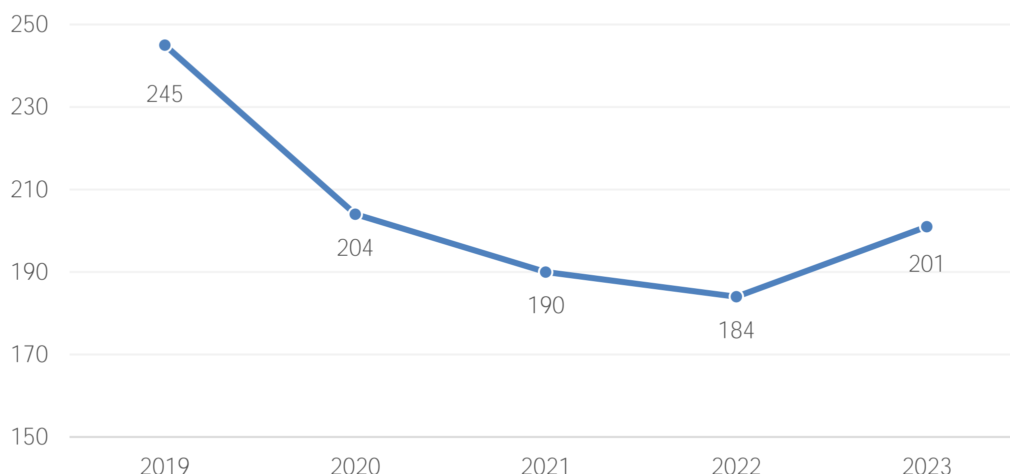








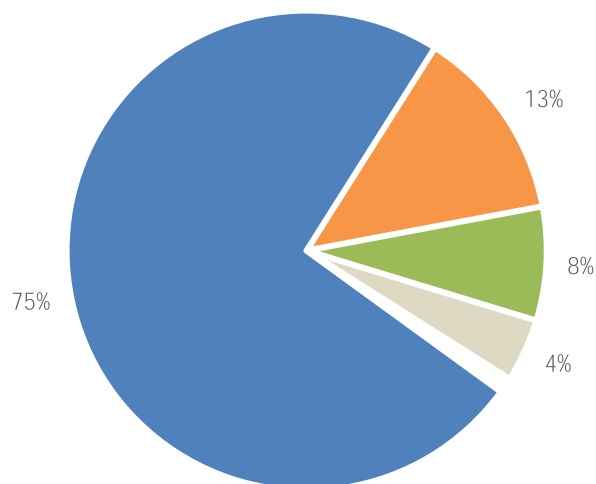




Number of Appeals by County

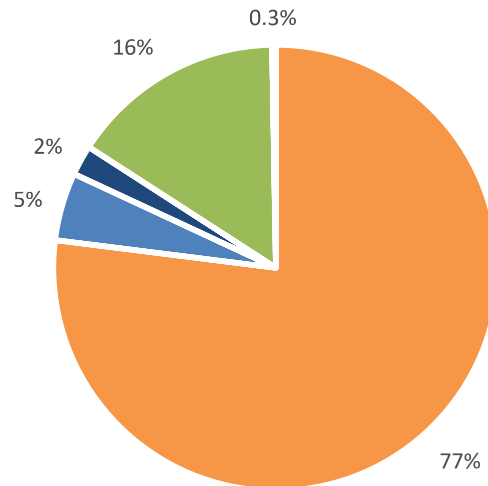
Adams	48	Clinton	26	Lackawanna	86	Pike	48
Allegheny	507	Columbia	16	Lancaster	166	Potter	6
Armstrong	16	Crawford	22	Lawrence	21	Schuylkill	63
Beaver	43	Cumberland	110	Lebanon	65	Snyder	24
Bedford	12	Dauphin	198	Lehigh	134	Somerset	20
Berks	183	Delaware	239	Luzerne	166	Sullivan	11
Blair	86	Elk	3	Lycoming	57	Susquehanna	4
Bradford	39	Erie	152	McKean	33	Tioga	10
Bucks	206	Fayette	61	Mercer	31	Union	17
Butler	48	Forest	8	Mifflin	12	Venango	36
Cambria	54	Franklin	68	Monroe	92	Warren	19
Cameron	1	Fulton	15	Montgomery	373	Washington	76
Carbon	23	Greene	32	Montour	2	Wayne	24
Centre	51	Huntingdon	33	Northampton	108	Westmoreland	106
Chester	170	Indiana	29	Northumberland	43	Wyoming	11
Clarion	21	Jefferson	42	Perry	19	York	209
Clearfield	32	Juniata	4	Philadelphia	1,786	TOTAL	6,509

Action by Superior Court in Filed Decisions in 2023

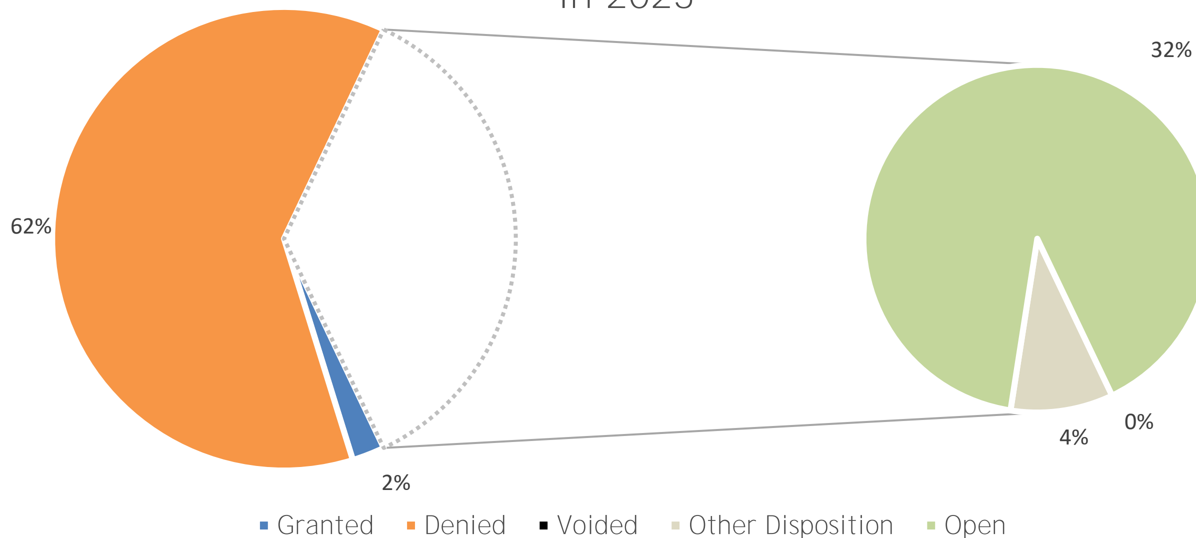


	2019	2020	2021	2022	2023
Affirmed (Precedential)	262	192	162	126	175
Affirmed (Non-Precedential)	3,805	3,459	2,909	2,868	2,943
Affirmed Total	4,067	3,651	3,071	2,995	3,118
Reversed (Precedential)	116	117	92	85	109
Reversed (Non-Precedential)	502	449	440	399	442
Reversed Total	618	566	532	483	551
Affirmed in Part, Reversed in Part (Precedential)	44	33	47	31	49
Affirmed in Part, Reversed in Part (Non-Precedential)	206	173	192	185	274
Affirmed in Part, Reversed in Part Total	250	206	239	216	323
Quashed, Dismissed, Transferred (Precedential)	19	7	18	6	7
Quashed, Dismissed, Transferred (Non-Precedential)	311	265	158	149	173
Quashed, Dismissed, Transferred Total	330	272	176	155	180
Other (Precedential)	2	0	0	1	0
Other (Non-Precedential)	23	28	18	16	43
Other Total	25	28	18	17	43

Applications for Reconsideration or Reargument in 2023



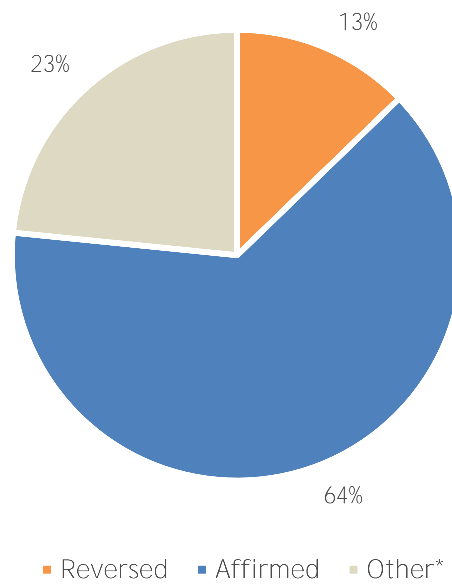
Treatment	Count	Percent
Denied	281	76.78%
Granted Reargument	18	4.93%
Granted Panel Reconsideration	8	2.18%
Untimely or Moot	57	15.57%
Other Disposition	1	.2%
Withdrawn	1	.2%
TOTAL	366	100%



Petitions for Allowance of Appeal	2019	2020	2021	2022	2023
Allocatur Petitions Filed	1,738	1,448	1,411	1,081	1,227
Granted	59	35	39	50	38
Denied	1,539	1,476	1,370	1,127	1,031
Voided	5	5	2	1	0
Other Disposition *	70	52	74	45	57
Open	733	616	524	437	540

* In 2023, this category included 16 discontinued, 19 vacated/remanded, 18 limited grants and 4 administrative closures.

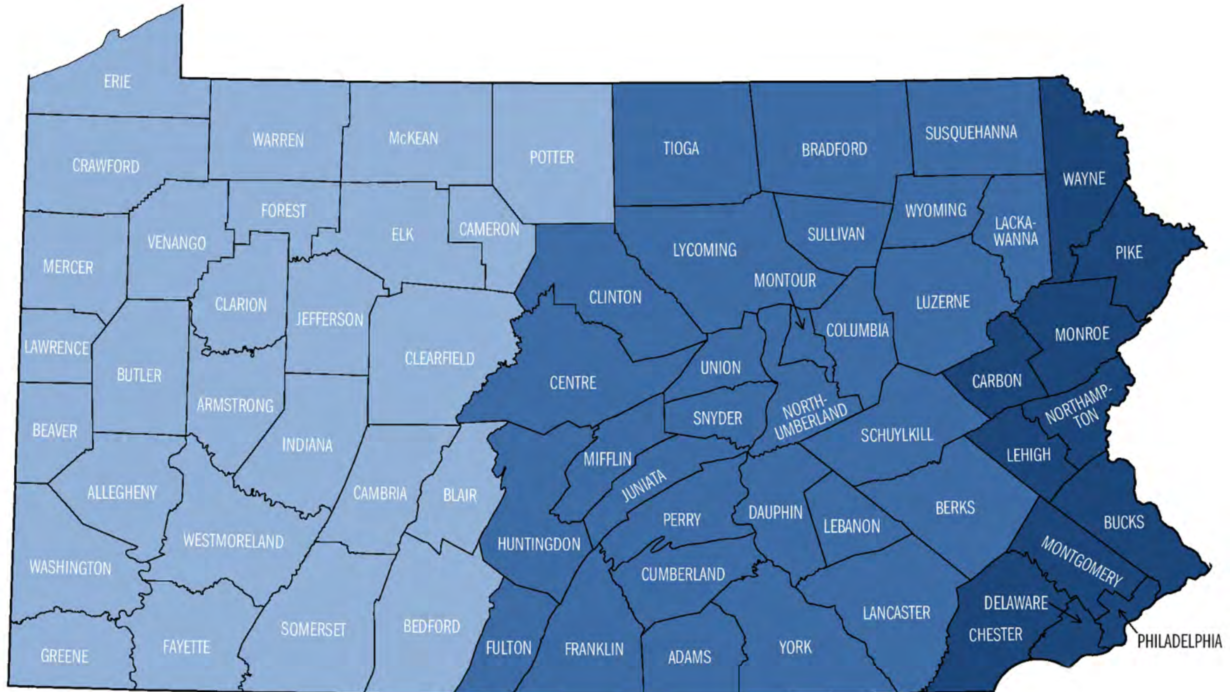
Supreme Court Disposition of Allowed Appeals from Superior Court Decisions in 2023



Disposition	2019	2020	2021	2022	2023
Reversed	21	24	29	6	6
Affirmed	32	48	30	12	30
Other *	11	15	31	20	11
TOTAL	64	87	90	38	47

* Includes 1 affirmed/reversed/remanded, 1 discontinued, 3 improvidently granted, 1 reversed in part, 4 vacated/remanded, and 1 vacated.

