

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

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## 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.<sup>1</sup> 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.<sup>2</sup>

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<sup>3</sup> requires the judges to interact in a group process,<sup>4</sup>

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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.<sup>5</sup>

### 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;<sup>6</sup> 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.”<sup>7</sup> 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.<sup>8</sup> 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.”<sup>9</sup> 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.”<sup>10</sup> A slightly different way of thinking of the deliberative process is “adversarial collaboration,” meaning “working with those with whom you disagree.”<sup>11</sup> 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

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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.”<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.”<sup>19</sup> 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.”<sup>20</sup>

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.<sup>21</sup> 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

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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;<sup>22</sup> 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.<sup>23</sup> Over time, “the propriety of the dissenting opinion . . . was one of the ‘longest and ‘liveliest’ institutional debates in American legal history.”<sup>24</sup> 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.<sup>25</sup> All judges vote on their assigned cases.<sup>26</sup> But, as part of that duty and a commitment to judicial independence, is there a responsibility to dissent if a judge disagrees?<sup>27</sup> Some argue dissenting may both “promote individual judicial responsibility and demonstrate transparency as to how a decision was reached by a panel of judges.”<sup>28</sup> Conversely, a recent proposal

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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.”<sup>29</sup> 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,<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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.”<sup>33</sup>

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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.”<sup>34</sup> 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.”<sup>35</sup> 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.”<sup>36</sup> It follows that, for these authors, “judicial deliberations are overrated,”<sup>37</sup> and there is “less deliberation among judges, at least in the common understanding of the word, than outsiders assume . . . .”<sup>38</sup> 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.<sup>39</sup> 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.”<sup>40</sup> Studies have also suggested the existence of gender-based and race-based panel effects in specific types of cases.<sup>41</sup>

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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.”<sup>42</sup> 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.”<sup>43</sup> 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?”<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> Both Judges Diane Wood (7<sup>th</sup> 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 (9<sup>th</sup> Circuit) are careful with the tone and content of their internal memoranda wanting to encourage the majority writer to accommodate their suggestions.<sup>47</sup>

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."<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup>

Forming accurate expectations about how other judges will act requires taking into account the rules of the relationships<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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."<sup>54</sup> 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.”<sup>55</sup>

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.”<sup>56</sup> 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,<sup>57</sup> 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.<sup>58</sup> Workload, as opposed to caseload,<sup>59</sup> can also affect the ability of judges to

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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.<sup>60</sup>

### 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.”<sup>61</sup> Yet, in their study they found that “circuit-level” norms had an important influence on dissenting behavior.<sup>62</sup> “Like many of the most interesting influences on behavior, norms are generally assumed to influence behavior, but they are difficult to measure empirically.”<sup>63</sup> 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.”<sup>64</sup> The decision is public; however, the internal deliberations of the panel usually are not.<sup>65</sup> 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.”<sup>66</sup> Understanding how judges make decisions, including what influences them, is an important endeavor.<sup>67</sup> 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

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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.”<sup>68</sup> 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.”<sup>69</sup> 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.”<sup>70</