Composition of Districts



Western District ●

Pittsburgh

Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Cameron, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Potter, Somerset, Venango, Warren, Washington, Westmoreland

Middle District ●

Harrisburg

Adams, Berks, Bradford, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lancaster, Lebanon, Luzerne, Lycoming, Mifflin, Montour, Northumberland, Perry, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wyoming, York

Eastern District ●

Philadelphia

Bucks, Carbon, Chester, Delaware, Lehigh, Monroe, Montgomery, Northampton, Philadelphia, Pike, Wayne

INTERVIEW WITH THE JUDGE

A Lawyer and Law Student Talk with Superior Court Judge Victor P. Stabile about Legal Writing and Advocacy

By Theodore C. Tanski and Inder Deep Paul

Author's note: Bryan A. Garner preaches plain English and was the founding editor of The Scribes Journal of Legal Writing, *in which he interviewed U.S. Supreme Court justices on legal writing and oral advocacy. Those transcripts inspired me and my summer intern to reach out to Superior Court Judge Victor P. Stabile. He kindly agreed to talk with us about writing and advocacy before Pennsylvania's intermediate appellate court. We can extract an important theme from what he told us — precision. Advocates assist the court. And when we do it with brevity, clarity and power, we best assist the court in reaching the correct decision.*

Tanski: Do you enjoy reading legal briefs?

Stabile: Briefs are what assist us in the work that we do. Do I enjoy it? Yes, only because I enjoy the work that this court does. I respect the importance of what this court does and appreciate after more than 30 years of practice that on the other side of that brief there's a real person. A life is being affected by the decision in each case. Most of our cases are in the criminal and family-law areas.

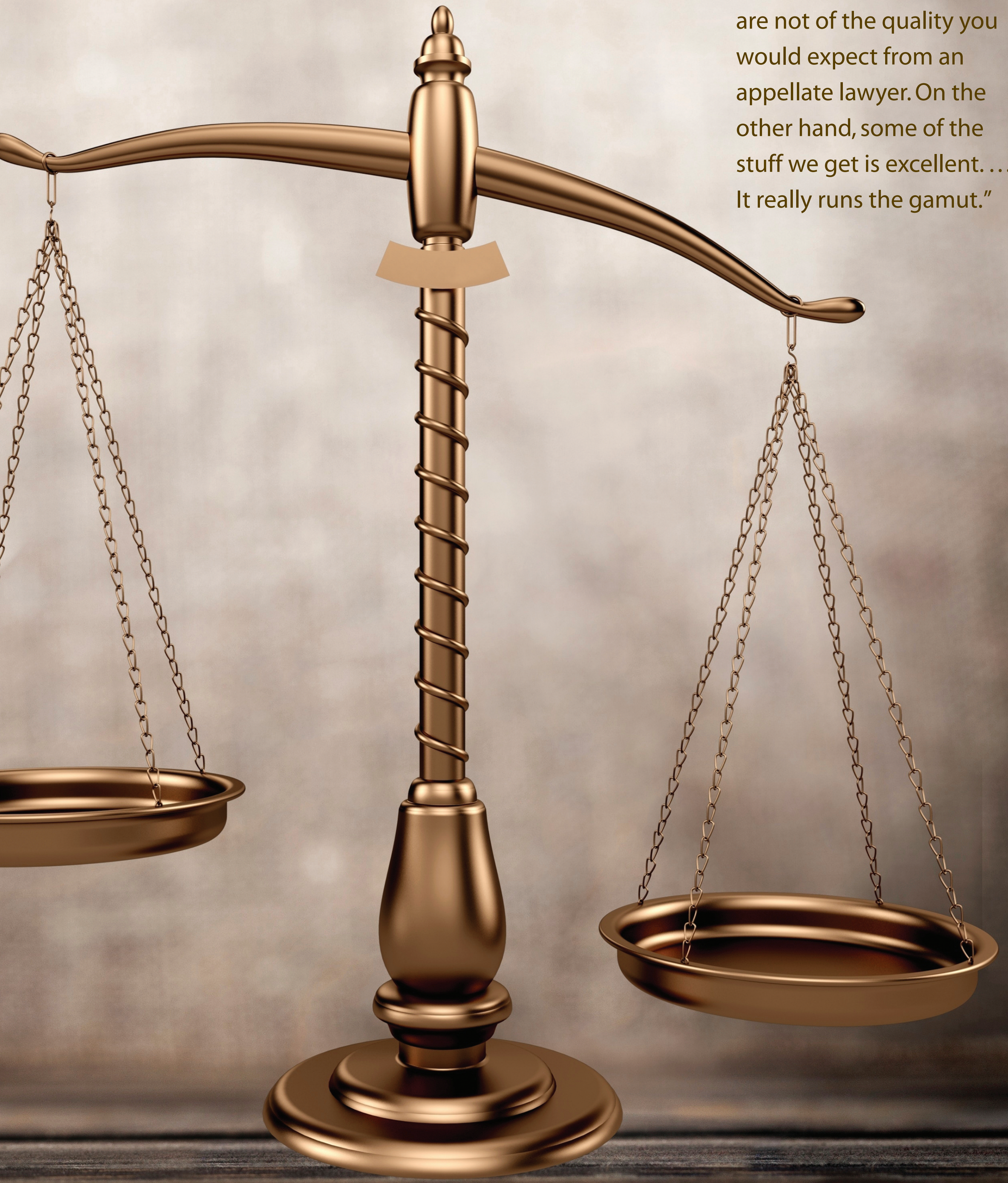
Tanski: How often after starting to read the briefs can you tell how much work a lawyer may have put into writing a brief?

Stabile: Unfortunately, sometimes very quickly. I hesitate to say this, but I think most members of the court probably share my opinion. I would say close to half the briefs we get are not of the quality you would expect from an appellate lawyer. On the other hand, some of the stuff we get is excellent, as you would expect. It really runs the gamut.

Tanski: What can bother you the most? A lack of clarity, legalese, maybe grammatical sloppiness or is there something else that is your trigger point?

Stabile: At the top of the list is an absolute disregard of the appellate rules of procedure

"Half the briefs we get are not of the quality you would expect from an appellate lawyer. On the other hand, some of the stuff we get is excellent. . . . It really runs the gamut."



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Judge Victor P. Stabile

Term

January 2014 to December 2023

Education

- Dickinson School of Law, J.D., Law Review, 1982
- SUNY Stonybrook, B.A., cum laude, 1979

Professional Experience

- Elected Judge of the Superior Court of Pennsylvania, 2013
- Partner, Dilworth Paxson LLP, and Managing Member of Harrisburg Office, 1992-2013
- Associate Dilworth Paxson LLP 1987-1992
- Deputy Attorney General, Office of Attorney General, Commonwealth of Pennsylvania, 1984-1987
- Judicial Law Clerk, Commonwealth Court of Pennsylvania, 1982-1984

Memberships and Associations

- The United States Supreme Court Bar
- The Pennsylvania Supreme Court Bar
- The Third and Eleventh Circuit Courts of Appeal Bars
- The United States Court of Federal Claims Bar
- The Eastern, Middle and Western District Courts of Pennsylvania Bars
- Member, the American Bar Association
- Member, the Pennsylvania Bar Association
- Member, the Dauphin County Bar Association
- Member (former), the Federal Bar Association for the Middle District of Pennsylvania
- Member, Federal Judicial Nominating Panel for the Middle District of Pennsylvania, 2001
- Elected Supervisor and Former Chairman, Middlesex Township, Pennsylvania 2000 to 2011
- Founding member, Cumberland County Task Force on Regional Development
- President, General Alumni Association, Dickinson School of Law, Capital Area Chapter 2000-2013
- Member, St. Joseph's Parish Council, Mechanicsburg, Pennsylvania; Chair, the Bishop's Lenten Appeal
- Member, Carlisle Fish and Game Club
- Member, Phi Sigma Alpha, The National Political Science Honor Society

Superior Court

Superior Court Judges

- President Judge Susan Peikes Gantman
- President Judge Emeritus, Kate Ford Elliott
- President Judge Emeritus, John T. Bender
- Judge Mary Jane Bowes
- Judge Jack A. Panella
- Judge Jacqueline O. Shogan
- Judge Sallie Updyke Mundy
- Judge Judith Ference Olson
- Judge Paula Francisco Ott
- › Judge Victor P. Stabile
- Senior Judge John L. Musmanno
- Judge Anne E. Lazarus
- Senior Judge Patricia H. Jenkins
- Senior Judge James J. Fitzgerald, III
- Senior Judge William H. Platt
- Senior Judge Eugene B. Strassburger, III
- President Judge Emeritus, Correale F. Stevens

in terms of what is supposed to be in a brief. Every part of a brief is important. For example, you would be surprised how many times people cavalierly state a basis for jurisdiction that is wrong. We cannot hear a case unless jurisdiction first attaches.

Tanski: What is the first thing you read?

Stabile: When I open a brief one of the first things I do, after I look at jurisdiction, is to review the question or questions presented. I want to know what we are looking at in a case before getting into its substance.

Tanski: And what are qualities, to you, that make for an excellent QP [question presented]?

Stabile: A properly presented question focuses the court on what your case is about and, ideally, is tailored to the specifics of your case in enough detail that we can immediately understand what is at issue in an appeal. Unnecessary detail tends to lose the point of the question for review. Formulating a question that focuses the court on your case is, in my opinion, somewhat of an art form.

Tanski: And what comes next?

Stabile: The summary of argument, because it should provide the reader essentially with a large head note or large head notes on the case. When a judge of the Superior Court has to read 45 cases for an argument panel and attempts to find a good synopsis of the case to review before argument, the summary of argument a lot of times can be very beneficial. A beneficial summary that has a very succinct statement of your issue or issues, what the principal legal authority is that supports an issue, why there is error and why you deserve to get relief from the court can be quite effective. You cannot possibly understand all the nuances of an argument by looking at a summary, but a good summary can refresh, focus the reader and get right to the point or points you want the court to understand.

Tanski: And what do you think are characteristics of a first-rate statement of facts?

Stabile: I think clarity, organization and only those material facts that are necessary to understanding your issue and that you

believe may be dispositive of your case. Of course, to gain credibility they have to be fairly balanced. Counsel will sometimes try to hedge by leaving out important facts. You then read the opposing brief and find there are important facts that were omitted. Omissions like that affect the credibility of your entire brief.

Paul: What facts do you think are material? Isn't materiality a subjective view?

Stabile: Not really. Facts drive the issues in your case. For example, we do not need three pages of procedural history if the issue in your case is substantive. Procedurally we need to know how you arrived at the appellate court, but facts should be drawn to the issues in your case. The appellate rules do require you to address both procedural and substantive facts. Of course, putting your material facts in context also is important so the court has a complete story. But are you going to give us the *Reader's Digest* version or are you going to give us an encyclopedia? What is appropriate is a matter of counsel's judgment and skill.

Tanski: Shifting gears, what do you wish you knew as an advocate that you now know on the bench?

Stabile: Probably an understanding of the immense volume of work that goes through this court. It is not out of the ordinary to read upwards of 1,000 pages a week. I do spend a lot of time in the quiet hours of the morning or in the evening reading and concentrating on cases to stay on top of our volume of cases. Understanding the time constraints upon the court should focus a litigant on the need to be succinct and artfully to draw the court as soon as possible to what is important in your case.

Tanski: What about oral argument?

Stabile: Here is a point I think many people miss. If you prepare argument properly, you probably spend several days vetting your case, preparing a great outline and perhaps an entire speech. Some counsel become frustrated when they get up to argue and don't have the opportunity to give this great presentation they have prepared. I respect that. I did that many times as an advocate. What counsel needs to understand, in my opinion, is that if the court asks a question, you need to answer the question. If you are being asked a question, in all likelihood the judge asking thinks your answer may affect the disposition of your case or needs clarity for understanding your appeal.

Tanski: There was a case I argued in front of you a while back. I came up ready to go on point one and you went right to point three. I said to myself, "That's where we're going, and that's what we're running with."

Stabile: Yes. I like to ask questions that I think are dispositive of the issues in cases. I know as a practitioner it was always frustrating to get an appeals decision back and look at it and say, "Gee, if I knew that's what they were interested in I would have loved to have had an opportunity to be asked about that." When the court has questions, don't be offended if you can't give your prepared speech. Do your best to answer those questions directly and with pertinent authority.

Paul: Might it be fair to say that sometimes before oral argument the bench has votes in mind or you may ask an attorney to rebut the presumption you or a colleague already has in mind?

Stabile: Well, I wouldn't use the word presumption. When we go to argument, yes, most judges, many times, have formed a tentative opinion in your case. We already read your briefs, looked at cases and

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reviewed select parts of the record. It would be unrealistic to assume the court does not have at least a tentative opinion of your case if your brief presents your case well. Now, there are some cases where we say we really need to sort this one out. Then there are others where it's pretty clear where the case is going.

Tanski: Can bad writing sometimes lose a strong case and if that's true maybe good writing can win a potentially weaker case?

Stabile: Yes, absolutely. The biggest assist that a well-presented brief offers to the court is to direct us to the authority or precedent that might affect or control your case and to relate that authority to your particular circumstances. The better these tasks are performed, the better the chances of succeeding on your appeal.

Tanski: Any particular tips on reply briefs?

Stabile: I hate to state the obvious, but the best reply brief is strictly a reply. Directly address new arguments or issues raised by the appellee. I reviewed a case recently where the attorney violated our rules 12 different ways to Sunday. Counsel wrote a 72-page brief and in the end of the brief incorporated 17 pages of another brief that he had written. He then wrote an exceedingly long reply similar in nature. It was not effective.

Tanski: Do you find that the court goes through a lot of edits with memorandums and published decisions?

Stabile: Many times, yes. There's a lot of work that goes into every decision, even a memorandum. It's a memorandum not because you can just crank it out in an hour or two. It's a memorandum because most times a judge believes that it's not something that adds to the precedent or jurisprudence of the commonwealth.

Paul: Do you like to stick to the statutory text in your decisions or do you like to go to the unexpressed purpose behind the text, view legislative history and other materials that are not found in the actual language of the statute?

Stabile: I would like to think of myself as a strict constructionist. We have a Statutory Construction Act in Pennsylvania where our Legislature has said when you get one of our statutes these are the rules you need to employ in order to ascertain our intent and to interpret statutes. This position as a judge is not a matter of personal prerogative. When construing statutes, you may not pursue intent or spirit when the language is clear. If it is not, then other considerations dictated by the act control interpretation, not your individual beliefs on a law.

Paul: I prepare for oral arguments. Obviously, I'm not a lawyer yet, but that's all moot-court arguments. What game plan did you follow as an advocate to be best prepared for oral argument?

Stabile: The more preparation the better. If the court doesn't ask questions, you need to prioritize what you think is important and dispositive in your case in order to be able to succeed in securing the relief you are asking for in your appeal. You want to touch upon your major points to see if we have any questions. It's OK to then say, "Unless the court has any further questions, I rest on my brief."

Tanski: Thank you, judge, for being gracious and generous with your time. ⚖

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COMMUNICATING DISAGREEMENT BEHIND THE BENCH: THE IMPORTANCE OF RULES AND NORMS OF AN APPELLATE COURT

RENEE COHN JUBELIRER*

I

INTRODUCTION

Appellate court judges typically decide the appeals before them as a group. This collective decision-making process is presumed to improve the quality of the decisions in terms of accuracy and consistency. The appellate design assumes that judges working together will communicate and consider different points of view, which increases the probability of reaching a better decision than would a single judge. The design makes assumptions regarding the different points of view that the judges bring to the process, their willingness to share and to consider different points of view, and the ways the judges will address disagreement. The nature of the true interaction between judges is a critical determinant of whether the assumptions underlying the presumed benefits of collective judicial decision-making are accurate.

Judicial decision-making has a social dimension. Communication among the judges throughout the process of drafting and issuing an opinion occurs "behind the bench". These communications are formally structured by procedural rules. Less understood are a court's norms, or "informal rules that specify certain behaviors as appropriate or inappropriate for individuals who occupy roles within a social institution," including customs and traditions.[1] Developed over time, norms also structure judges' expectations and interactions with each other. Rules and norms vary between courts, and so does the nature of judges' interactions with each other. Understanding the interactions between judges is critical to understanding the collective decision-making process of a multimember court, as

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1. VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT 39 (2006) (citing Thomas G. Walker, Professor of Political Sci., Emory Univ., Presentation at the Conference on the Scientific Study of Judicial Politics, *The Role of Norms in Institutional Evolution, Maintenance and Change*, at 2 (1997)).

is understanding the effect of the court's rules and norms on those interactions. Because fully understanding the effect of these rules and norms from outside that court is difficult, it can be particularly helpful for judges to look behind the bench and within their court.[2]

In this article, I examine the rules and norms of the appellate court on which I sit and their effect on the interactions between the judges, particularly with regard to communicating and addressing different points of view. My study of the Commonwealth Court of Pennsylvania supports the notion that a court's rules and norms affect the communication of disagreement and that certain rules and norms can reduce costs of disagreement and increase the benefits of the collective decision-making process.

The rules and norms of the Commonwealth Court encourage judges to communicate respectful disagreement formally and informally within an internal structure that promotes a collaborative process in which judges consider other views. Communicating different points of view internally—as opposed to the filing of minority opinions outside the court—is structured with a sliding scale of effort that relates to the importance of the disagreement to each judge; thus, the internal communication of disagreement can involve minimal effort costs. By custom, judges are expected to voice their different points of view, promoting sincere consideration of different perspectives without affecting collegial relationships. Every judge votes on every case, which increases the judges' effort costs while also increasing the probability of achieving a correct decision, consistent with precedent, and reduces the influence of individual bias. The judges find the extra costs are worth the perceived benefits.

Part II of this article describes the benefits and costs of appellate group decision-making and the importance of rules and norms in affecting judges' decision-making. In Part III, I study the unique institutional rules and norms of the Commonwealth Court, incorporating interviews with the other judges on the court and empirical data, which supports the importance of the institutional structure on decision-making.

II

DECISION-MAKING ON A MULTIMEMBER COURT

Intermediate appellate court judges typically decide the merits of an appeal as one of a panel of three or more judges. Courts are structured so that a larger number of judges sit together to decide cases as you travel up the judicial hierarchy, and the cases become more difficult, controversial, or important. Reaching a final decision[3] requires the judges to interact in a group process,[4]

2. Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 CAL. L. REV. 1479 (2012).

3. For this article, I focus on reported or unreported opinions that resolve the issues before the court by setting out the facts and applying the law to those facts with the court's legal analysis/explanation. For a discussion of why judges may not want to provide reasons for decisions, see Mathilde Cohen, *When Judges Have Reasons Not To Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483 (2015).

4. Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 82 (1986).

giving the work a social dimension. This multimember design is "specifically structured to promote a collaborative form of decision making," which presumably improves the quality of decisions and opinions.[5]

A. The Deliberative Process

A number of assumptions underlie the presumption that increasing the number of judges deciding a case improves the quality of decisions, including: 1) there will be diversity of opinion and ideas; 2) judges will express their diverse ideas to each other; 3) judges will listen to and consider ideas and opinions that differ from their own; 4) considering these different perspectives will increase the probability of reaching a correct decision;[6] and 5) the opportunity for judges to express their disagreement publicly through a separate opinion will cause other judges to consider the disagreement seriously.

These assumptions appear to be based on the belief that judges reach their decision pursuant to a deliberative process of "dialogue, persuasion and revision."[7] When there is disagreement, the deliberative explanation of decision-making assumes that internal exchanges will occur among judges who vote and that these exchanges will influence how they vote.[8] When these internal exchanges occur between judges with diverse backgrounds and experiences, the judges have the opportunity to consider a wider range of perspectives than would a panel of like-minded judges. Viewing judicial decision-making as a deliberative process, the presence or absence of diversity on a panel would have "informational or deliberative consequences."[9] The theory is that even a single judge with a different perspective can have influence over the outcome, as long as other judges will consider that perspective.

This deliberative process is utilized by a collegial court as defined by Harry Edwards. Judicial collegiality is a "*process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered."[10] A slightly different way of thinking of the deliberative process is "adversarial collaboration," meaning "working with those with whom you disagree."[11] When social scientists who have different theories work together with the goal of publishing joint research, they stringently test the other party's theories and

5. Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1321 (2013); *see also* HETTINGER, *supra* note 1, at 1.

6. *Kim*, *supra* note 5, at 1321 (citing Kornhauser, *supra* note 4, at 98); *see also* Kevin M. Quinn, *The Academic Study of Decision Making on Multimember Courts*, 100 CALIF. L. REV. 1493, 1496 (2012) ("increasing the size of the multimember court increases collective accuracy, all else being equal").

7. Kim, *supra* note 5, at 1321 (citing Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1656 (2003)).

8. *Id.* at 1325.

9. Quinn, *supra* note 6, at 1498; Kim, *supra* note 5, at 1325.

10. Edwards, *supra* note 7, at 1644.

11. Berzon, *supra* note 2, at 1481, 1484 (citing Daniel Kahneman, *Experiences of Collaborative Research*, 58 AM. PSYCHOLOGIST 723, 729–30 (2003)).

results, subjecting them to a "test that the other party expects [] to fail."[12] This process can also ameliorate trait and cognitive biases. Although adversarial collaboration may not lead to agreement, Berzon posits that the process "generates better data, reaches sounder conclusions, and garners more legitimacy."[13] Whether the deliberative process consists of collegial deliberation or adversarial collaboration, the process requires colleagues or "adversaries" with different views to communicate those views, and receptive judges to listen to them.

That judges have differences of opinion and viewpoints when deciding cases is not surprising. While many theories aim to explain the source of these differences, judges are human and, therefore, may be influenced by temperament, background, personal and professional experiences, characteristics of personal identity, ideology, or other factors.[14] However, that does not mean that judges, "when they don their robes," do not want to be independent and "set aside their passions, prejudices and interests and follow the law."[15] The assumption is that a deliberative process can "play[] an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways."[16] In summary, more input and alternative points of view provide a moderating or constraining influence on arbitrary decision-making.

B. Communicating Different Points of View

Judges can communicate different viewpoints both internally, to the other judges on their court, and externally, to the parties and public. Although sometimes conflated under the general topic of dissent, it is helpful to separately consider the *process* through which judges communicate different viewpoints internally from the *product* of the deliberative process, which is an externally-

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12. *Id.* at 1485.

13. *Id.*

14. David Levi stated "most judges are more than aware that they are 'making law,' in the sense of amplifying it, when they apply precedents or statutory language to particular factual settings." David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1795–96 (2009). He also contends "that most judges, particularly the very best ones, are acutely aware of the potential of personal factors, including judicial philosophy, life experience, and personality, to affect how judges approach and then decide legal issues." *Id.*

15. Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics*, 97 CORNELL L. REV. 191, 192 (2012).

16. Edwards, *supra* note 7. *See also* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009); Frank B. Cross, *Collegial Ideology in the Courts, Review Essay*, 103 NW. U. L. Rev. 1399 (2009) (reviewing CASS R. SUNSTEIN, ET AL., ARE JUDGES POLITICAL (2006) and HETTINGER, *supra* note 1); Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping with Dissent*, 83 MASS. L. REV. 93 (1998); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2298 (1999).

issued ruling.[17] The reasons for each differ, as do the incentives, benefits, and costs.

Internal communication, including voting, can be oral or written, on paper or electronic, informal or formal. Depending on the court, voting can occur at conferences after the cases are argued, after a draft opinion is circulated, with or without extended discussion, and with various opportunity to subsequently change the vote. There may be additional discussion in memoranda and emails. Judges can also circulate minority opinions such as dissents and concurrences. If effective, a minority viewpoint can become the majority position.[18] In addition to potentially persuading the other panel judges, disagreement expressed internally can, on some courts, cause non-panel judges to want to review the opinion to decide whether a larger group of judges should review the case through en banc review, or whether rehearing or reargument should be granted.

Not wanting to be reversed by a higher court or publicly embarrassed, a panel majority that might otherwise wish to deviate from precedent or existing legal authority may moderate their views to avoid the threat of a public dissent, also referred to as a "whistleblower hypothesis."[19] The possibility of separate opinions "is the leverage required to ensure that each judge takes seriously the critiques of the others," which "improves the internal decision-making process and therefore the quality of . . . dispositions, regardless of whether the dispositions are ultimately rendered unanimously."[20]

However, collaborating with a group increases the effort costs of judges. It can take more time and effort to consider and evaluate another point of view, as well as to express disagreement. As caseloads increase, the costs of disagreement also increase. The social fabric of the court and the interrelationships between the judges can be adversely affected where communication of disagreement creates tension among members of the court or a judge loses credibility by over-disagreement.[21] This can occur at different points during the decision-making process, and some of these costs are greater when a dissenting opinion is written and publicly filed.

The product of the decision-making process is a decision issued outside of the court. This decision can be one unanimous majority opinion or a majority with minority opinions expressing differing viewpoints. Much has been written about

17. *See* Marie-Claire Belleau & Rebecca Johnson, *Ten Theses on Dissent,* 67 U. TORONTO L.J. 156 (2017).

18. Peter W. Hogg & Ravi Amarnath, *Why Judges Should Dissent,* 67 U. TORONTO L. J. 126, 139 (2017) (citing Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 33, 41–42 (1994) (expression of disagreement will be more fully and forcefully developed in a dissenting or concurring opinion as opposed to memos or oral communication)).

19. Richard Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1112 (2011) (citing Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998)).

20. Berzon, *supra* note 2, at 1486.

21. *Id.* at 1462.

dissenting opinions. Some general benefits of dissenting opinions are that they can inspire the unsuccessful party to appeal; a reviewing court to adopt the dissenting position, which may enhance the reputation of the dissenting judge as having written an influential dissent;[22] elected officials to address the issue; and future litigants to craft arguments that might be more successful. On the other hand, it takes more effort for a judge to draft a dissenting opinion than informal, internal objections. Public disagreement may also more negatively affect the collegial relationships between the judges.

Fundamental philosophical and jurisprudential considerations underlie whether to write dissents. Different viewpoints publicly expressed have the potential of politicizing the court, meaning cases appear to be decided on a political, not legal, basis. Public disagreement can create indeterminacy and uncertainty in the law. The prestige of the court can be adversely affected. These reasons apparently motivated Chief Justice Marshall to begin a "consensus norm" on the Supreme Court, encouraging judicial compromise so that one unanimous majority opinion could be issued instead of multiple individual opinions.[23] Over time, "the propriety of the dissenting opinion . . . was one of the 'longest and 'liveliest' institutional debates in American legal history."[24] The consensus norm ultimately collapsed, and today dissents are not unusual.

The concepts of individual judicial responsibility to decide cases, and the independence of judges to fulfill this responsibility, may be in tension with the constraints placed upon judicial decision-making. The judicial duty can be viewed as requiring more than simply adjudicating specific factual disputes, such as elucidating the law.[25] All judges vote on their assigned cases.[26] But, as part of that duty and a commitment to judicial independence, is there a responsibility to dissent if a judge disagrees?[27] Some argue dissenting may both "promote individual judicial responsibility and demonstrate transparency as to how a decision was reached by a panel of judges."[28] Conversely, a recent proposal

22. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 256 (2013) ("The main benefits of dissenting thus derive from the influence of the dissenting opinion, and, a closely related point, the enhanced reputation of the judge who writes the dissent.").

23. Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent,* 124 HARV. L. REV. 1305 (March 2011). *See also* William H. Pryor, Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty,* 60 FLA. L. REV. 1007, 1016–17 (2008) (noting that "clarity was a goal" for Chief Justice Marshall, who angered Thomas Jefferson as the Court continued to issue unanimous pro-federal opinions written by Marshall even after Jefferson and Madison had appointed a majority of justices).

24. *Id.* at 1309. One commentator "thought dissents 'entertaining' but ultimately 'as useless as 'sassing' the umpire of a baseball game.'" *Id.* (quoting Walter Stager, *Dissenting Opinions – Their Purpose and Results,* 19 ILL. L. REV. 604, 607 (1925)).

25. Hogg & Amarnath, *supra* note 18, at 129–130.

26. Tonja Jacobi & Eugene Kontorovich, *Why Judges Always Vote,* 43 INT'L REV. L. & ECON. 190 (2015).

27. Bernice B. Donald, *The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts,* 47 U. MEM. L. REV. 1123 (2017).

28. Hogg & Amarnath, *supra* note 18, at 126. *See also* Belleau & Johnson, *supra* note 17, at 156 (noting that the public ought to "attend to judicial dissent in order to engage with the ways that our

suggests that "judges pause to consider when and why it makes sense to consider their colleagues' votes, as opposed to indulging themselves in solipsistic decision making."[29] Communicating disagreement internally might satisfy a judge's individual judicial responsibility, even if a dissenting opinion is not publicly filed.

In sum, societal and judicial expectations have changed over time as various factors have weighed more or less heavily for the individual judge, the court as a whole, and the legal system. These changes have also changed judicial behavior. So, while a level of disagreement is critical to an unbiased and thoughtful appellate decision,[30] there are also costs arising out of this process. These costs vary depending on whether the disagreement was communicated internally or externally and the manner of communication. Although appellate courts presumably foster a deliberative, collegial decision-making process, that presumption may be inaccurate where the costs of the process are too great or the perceived benefits insufficient.

C. To Agree or Disagree—Other Considerations

In their comprehensive study, "The Behavior of Federal Judges," Epstein et al. conclude that the time, effort, and social costs of communicating and considering different views make it unlikely that such deliberation occurs in the courts. They model the judge as a rational actor making choices in a labor market.[31] This model, called the judicial utility function, posits that judges

> are motivated and constrained, as other workers are, by costs and benefits both pecuniary and nonpecuniary, but mainly the latter: nonpecuniary costs such as effort, criticism, and workplace tensions, nonpecuniary benefits such as leisure, esteem, influence, self-expression, celebrity (that is, being a public figure), and opportunities for appointment to a higher court; and constrained also by professional and institutional rules and expectations and by a 'production function'—the tools and methods that the worker uses in his job and how he uses them.[32]

The authors make assumptions regarding the effect of diversity on panels, which are very different from the assumptions with which we began. While the authors agree that the more heterogeneous or diverse a panel, the less likely judges are to think alike and be predisposed to agree with each other, the authors do not believe the judges will communicate their disagreement. Instead, they assume that a judge who is in the minority, either in a panel or on the court as a whole, will want to go along with the majority, which they call "conformity."[33]

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system of justice operates, renews itself, and changes").

29. Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges,* 105 GEO. L.J. 159, 189 (2016). *See also* Hogg & Amarnath, *supra* note 18, at 133–134 (citing Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court,* 100 CAL. L. REV. 1445, 1463–73 (2012) (proposing a norm that judges stop and consider under what grounds a dissent can be justified)).

30. *See, e.g.,* Wood, *supra* note 29, at 1447 n.9 (listing articles discussing the costs and benefits of dissenting).

31. EPSTEIN, *supra* note 22.

32. *Id.* at 5.

33. *Id.* at 144–145, 154.

They attribute unanimous decisions to dissent aversion, arising from the costs of disagreement. These costs are both the expenditure of effort to articulate this disagreement (effort aversion) and the social costs of disagreement, which involve the relationships with the other judges and the fear that disagreement will cause other judges to disagree with their majority opinions, creating more effort costs. Judges will instead go along to get along. They also discount the assumption that judges will sincerely consider different opinions, particularly ideological disagreements, which are more difficult to resolve by discussion or compromise, "being rooted more in values, experience, personal-identity characteristics, and temperament than in beliefs based on objectively verifiable facts, and, for most judges, being more important."[34] Moreover, "once a judge casts even a tentative vote he may fear loss of face if he allows his mind to be changed by another judge at the conference."[35] Because judges do not choose their colleagues, the authors assume that what a judge's colleagues say or think has little influence on how that judge votes and were surprised that even when there is a majority on the panel, the judges have a tendency to bend in the direction of a judge with a different ideology—which they refer to as a "wobbler effect."[36] It follows that, for these authors, "judicial deliberations are overrated,"[37] and there is "less deliberation among judges, at least in the common understanding of the word, than outsiders assume . . . ."[38] In their view, unanimous opinions may reflect not agreement through a deliberative or collaborative process, but a determination that the costs of engaging in that process are too high to justify communication of that disagreement. In this situation, the multimember decision-making process may not achieve benefits that require willingness to communicate and consider different points of view.

Other studies have found that panel composition may influence the votes of the judges.[39] For example, a study of United States D.C. Circuit cases involving challenges to Environmental Protection Agency determinations found that "the ideology of one's colleagues is a better predictor of one's vote than one's own ideology."[40] Studies have also suggested the existence of gender-based and race-based panel effects in specific types of cases.[41]

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34. *Id.* at 329.

35. *Id.* at 309. The authors posit that a judge might not dissent "because of fear of retaliation," although without supporting empirical data. *Id*. at 207.

36. *Id.* at 192.

37. *Id.* at 390.

38. *Id.* at 272.

39. Kim, *supra* note 5, at 1322.

40. Revesz, *supra* note 19, at 1764. In Revesz's study, he, as does Epstein, et al., focused on political partisanship, meaning the influence of the ideological leanings of judges or justices on their colleagues.

41. *See* Quinn, *supra* note 6, at 1498 (citing Christina Boyd et al., *Untangling the Casual Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 403 (2010)); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 56 AM. J. POL. SCI., 33–35 (2012).

If judges do not consider different viewpoints, there can be little question that the costs of communicating those views would outweigh any benefit. Focusing only on the external communication of disagreement, the benefit of a dissenting opinion for Epstein, et al., is whether it will be cited by other courts. Their study finds little citation to dissenting opinions of federal judges on the courts of appeals, which means there is "little payoff to a court of appeals judge from writing a dissent—the influence of his dissent, at least as proxied by citations to it, is likely to be zero."[42] They believe this also helps to explain the low dissent rate.

However, it is also possible that panel effects can be attributed to the "dynamics internal to the members of a panel."[43] Are there reasons that some judges may engage in a collegial deliberative process and communicate disagreement, while the costs of such deliberations are too high for others? If so, can we identify "mechanisms that foster effective decisionmaking?"[44] Is it always too costly, or are there some courts in which the benefits can still incentivize judges to communicate and consider disagreement? Otherwise, instead of a group of judges, it would be as beneficial and less costly to have a single judge with many clerks make the decision.

D. Institutional Context of Judicial Decision-Making

Just as judges are different, the courts on which they sit also are different. The procedural rules and the internal operating procedures vary between courts, and the historic traditions and culture of the court will have developed in very different ways.

Although judges may begin to work with each other on an individual case when it is assigned to the panel, the decision-making process is part of a larger social system in which the judges' ongoing relationships with each other operate. The rules, procedures, customs, and culture of the court create an institutional context or design, which structures the judges' interactions in specific ways. The institutional design includes not only formal, written rules and published internal operating procedures, but also informal, often unwritten, norms and traditions.[45] The written rules may be available to the public, but there are many unwritten informal norms that guide the relationships behind the bench.

In judges' accounts of the way their courts work, they consider the effect that their communications are likely to have on their colleagues. For example, Justice Eva Guzman described methods of registering disagreement internally at the Supreme Court of Texas.[46] Both Judges Diane Wood (7th Circuit) and Marsha

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42. EPSTEIN, *supra* note 22, at 290.

43. Kim, *supra* note 5, at 1325.

44. Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1671 (2009) (citing Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 29–43 (2007)).

45. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 18 (1997).

46. Eva M. Guzman & Ed Duffy, *The (Multiple) Paths of Dissent: Roles of Dissenting Judges in the*

Berzon (9th Circuit) are careful with the tone and content of their internal memoranda wanting to encourage the majority writer to accommodate their suggestions.[47]

These judges' descriptions illustrate that they develop expectations about how they believe their colleagues will react before deciding how to proceed. This can be understood as a "strategic account" of judicial behavior as described by Lee Epstein and Jack Knight in "The Choices Justices Make."[48] Decisions of appellate judges on multimember courts are not made in isolation. There is a majority rule, and so in order to reach the result that a judge desires or believes is correct, the judge has to convince a majority of the other judges who have the ability to vote, to vote as they do. This means that the judge needs to consider the preferences and judicial philosophies of the other judges and have accurate expectations as to how the others will act.[49] In order to have the collective decision be as close to a judge's views as possible, the judge will have to think about what the others might do and act in accordance.[50]

Forming accurate expectations about how other judges will act requires taking into account the rules of the relationships[51] upon which the judges can rely in order to form their expectations. The rules must be well known and generally accepted—such as a rule requiring motorists to stop at red lights—so they can accurately predict what others will do: stop if the light turns red. In addition, each of the judges must believe that the others will comply with the rules; this depends on both information about the rules and whether there are sanctions for non-compliance.[52] Informal sanctions on a court can range from ostracism to refusal to interact cooperatively, to even outright rejection of decisions.

Thus, the interactions between judges take place within a complex institutional framework, in which sets of rules structure their social interactions.[53] In accordance with this analysis, one would expect that the use of different rules and norms to structure the judges' social interactions would affect the judicial decision-making process. This is, in part, because the strategic interactions and expectations of how the judges will act shape their choices and those interactions and expectations are themselves shaped by the institutional structure, rules, and norms. The Hettinger et al. study confirms that "[i]nstitutional context thus has a substantial impact on the likelihood that judges will express their disagreements in the form of dissenting opinions."[54] Another scholar also concluded that

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Judicial Process, 97 JUDICATURE 108 (2013).

47. Wood, *supra* note 29, at 1465; Berzon, *supra* note 2.

48. EPSTEIN & KNIGHT, *supra* note 45, at xiii.

49. *Id.* at 79.

50. See Jacobi & Kontorovich, *supra* note 26, at 190, for novel institutional explanations about why judges always vote and do not abstain.

51. *Id.* at 115.

52. A sanction is an action that increases costs and diminishes the benefits of non-compliance. *Id.* at 117.

53. *Id.* at 112.

54. HETTINGER, *supra* note 1, at 111.

"[s]ome structures and procedures for decisionmaking reduce imperfections in decision processes more effectively than others. In the institutional design of courts, one goal should be to identify mechanisms that foster effective decisionmaking."[55]

Because each court can develop its own internal rules and norms, different courts can answer questions differently, such as which judges can vote on opinions, how the votes are made and communicated, whether votes can be changed, with whom there is discussion and the structure of such discussions, how cases are assigned to the judges to write majority opinions, and whether disagreement is expected or is unusual. Does it matter if these questions are answered differently?

Judge Patricia Wald wrote that, when she joined the District of Columbia Circuit Court, she imagined that "conferences would be reflective, refining, analytic, dynamic. Ordinarily they are none of these."[56] Why was her experience different from the description of other judges, such as Judge Edwards?

In addition to the factors on which studies of judicial behavior often focus as influencing a judge,[57] judges are also affected by the institutional norms that structure the relationships of the judges with the other judges and staff on the court. Looking at judges like other workers, as Epstein, et al. suggest, the rules and unwritten norms that structure the environment and relationships at the place of employment will have a significant effect on how the workers do their jobs—and whether they enjoy their work and put in extra hours and effort or count the minutes until they can leave. This may be particularly true where, as with judges, there is no elasticity to salary and no real threat of job loss for federal judges, or within the elected term for state judges. Depending on the rules and norms, the conformity effect Epstein, et al. document could either reflect effort aversion, just going along to get along, or it may be the result of collaborative deliberation resulting in consensus. While there are different theories, and different experiences, it may not mean that only one is correct but that all are plausible when evaluating courts with different institutional structures. For example, expressing disagreement may be frowned upon in one court as undermining collegiality or creating additional costs and not in another.[58] Workload, as opposed to caseload,[59] can also affect the ability of judges to

55. Baum, *supra* note 44, at 1670–71.

56. RICHARD A. POSNER, HOW JUDGES THINK 2 n.5 (2008) (quoting Patricia M. Wald, *Some Real-Life Observations about Judging*, 26 IND. L. REV. 173, 177 (1992)).

57. Including legalistic factors, such as "constraints imposed by following rules, precedent, the reasoning and justificatory requirements of judicial opinion writing," judicial temperament, judicial philosophy, and political ideology, or a workplace model of judicial behavior. Renée Cohn Jubelirer, *The Behavior of Federal Judges: The "Careerist" in Robes*, 97 JUDICATURE 98, 99 (2013).

58. HETTINGER, *supra* note 1, at 39.

59. Caseload is "an imperfect measure of workload because cases are not uniform with respect to the time and effort required to decide them." EPSTEIN, *supra* note 22, at 292.

internally or externally express disagreement with the opinions of their colleagues.[60]

E. Looking Behind the Bench

One of the difficulties in examining the question of how great an effect the institutional design of a court actually has on judicial decision-making is that, while the written rules of the courts are generally available to the public, the unwritten customs and norms are not easily discernible to those outside. Hettinger et al. describe informal norms as "notoriously slippery," "difficult to define, much less measure."[61] Yet, in their study they found that "circuit-level" norms had an important influence on dissenting behavior.[62] "Like many of the most interesting influences on behavior, norms are generally assumed to influence behavior, but they are difficult to measure empirically."[63] Because the interactions between the judges behind the bench are not observable outside of the court, those who wish to understand them have examined their reflections in the written opinions that are filed. For example, the frequency of dissenting opinions, i.e. dissent rates, have been used as "behavioral manifestations of decision-making norms operative at the circuit court level."[64] The decision is public; however, the internal deliberations of the panel usually are not.[65] Thus, looking at panel composition effects may provide some reflection of internal interaction of the panel, even if such reflections are likely to be quite imperfect and incomplete.

"[T]he better that judges are understood the more effective lawyers will be. . . [a]nd judges who understand their motivations and those of other judges are likely to be more effective judges."[66] Understanding how judges make decisions, including what influences them, is an important endeavor.[67] The influence that judges may have on each other is at the heart of studying a multimember appellate court. Engaging in this endeavor as a sitting judge, as I have previously

60. HETTINGER, *supra* note 1, at 40. *See also* Posner, *supra* note 56.

61. HETTINGER, *supra* note 1, at 39.

62. *Id.* at 111.

63. *Id.*

64. *Id.*

65. Releases of the notes of Justices of the United States Supreme Court have provided insight into their deliberations. See EPSTEIN & KNIGHT, *supra* note 45, for an example. However, courts do not typically release information about the deliberations contemporaneously with the decision. *See also* Edwards & Livermore, *supra* note 16, at 1903 ("[t]he deliberative process . . . cannot be observed by outsiders").

66. EPSTEIN, *supra* note 22, at 6. *See also* Kem Thompson Frost, *Predictability in the Law; Prized Yet Not Promoted,* 67 BAYLOR L. REV. 51, 65 (2015) (the how and the why of opinions is not easily observable from the cases).

67. For examples, *see* Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1315 (2009); Stephen J. Choi & Mitu Gulati, *A Tournament of Judges*, 92 CAL. L. REV. 299 (2004); Jay S. Bybee & Thomas J. Miles, *Judging the Tournament*, 32 FLA. ST. U. L. REV. 1055 (2005); Scott Baker, et al., *The Continuing Search for a Meaningful Model of Judicial Ranking and Why it (Unfortunately) Matters*, 58 DUKE L. J. 1645 (2009).

expressed, can be an "out of body experience."[68] Although aware of the general caution regarding the questionable veracity of judicial self-reporting, I believe judges benefit from studying this literature, and that judges can make a necessary and essential contribution to further understanding internal decision-making by virtue of their experience, knowledge, and observations.

There is a growing trend of judges to look inward. For example, Justice Guzman cautioned studies, such as Epstein, et al., "fail[ed] to account for a broad range of judicial behavior, much of which is informal and occurs behind the scenes."[69] Underlying her critique of Epstein, et al.'s model is her understanding, by virtue of sitting on the Supreme Court of Texas, of the influence of an "unwritten dissent."[70] Judges Berzon, Wood, and Lipez have provided their insights based on their experiences as judges on their different courts. For example, Judge Berzon and her colleagues share bench memos before argument; however, she notes that the "ultimate dispositions often bear little resemblance to these memoranda—an indication that the adversarial collaboration process does work, in the long run, to improve the final opinion."[71] Judge Pryor examined the way his court internally addresses whether to rehear an appeal en banc, explaining how and why it can change his mind.[72] Judge Lipez described the decision to grant reconsideration of an issued opinion on his court as "your own colleagues undoing your work. There is no minimizing the unpleasantness of this phenomenon, which . . . can be the most divisive event in the life of a court of appeals."[73]

Thus, judges may be in a better position to discover whether the norms of an appellate court affect not only the way the judges relate each to other, but also their joint decision-making. If the norms influence the communication of disagreement, they may also affect how disagreement is structured, how consensus is developed, and the effectiveness of the group process through which the judges make decisions. As Judge Berzon perceptively states, when her court cannot arrive at consensus, she does "not regard such a result as a failure of the collaborative process but rather as integral to its functioning."[74]

Like these judges, I will look inward at the intermediate appellate court upon which I sit, examining its rules and norms, where they came from, how they structure communications and address disagreement, and how the judges

68. Cohn Jubelirer, *supra* note 57, at 98–99.

69. Guzman & Duffy, *supra* note 46, at 108. For example, dissenting judges can help narrow the scope of the issues addressed in per curiam, unsigned opinions issued without oral argument.

70. *Id*. *See also* Belleau & Johnson, *supra* note 17, at 169 (describing the "invisible dissent").

71. Berzon, *supra* note 2, at 1486 n.37.

72. Pryor, *supra* note 23, at 1019–1021.

73. Kermit V. Lipez, *To Lobby or Not to Lobby: That is an Important Question,* 31 ME. B.J. 18, 19 (2017).

74. Berzon, *supra* note 2, at 1487. This view is not universal. Chief Justice John Roberts of the U.S. Supreme Court said he believes dissenting opinions are a symptom of dysfunction. Wood, *supra* note 29, at 1450 n.27 (citing M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 283 nn.1–2 (2007)).

perceive them to work. My goal is to identify rules and norms on the Commonwealth Court that might reduce costs of disagreement and, therefore, increase the likelihood that the judges will engage in a collegial, deliberative and collaborative decision-making process.

III

THE COMMONWEALTH COURT

A. History and Design of the Commonwealth Court

The institutional design of the Commonwealth Court of Pennsylvania, an intermediate appellate court, is unique. In its appellate jurisdiction, the Commonwealth Court hears appeals from decisions of the county courts and state administrative agencies. This court's unique jurisdiction is based on both the subject matter of the issue and the identities of the parties. Thus, the court hears most, but not all, matters involving governmental bodies, including local civil service matters, eminent domain cases, negligence actions for damages against government entities, and zoning disputes, among others. Essentially, the court deals with administrative law, governmental law, and public law. The only other court in the country that has similar jurisdiction is the Federal D.C. Circuit, which deals with administrative agency appeals involving federal administrative agencies.[75]

However, unlike most appellate courts, the Commonwealth Court has significant original jurisdiction, approximately 18-20% of its cases. In these matters, the judges make decisions individually as trial court judges. Actions by and against the Commonwealth government generally commence in Commonwealth Court, except where money damages are sought. The court hears all challenges to state government policies in its original jurisdiction. The court also considers election issues involving candidates for local, state, and national office, with challenges to state and national office falling within its original jurisdiction. The court recently made news when a judge in our original jurisdiction heard a controversial case about gerrymandering.[76]

After constitutional amendment created the Commonwealth Court in 1968, the Governor appointed the seven original judges who had to be confirmed by the Senate in 1970. Four nominees were Republicans and three were Democrats. They each had political experience and understanding. The first President Judge, James S. Bowman, had been a member of the state House of Representatives and a trial court judge in Dauphin County, home of the state capital, before his appointment. The other judges gave the court geographical diversity and

75. See Baum, *supra* note 44, at 1674, for a discussion of the effects of judicial specialization on judicial behavior in courts, of which the Commonwealth Court is one. He argues that the immersion of judges in specific fields can have powerful effects on judicial decisions. *Id.* (citing David W. Craig, *The Court for Appeals—and Trials—of Public Issues: The First 25 Years of Pennsylvania's Commonwealth Court*, 4 WIDENER J. PUB. L. 321, 323 (1995)). Baum describes the public law jurisdiction of the Commonwealth Court as considerably broader than other more specialized courts.

76. *See e.g.,* League of Women Voters v. Wolf, 177 A 3d. 1000, 177 A.3d. 1010 (Pa. Cmwlth. 2017).

additional legal and political experience with a former law school dean, district attorney, state representative, and trial court judges. All the judges "had additional public sector background suitable to the court's mission."[77] The original judges were World War II veterans, and their military experience was evident in their work ethic and their respect for the President Judge.[78] The court originally sat en banc (all together) and heard arguments for every case brought to the court. When the workload increased, the legislature added two more commissioned judges, for a total of nine commissioned judges, where it remains today, and the court began hearing cases in three-judge panels.[79] As the workload grew, senior judges assisted the court, which allowed the size of the Court to remain at nine commissioned judges. Similar to judges on other courts, the original judges had to grapple with two issues: 1) "When the citizens have elected an appellate body to bring collective wisdom to deciding cases, how can all the judges participate in every appeal in a populous state?"; and 2) how to "ensure that the decisions of panels, when issued, are not in conflict with each other."[80] The judges met this challenge by adopting innovative internal operating procedures very similar to the current ones.

After the appointment of the original judges, all judges since have run for election. Since 1986, the constitution requires Pennsylvania appellate court judges to initially run in contested partisan elections and then stand for a "yes or no" retention vote every ten years. When a judge reaches the age of 75, under the Pennsylvania Constitution, the judge must retire from commissioned status but may continue to serve as a senior judge upon appointment by the Supreme Court.

B. How the Rules and Norms Structure the Interactions Between the Judges

From my interviews with commissioned judges, and reviewing the reminiscences of former judges,[81] specific rules and norms are particularly, and consistently, important to the judges and their work. They structure how judges communicate different points of view, both internally within the court, and externally to the public, while providing a work environment within which the institutional structure operates.

Internal communications are structured by the internal operating procedures, which are overlaid on what the judges refer to as a "tradition of constructive collegiality."[82] The procedures and tradition operate together synergistically,

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77. Craig, *supra* note 75, at 346.

78. *Reminiscences of Daniel Schuckers, Prothonotary*, Commonwealth Court of Pennsylvania, at 8, *available at* http://pacchs.org/Reminiscences/REMINISCENCES%20-%20Dan%20Schuckers.pdf [https://perma.cc/B4WE-Z6Z3] (last visited Feb. 26, 2019).

79. Kim, *supra* note 5.

80. Craig, *supra* note 75, at 337.

81. *See Oral Histories and Reminiscences*, Pennsylvania Commonwealth Court Historical Society, *available at* http://pacchs.org/oral_histories.html [https://perma.cc/G48C-JL5N] (last visited Feb. 26, 2019). The author interviewed the judges of the court in 2014.

82. Craig, *supra* note 75, at 367.

such that both are integral and essential to the deliberative process. The tradition of the court firmly requires both friendly respect between the judges, as well as the communication of honest disagreement.[83] The judges expect their colleagues to communicate disagreement, and, because it is expected and everyone participates in the communication, any thin skins have to thicken.

For clarity, this discussion of the relevant rules and norms is organized in chronological order, from case assignment until disposition, and not in order of importance.

1. Case Assignment

In general, cases are either submitted without argument to the court on the briefs and record made at the fact-finding tribunal (usually a trial court or administrative agency), or argued by the parties in front of a panel of judges. Cases that are submitted to a panel on briefs without argument are mechanically assigned by the chief clerk to a judge to draft a preliminary opinion. By rule, argued cases are assigned by the presiding judge, who is usually the most senior on the panel. By custom, the presiding judges do not assign all the interesting or controversial cases to themselves or make assignments based on subject matter. The presiding judge will assign a case to a panel judge that had any previous involvement with the case, such as hearing a preliminary motion. Otherwise, the assignment is random. Random assignment precludes the ability of the presiding judge to try to determine the outcome through the assignment and treats the other judges on the panel with consideration and respect.[84]

2. Argued Cases

Cases that are argued are assigned most often to a three-judge panel for argument; cases can also be directly assigned to be heard by the court en banc—typically seven judges—for which arguments are televised in their entirety on the Pennsylvania Cable Network.[85] Most judges circulate bench memos to each other in advance of argument.

3. Voting

Voting varies depending on whether the case is argued or submitted. After argument, the judges conference to discuss the cases and preliminarily vote on the outcome. The judges orally communicate their points of view and, when they differ, discuss their disagreements. The presiding judge assigns the case to a judge

83. As Judge Craig wrote, "the court has developed unwritten traditions that are just as important and, indeed, so prevalent that observers outside of the court have recognized them." *Id.* at 368.

84. A study that evaluated opinion assignment on the federal courts of appeals found that "female and more liberal judges are substantially more likely to write opinions in sexual harassment cases," which appears to result from "an institutional environment in which judges seek out opinions they wish to write." Sean Farhang, Jonathan P. Kastellec & Gregory J. Wawro, *The Politics of Opinion Assignment and Authorship on the US Court of Appeals: Evidence from Sexual Harassment Cases,* 44 J. LEGAL STUD. S59, S59 (2015).

85. The televising of oral arguments can also publicly display different viewpoints of the judges on the panel.

to draft the opinion after the preliminary vote. Once the opinion is written, it is circulated to the full court for votes with a cover memo that sets out any concerns or disagreements with the majority position raised at the discussion after argument. When a case is submitted, a randomly assigned judge drafts an opinion and circulates it to the other two panel judges for a preliminary vote, or "PV." The panel judges communicate their PV, which is generally either "agree" or "disagree," along with any comments. If the opinion garners two votes of agreement, it can be circulated to the full court with a cover memo containing the communications of the panel judges and any response by the author.

One of the most innovative aspects of the court's Internal Operating Procedures (IOPs)[86] is that every commissioned judge reads and votes on every opinion even if not on the panel, which has been referred to as "the full court press."[87] The judges on the panel can vote to join, concur, or dissent, and can write a minority opinion (concurrence or dissent). Non-panel judges can vote objection or no objection.

Another innovation since I joined the bench is that votes are now cast on the court's electronic case management system (PACMS), to which every chambers has access. All opinions are circulated in this system, which permits the judge to see the opinion, accompanying cover memo—which contains any preliminary votes and comments of the panel judges—and all votes that are entered after circulation, along with any comments of the voting judges.[88] Judges receive notifications when votes are entered and can use PACMS any time to read votes or comments or input their votes and their comments. In this way, all judges communicate agreement, disagreement, suggestions, or compliments, internally, to the other judges. These internal, informal communications are structured by the IOPs. An informal comment in PACMS is quickest and easiest, and the comments can be as lengthy or short as needed to make the point. In addition, once one judge has expressed a point of view, the cost of the other judges can be reduced by just agreeing with that judge.

The judges do not weigh heavily the feelings of the other judges when deciding *whether* to object, as long as there are honest intellectual differences. They feel it is important to communicate their differences so that the majority author and the other judges all have the benefit of their views. Because it is routine to see comments, it is considered part of the deliberative decision-making process. Judges do consider the other judges' feelings with *how* they express their objection. There is a tradition of writing respectfully. Judges can also comment in a complimentary way, suggest that an opinion that is circulated as an unpublished memorandum opinion be re-designated for publication, or suggest additional authority to support a proposition of law.

86. 210 Pa. Code §§ 69.101–69.502. These procedures offer guidance and information to counsel and litigants as to the Court's internal processes for matters before the Court.

87. Craig, *supra* note 75, at 336–37.

88. The briefs are also available on PACMS.

All of the judges read and consider the comments of the other judges and can change their votes or revise their opinions to address the comments—vote fluidity.[89] The judges have varied backgrounds and prior legal experiences and expertise that they bring to bear. The judges understand that one reason that they invest the time and effort in voting on every case, commenting to the other judges, and reading the other judges' comments is so that everyone's views will be seriously considered. There is, therefore, an expectation that judges will change their vote if, upon consideration of a different view, they sincerely change their mind about the circulating opinion. There is no shame to this fluidity of voting—it means the process is working. Where the authoring judge wishes to modify the opinion in response to a comment, a revised opinion is circulated to the court with a cover memo explaining the changes. The tradition is that the memo always ends by thanking the judge who commented, and that the author looks forward to additional comments. The modification may not affect the outcome, in which case there is no need for a new vote, or it might affect the outcome, thus requiring a new vote; the author will then apologize for any inconvenience.

In addition to commenting on opinions in PACMS, all judges can separately circulate formal memos to the other judges. Memos require more effort than a PACMS comment and, therefore, are not circulated as often. The memos will discuss the disagreement and usually cite facts and precedent to support a legal argument or discussion of the issues. It is possible that, because such memos are not usually circulated, and additional effort is involved in drafting them, they indicate a greater intensity of the disagreeing judge's position and a greater confidence in that position. If the disagreeing judge is not on the panel, it may inspire panel members to rethink their position.

The judges who sat on a panel have an additional opportunity for expressing their views because they can write dissenting or concurring opinions. Thus, they have the opportunity to express their disagreement to the public.[90] In deciding whether to write and circulate a separate opinion, the judges will consider many factors. Although some judges might consider whether the majority opinion is reported or unreported, that is not determinative.[91] One factor that is *not* considered is whether the authoring judge will be upset that a separate opinion is written. Judges that might be sensitive when they arrive at the court quickly see that all judges receive the constructive critique of their colleagues and so it is not personal. Thin skins must and do thicken. In part, this results from the respectful

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89. Posner & Vermeule, *supra* note 29*,* at 159.

90. Berzon, *supra* note 2, at 1486–87.

91. The IOPs list the factors to consider regarding whether opinions should be reported, such as whether the case adds to the development of the law, applies the law to a new factual situation, etc. As is customary in many courts, the majority of the cases are unreported, but both reported and unreported opinions "go to conference" for discussion. Currently, all opinions of the court are available online, and unreported opinions can be cited, not as precedential, but as persuasive authority. 210 Pa. Code § 69.414 (2018). Thus, it is questionable whether any opinion is truly "unreported" but is, more accurately, not binding precedent.

tone of the critique or disagreement. Judges do not use separate opinions as an opportunity to be critical of another judge, and they try hard not to write to offend. The culture of the court is that the judges focus on the message and not the messenger and try not to take separate opinions personally. Moreover, if an opinion contains language that a judge finds offensive, whether the perceived offense be toward another judge, a litigant, or counsel, the judge can ask that the language be changed.[92] The inclusion of any such language would presumably be unintentional, and the authoring judge would make the change.

Judges often write at least a short dissent if they disagree rather than dissenting without opinion so that the parties know the reason for the dissent. The dissenting opinion may be more flexible and creative than a majority opinion. While a majority opinion expresses the opinion of the majority of the court, a dissenting opinion can express the individual viewpoint of the author, discuss reality outside the law, or explain why the current state of the law should be changed.

The IOPs contain time constraints for voting, which are taken very seriously by the judges who do not wish to hold up their colleagues' work. By tradition, the authoring judge will grant another judge's request for an extension of time to vote or to circulate a separate opinion as a matter of courtesy. There is a sanction for noncompliance with the time constraints, which is that the majority writer can file the opinion without waiting for a separate opinion to be circulated or delayed vote to be cast. Although that sanction has not been used since I have been on the court, it was used in the past and, therefore, remains a credible incentive to voting and circulating separate opinions in a timely fashion.

4. Judicial Conference

A central feature of the deliberative process is our judicial conference. If four judges disagree with the majority opinion, the opinion cannot be filed, and the matter is sent to judicial conference, where all the judges gather and discuss those cases. Judicial conferences are held in person nine times a year during argument sessions.[93] At conference, the judge who wrote the majority opinion speaks first and explains why the majority opinion is correct on the facts and the law. The other judges can, and do, ask questions about the factual record, the parties' arguments, legal precedent, and reasoning. Then, if there is a dissent, the dissenting author explains why that opinion is correct, and, again, the judges can, and do, ask questions. If there was no dissenting opinion, the objecting judges explain their objections. There is a discussion during which any judge can speak without regard to seniority as many times as needed. At the end of the discussion, the president judge holds a vote, with the newest judge voting first.[94] Depending

92. During an interview, one judge described how former President Judge David Craig refused to allow the judges to say or write that there is "no merit" to an argument but instead should write that the party "did not prevail." Author's interview with Commonwealth Court Judge, 1/21/2014.

93. Because of increased volume, the Court can have a video conference between sessions.

94. In this way, the newer judges will not feel pressured by the votes of the more senior judges.

on the outcome, the opinion can be filed as written, reassigned to a different judge on the panel, withdrawn by the authoring judge to rewrite, or, if the vote of the panel judges is contrary to the vote of the commissioned judges, assigned to be submitted or argued to the court en banc. Although the judges will have already voted while the opinion was in circulation, they can change their votes at conference based on the questions, answers, and discussion, and any additional work the judges did to prepare for conference. The opinion writers can also change their position after the discussion. The discussions, while often quite animated, have remained respectful and collegial during my tenure (since January 2002).

All the judges prepare for judicial conference, many as if for oral argument. Some judges strategize in their preparation. Prior to conference, a majority writer may think long and hard about whether to withdraw the opinion and rewrite when five or more judges voted in opposition to the majority opinion. The judges all felt that the effort costs are worth the benefits of conference.[95] There is an expectation that disagreements will be honestly aired at a conference that is "always heated and wonderful," where the judges "really care and battle it out."[96] Minds are changed when knowledgeable judges participate in discussion, even though they were not on the panel. Because everyone participates, and has at different times been a majority writer as well as an objector or dissenter, it is not personal. Conference gives all the judges a voice in the decision, so everyone can be heard and then accept the decision. There is a sense that if some judges did not have input into the precedent, they might try to diminish it by distinguishing it in subsequent opinions. The goal is to allow the court to police itself to maintain consistency of precedent and development of the law. Judges listen to their colleagues and may change their minds.

While the judges do have different judicial philosophies, the judges do not see political partisanship as influencing their colleagues' decisions. The backgrounds and experiences of the judges affect the decisions; it is this diversity that is shared through voting and at conference. The composition of the court does not change often, and usually changes only incrementally. After reading the other judges' opinions, reading their votes and comments, and deliberating and adversarially collaborating with them over a period of years, we become familiar with one another's judicial philosophies and perspectives on legal issues. When writing opinions, the judges can, and many do, predict what another judge's disagreement might be and try to write, if possible, to avoid it. It can also change the way we look at certain cases. One of my former colleagues had a particular point of view about Turner or Anders letters and briefs, which have to be filed when a public defender wishes to withdraw from representation. She articulated the position well; therefore, I did not have to focus on that issue. However, after

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95. Judge Craig in 1995 wrote that "[a]s a result of this court-wide scrutiny of every appellate decision, the [C]ommonwealth [C]ourt has received high marks in surveys of the legal profession for consistency in its appellate decisions, whether published or not." Craig, *supra* note 75, at 339.

96. Interview with Commonwealth Court Judge (January 21, 2014).

she left the court, I realized that, without consciously thinking about it, I was now examining those cases with her eyes and communicating her view to the others. We continue to hear the voices of colleagues after they have left the court, both within their opinions, as well as in our collective memories.[97]

5. Other Norms

The informal norms and our traditions have created an environment of friendship and respect in ways that might not specifically impact voting and the process of deciding cases but nonetheless benefit the decision-making process. There is a norm of equality, as seen in the way argued cases are assigned, and which is carried through to the president judge, who is elected every five years by the majority of the commissioned judges. The best president judge is one who sees all the judges as equals and does what is right for the court without an agenda. During my tenure, the president judge has submitted important administrative questions to the judges at our judicial conferences and asked for the judges to vote on them rather than deciding these issues alone.

Another tradition is the willingness of every judge to help the other judges with their work. For example, every judge will fill in whenever necessary for a judge who is unable to hear a case, whether because of illness, recusal, or family emergency. Even in the midst of disagreement, the judges help each other. There is a custom that, when an opinion is reassigned from the judge who wrote the original majority to a dissenting judge to write a new majority opinion, the dissenting judge may use any of the text from the original majority opinion. It is customary to internally thank the original judge when circulating the new majority opinion, but there is no external attribution.

The importance of court staff and law clerks in the institutional structure of a court may also vary. The Commonwealth Court has staff that is extremely knowledgeable, with the former and current prothonotaries, the former executive administrator, and a former law clerk of the Court being the authors of the recognized treatise on Pennsylvania Appellate Procedure.[98] Attorneys and pro se litigants can call the court and get friendly help (of course, not legal advice) in filing their documents. Judges will typically try to hire the staff of departing judges, if possible, so that staff can remain part of the court family. In 2007, through the efforts of then-President Judge Bonnie Brigance Leadbetter and

97. We can also hear their voices through their law clerks, who often continue to work for the court in the chambers of other judges. During my tenure on the court, I have hired three law clerks who previously worked for different colleagues. The study of the role of law clerks is an area that needs to be explored more fully. Every chambers is different in terms of the process of drafting opinions, who reviews them, what input the clerks have, whether there are career clerks, and how disagreement is resolved. There is an opportunity to obtain diversity of opinion from hiring law clerks with diverse backgrounds and experiences which can, depending on whether law clerks are encouraged to critique opinions, also provide some amelioration of bias. *See* Donald Molloy, *Designated Hitters, Pinch Hitters, and Bat Boys: Judges Dealing with Judgment and Inexperience, Career Clerks or Term Clerks*, 82 LAW & CONTEMP. PROBS. No. 2, 2019 at 133.

98. RONALD DARLINGTON, MATTHEW MCKEON, DANIEL SCHUCKERS & KRISTEN BROWN, PENNSYLVANIA APPELLATE PRACTICE (2013).

retiring Prothonotary Dan Schuckers, the Commonwealth Court Historical Society (CCHS) was created as a non-profit corporation. The CCHS sponsors continuing legal education programs and dinners and hosted a 40th anniversary celebration that included a symposium at Widener Law School and a two-volume edition of the Widener Law Journal devoted to scholarly articles about the jurisdiction of the court and the development of its precedent over the last 40 years.[99] The judges participate in the educational programs, which also have a social component to them and foster pride in the Court.

Because it is a court of statewide jurisdiction, the judges have home chambers throughout the Commonwealth in the communities in which they live. Therefore, most communication is through the comments in PACMS, memos, and written opinions or bench memos, a type of virtual conversation, in addition to email and, less frequently, phone calls. However, when the court comes together at argument sessions nine times a year, the judges join in person for judicial conference, socializing, and dining together, encouraging and fostering the collegiality on which the court was initially founded. It is perhaps because the judges work throughout the Commonwealth that they appreciate the opportunity for in-person collaboration and decision-making.

C. The Effect of the Rules and Norms on Decision-making

Why might these norms increase the benefits of decision-making? Judicial and democratic decisions have much in common. Argument, including group discussion, and voting are the two primary mechanisms for both judicial and democratic decisions.[100] As in democratic institutions, in which there is a need to constrain or minimize self-interest and maximize promoting the public good, judicial institutions must also constrain or minimize the self-interest of the decision makers to promote public confidence in the rule of law. As knowledgeable as they are, judges on a multimember court are to consider the views of the other members. In order to honestly consider other views, judges have to recognize that they do not have all the answers. Variously described as "judicial modesty,"[101] "a stiff dose of epistemic humility,"[102] and "recogniz[ing] their own fallibility,"[103] this is a critical component of judicial temperament. Although there are effort costs involved, the collective decision-making process works where judges believe that, through the communication and consideration of divergent views, it will be possible to reduce bias and arrive at an accurate and consistent decision. This describes not only judicial decision-making, but also the pragmatic approach of structuring terms of persistent disagreement in a

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99. *See* 20–21 WIDENER L. REV. (2011). A 50th anniversary celebration is being planned for 2020.

100. JACK KNIGHT & JAMES JOHNSON, THE PRIORITY OF DEMOCRACY: POLITICAL CONSEQUENCES OF PRAGMATISM (2011).

101. Pryor, *supra* note 23, at 1015.

102. Posner & Vermeule, *supra* note 29, at 163.

103. Lipez, *supra* note 73, at 20. The term "collegiality" descends from the Latin "collegium" meaning "'body of colleagues or coworkers' engaged in a shared enterprise. . . . respect[ing] each other's positions, recognize[ing] their own fallibility, and [ ] open to persuasion." *Id.* (citing Edwards, *supra* note 7).

democratic institution. Focusing on the value of diversity in decision-making, there are three commitments that are central to democratic pragmatism: first, fallibilism, which requires that the decision-makers know they do not have all the answers and be willing to engage in debate and argument to find the answers; second, anti-skepticism, which requires that the decision-makers believe that there is a possibility of achieving a correct decision; and third, consequentialism, which requires that the decision-makers consider the consequences of their decisions on future activities.[104] This pragmatic approach is consistent with a collegial deliberative process and adversarial collaboration in judicial decision-making, which presumes the following: judges realize that they are not always right, and that their views must be challenged—that they are fallible; that it is possible to reach a correct decision, a commitment to anti-skepticism; and that the consequences of this process, which "increase the opportunity for diverse voices to be heard,"[105] also increase the probability of a decision that will be legitimate. For these reasons, a pragmatic judge could value engaging in the adversarial collaborative process of collegial decision-making even if at greater cost or effort.

The rules and norms of the Commonwealth Court appear to have created a balance where judges honestly participate in a collegial deliberative and adversarial collaborative process giving effect to the assumptions on which appellate decision-making rests. There are arguments that this facilitates better decisions and promotes the values of democratic pragmatic decision-making.

Importantly, the judges' expression of disagreement is encouraged and structured in ways that permit a sliding scale of effort that relates to the importance of the disagreement to each judge. The main investment of time and effort is that every judge reads and votes on every opinion. However, the judges all believe that the effort to do this is worth the benefit to the legal precedent of the Court. The easiest expression of disagreement is through a short comment or objection in PACMS, which can take very little time and effort. This comment reaches the authoring judge and other judges who may agree with the objection. If objecting judges wish to invest more effort, because the issue is important to them, or they have high levels of self-confidence in their position,[106] they can write a longer comment, a formal memo to the court, or, if the judge was on the panel, a separate opinion. Even if one judge does not want to invest the time and effort, another judge might. Because all the judges do regularly express their different opinions, the court encourages the "adversaries" necessary for the process to work.[107] Moreover, because all the judges participate, and regularly object to

104. KNIGHT & JOHNSON, *supra* note 100.

105. *Id.* at 45.

106. Voting, when sincere, reflects a judges' view but not necessarily their confidence level. Where there is interdependent voting, the other judges should also know the confidence level, as it is "highly informative." Posner & Vermeule, *supra* note 29, at 181. Confidence levels are communicated to the other judges through the sliding scale of effort, in addition to the opportunity to discuss the different points of view at conference.

107. Berzon, *supra* note 2.

other opinions, the judges understand the process and do not take it personally. Structuring so many opportunities for adversarial collaboration behind the bench can reduce the costs of public dissensus, such as the risks of politicizing the court and creating indeterminacy in the law because those risks are actualized only by the expression of dissensus *outside* of the court. Additionally, the need to write a dissenting opinion as leverage to assure the objecting viewpoint is taken seriously is reduced because objections and comments are seriously considered.

The two-tiered voting process contributes to the resolution of differences between the judges.[108] Because the judges see each other's votes on all cases all the time, after years of reading the opinions and comments and hearing conference discussions, the judges become very familiar with how the other judges think. Therefore, even before circulating a proposed opinion, judges may be able to predict the concerns of their colleagues and how they will vote, thereby providing the opportunity, prior to circulation, to moderate any ideological or other influence in the judge's opinion independent of the panel composition. In addition, the perspectives of the other judges, over time, may become internalized within the judge. With our two-tiered approach to voting, the decision may benefit from the diversity of a small panel, while the court's jurisprudence benefits from the consistency and measured developments of legal precedent provided by the oversight of the full court.[109] This aspect of our institutional design should enable "outcomes across rotating panels[]sufficiently consistent to promote predictability."[110]

Because disagreement is expected, encouraged, and all judges engage in it, judges do not take such disagreement personally. And, because it is respectful and occurs within the court's structure, disagreement does not affect judicial relationships. Moreover, the expectation that all judges will object and critically comment about circulating opinions eventually thickens the skins of any thin-skinned judges on the court. Because everyone is treated equally, I have not seen, nor have any of the judges commented about, tension among the members of the court based on disagreement. Vote fluidity is expected, and there is no loss of face in changing one's vote; there would be little purpose to deliberation if votes could not change.

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108. Posner & Vermeule, *supra* note 29. Eric Posner and Vermeule argue for a two-stage voting procedure in which all judges vote in the first stage, and in the second stage, the judges may change their votes depending on what they learned. This strict two-stage procedure may help reduce "free rider" concerns, where judges rely on the efforts of the other judges, a form of effort aversion. This is a potential issue with the Commonwealth Court process of interdependent voting, as judges can see each other's votes in PACMS. There are also some efficiencies from allowing the judges to see each other's votes, in situations where judges have imperfect information, as it allows for efficient information gathering and processing (such as sharing bench memos). I believe judges' concerns about their reputations with their colleagues limit excessive free riding.

109. For example, see EPSTEIN & KNIGHT, *supra* note 45, at 88–89 (describing how if Justice Burger had been trying to get the court to dismiss *Craig v Boren*, 429 U.S. 190 (1976), on standing grounds; on a three-person court, he might have succeeded).

110. HETTINGER, *supra* note 1, at 116.

A recent study, in examining whether judges should take into account the votes of colleagues in making their vote, argued "for a presumption that judges not only may, but should consider the votes of other judges as relevant evidence or information, unless special circumstances make the systemic costs of doing so clearly greater than the benefits . . . . Interdependence should be the norm. . . ."[111] Interdependence is the norm on the Commonwealth Court. I note with interest that this study particularly focused on public law,[112] which is the jurisdiction of the Commonwealth Court. Our judges can incorporate our colleagues' points of view in their decisions, which also causes no loss of face. Instead, there is appreciation for considering the votes of the other judges.

A recent survey of federal judges concerning their approach to statutory interpretation found two factors, the judges' generation and whether they had previous experience on Capitol Hill, to be more important than any ideological affiliation as conservative or liberal.[113] The survey also found that D.C. Circuit judges were in "a category of their own."[114] The Commonwealth Court engages in significant statutory construction and has a jurisdiction similar to the D.C. Circuit. In my interviews, my colleagues similarly stated that they believed that the background of the other judges in state or local government or private practice had more effect on their points of view than political or ideological affiliation. The federal judges surveyed "acknowledged the need for pragmatism," and as such, engaged in a form of "intentional eclecticism" because they were willing to consider many different kinds of arguments and evidence.[115] The judges defended this approach as "the only democratically legitimate" approach. From the interviews and my experience, it appears that the judges on the Commonwealth Court keep an open mind, read the comments and objections of the other judges, and place a high value on judicial conference discussions.

The rules and norms of the court have created a pragmatic approach that structures the terms of disagreement as defined by Knight and Johnson.[116] The three values of pragmatism appear to be present. First, the judges on the court realize that they are not always right and that their beliefs must be challenged through full-court voting and conference; in other words that they are fallible. Thus, changing one's mind is not shameful for a pragmatic judge, but an accepted expression of fallibility. Second, the judges believe it is possible to arrive at the best decision through the expression of diverse ideas, a commitment to anti-skepticism. Judges would not sincerely participate in the two-tiered process of

111. Posner & Vermeule, *supra* note 29*,* at 159, 162. Moreover, "a judge in the minority may change her vote, and should change her vote, unless she has significant self-confidence or can cite other institutional considerations." *Id.* at 176.

112. "Public law," refers to the extent of judicial deference to administrative agency rules and actions, immunity, statutory construction, among others. *Id.*

113. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals,* 131 HARV. L. REV. 1298, 1303 (March 2018).

114. *Id*.

115. *Id.* at 1300.

116. KNIGHT & JOHNSON, *supra* note 100.

voting and conference if they did not believe that it would lead to a better decision. Finally, the judges understand that the consequences of this process, which "increase[s] the opportunity for diverse voices to be heard,"[117] also increases the probability of a decision that will be legitimate. The commitment to consequentialism inspires the judges to spend the additional effort, reading and voting on every opinion and preparing for conference as if for an oral argument, in order to achieve consistency and institutional legitimacy.

My interviews and the history of the court reveals that these procedures for doing our work were not created by or for the effort averse or the leisure-seekers. Rather, it is possible that the judges derive a non-monetary satisfaction from their work environment, which outweighs the leisure preference. Given the effect that a court's rules and norms can have on judicial decision-making, it is also plausible that the differences in experiences that Judges Posner and Edwards describe could be the result of different rules and norms on their courts. A pragmatic judge may find a value in engaging in the adversarial, yet collegial and collaborative process of decision-making, even if at greater cost or effort. Perhaps the theories of both Judges Posner *and* Edwards can be understood together when explained this way: in a judicial utility model, a rational, pragmatic judge can be motivated to invest additional effort in decision-making within the institutional norms of a multimember court given the right incentives, rules, and norms. The institutional structure of the Commonwealth Court provides support for that proposition. That the dissent rates of the Commonwealth Court are no different than the dissent rates of other courts, even though the expression of true disagreement is encouraged and often occurs, supports the finding that the internal process of deliberating can help to reduce differences.

D. Empirical Data

To test my observations of the effect of the Commonwealth Court's rules and norms on decision-making, I studied a subset of cases issued by the court. I expected that, because all judges vote, I would not see panel composition effects and, because of collaboration and vote fluidity, I would not see higher dissent rates even though there is considerable communication of different views.

I reviewed appeals from the Workers' Compensation Appeal Board (Board) during 2007. During 2007, the commissioned judges were four Republicans and five Democrats, and there were three Democrat senior judges appointed by the Supreme Court, who could sit on panels but not en banc. In workers' compensation, decisions are generally in favor of either injured employees, called claimants, or employers or their insurers. The typical method of testing theories is to examine the impact of ideology, or a proxy for ideology, in order to measure diversity of the judges and their likelihood of disagreement. Although, like Judge Berzon, I have concerns about this methodology, I used the party from which the judge was elected to the bench as a proxy for ideology—Democrat (D) and

117. *Id.* at 45.

Republican (R)—and assumed rather simplistically that a Democrat will have a preference for the injured employee-claimant, and a Republican will have a preference for the employer-insurer, although I have no reason to think this is true.

I examined these cases to see whether the employer or claimant was successful in the appeal, who the moving party was (the appellant-petitioner will have the greater burden and is always less likely to be successful on appeal), and the panel composition in terms of Republican or Democrat. The hypothesis is that because of the oversight of the full court before opinions can be filed, panel effects will be eliminated or reduced and the decisions of panels will not deviate based on composition.

I studied 304 workers' compensation opinions of the court, in which there were 298 panel decisions and 6 en banc opinions. The three-judge panels were comprised of either all Ds, 2 Ds and 1 R, or 2 Rs and 1 D. The three-judge panels can have at most 1 senior judge sitting with 2 currently-commissioned judges. Claimants who were unsuccessful in front of the Board appealed in greater numbers than did unsuccessful employers. Of the 304 cases, 228 were claimant appeals, while 76 were employer appeals. It is always harder to prevail as an appellant or petitioner, so I would expect a high percentage of affirmances, which I found. Considering anything less than a full affirmance as a victory, at least in part, for the appellant-petitioner, 249 or 82% were affirmed, and 55 or 18% were reversed. Out of 228 claimant appeals, there were 185 affirmances, and 43 reversals, including en banc decisions.

Table 1 illustrates the three-judge panels. As shown, in all D panels 78% of claimant appeals were affirmed, while 22%, were reversed, and 100% of employer appeals were affirmed, with no dissenting opinions.[118] In 2D 1R panels, 84% of claimant appeals were affirmed, while 16%, were reversed, and 84% of employer appeals were affirmed, while 16% were reversed. In 1D 2R panels, 79.5% of claimant appeals were affirmed, while 20.5%, were reversed, and 78% of employer appeals were affirmed, while 22% were reversed.

118. Note that claimants' attorneys typically receive a percentage of the weekly compensation payment, while employers typically have a different calculation of legal costs. Claimants can recover costs under certain circumstances. This may affect the number of appeals from each group, and the confidence required for employers to appeal.

Table 1: Panel Statistics

Panel Composition	Employer Appeals		Claimant Appeals	
	Affirmed	Reversed	Affirmed	Reversed
3D	9	0	32	9
2D, 1 R	41	8	119	23
1D, 2 R	14	4	31	8

The results support that there are no real panel composition effects based on political party. The affirmance rates in favor of an employer in all D panels was 78%, while it was 79.5% in 1D 2R panels. Similarly, the reversal rate in favor of a claimant was 22% in all D panels, while it was 20.5% in 1D 2R panels. Further study of larger numbers is needed to determine whether the affirmance in favor of claimants of 100% in all D panel and affirmance rate of 78% in favor of claimants in 1D 2R panels is statistically significant because only 39 appeals were filed by claimants, and so the number of reversals was only four.

The en banc panels are different because, for these cases, seven commissioned judges sit on the panel. There were six en banc workers' compensation cases, all filed by claimants; three were affirmed and three reversed. These cases tell an interesting story. Of the six, three began as cases submitted to a panel, while three were originally listed for en banc argument. Typically, a case will go to en banc consideration after being assigned to a panel when there is disagreement between the panel and the majority of commissioned judges per the IOPs. A panel majority, which could file the opinion on another court, cannot on our court if it is not consistent with the majority vote of the court. After the case is either submitted or argued to the en banc panel, there is another post-argument conference to vote on the outcome. There is no prohibition about changing the vote that originally compelled the case to en banc consideration. In fact, if the objecting judges change their minds, an opinion that went to conference can be filed as unanimous. A sophisticated litigant will be able to see a reflection of this because the case will initially have been ordered submitted to a panel on briefs without argument—or argued before a three-judge panel—and after a period of time, there will be a subsequent order setting an argument before the court en banc. The parties will also see that it is a unanimous opinion, and, if they are familiar with the IOPs, they will suspect that there was an initial disagreement among the judges—although it is also possible that judges will request en banc argument after reviewing the briefs if they believe the issues warrant it. However, even if they suspect disagreement, they will not know whether the former majority or former dissenting opinion prevailed.

Table 2: En Banc Statistics

En Banc Composition	Majority Author	Prevailing Party	Dissent	
2R, 5D	R	Claimant	None	
3R, 4D	D	Claimant	2R	
	D	Employer	2D	
4R, 3D	R	Employer	2D	
	D	Employer	None	
	D	Claimant	3R	

Table 2 illustrates en banc panels. Of the six en banc opinions, four had dissenting opinions. This is a rate of 67%, although the sample size is too small to enable a statistically significant inference to be drawn.[119] The panels were composed as follows.

The rate of separate opinions varied from 11.5% in 2004 to 7% in 2007. In the data analyzed by Hettinger et al., they found that the rate of separate opinions on the U.S. Court of Appeals was "low, averaging about 13% percent across the years" they studied, with substantial variation ranging from 2% to 41%.[120] The rates on the Commonwealth Court are low, certainly less than the average of the federal courts. This is notable because, even though expressing disagreement is encouraged, the public expression of dissensus in separate opinions is no greater than the average on the federal appellate courts.[121]

III

CONCLUSION

My analysis supports that understanding the reality of judicial decision-making on a multimember court requires knowledge of the institutional context within which the judges work on that particular court. Each court has its own

119. *See* EPSTEIN, *supra* note 22, at 269 (sample of seven en banc cases was too small in their study, although the dissent rate for all en banc cases in the federal courts of appeal during 2005–2010 was 77%).

120. HETTINGER, *supra* note 1, at 110.

121. Moreover, I note that, per Epstein et al., the likelihood of disagreement grows with the size of the panel, and thus is more likely to have dissents on the U.S. Supreme Court because there are nine judges as opposed to panels of three. However, although the panel size is usually three judges, because all the commissioned judges read and vote, the likelihood of disagreement should also grow. EPSTEIN, *supra* note 22, at 267.

unique institutional context, which is created by the court's formal rules, informal norms, the judges' interpretation of the rules and norms, and the work environment that they create. Because so much of the decision-making process occurs behind the bench within the institutional context, it may be difficult for people outside of a court to see more than the external reflection of that process in published opinions.

The benefits of adversarial collaboration and a collegial deliberative decision-making process on a multimember appellate court are that consideration of a diversity of opinions of a group of decision-makers is more likely to lead to more consistent and accurate decisions that are less likely to be biased. However, for the benefits to be realized, the group of decision-makers must be willing to express disagreement and listen to and consider the different opinions of others. Both the expression of disagreement and consideration of other perspectives have effort costs, and the filing of separate opinions can also create costs to the legal system. Studies of other courts have shown the likelihood that not all courts have judges who consistently engage in either a collegial deliberative process or an adversarial collaborative process of decision-making. Thus, those courts may not realize all of the benefits that they could from the multimember group decision-making process. I believe that the unique institutional structure of the Commonwealth Court has created an adversarial collaborative yet collegial process that does realize the benefits of a multimember group decision-making process, while reducing the effort and systemic costs of this process and thus fostering effective decision-making.[122] If more judges look within their courts, there may be other rules and norms that can change the balance of the costs and benefits of appellate decision-making.

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122. I note that the size of the Commonwealth Court is optimal—nine judges was considered the "maximum feasible size" of an appellate court. *See* Cross, *supra* note 16, at 1403 (citing J. Woodford Howard, Jr., Recommendations of the Judicial Conference of the U.S., Courts of Appeals in the Federal Judicial System 213 (1981)).

Historical Society Websites

Supreme Court:
Supreme Court of Pennsylvania Historical Commission
https://www.pasupremecourthistory.org/

Superior Court:
Historical Society of the Superior Court of Pennsylvania
https://www.superiorcourthistory.org/

Commonwealth Court:
Pennsylvania Commonwealth Court Historical Society
https://pacchs.us/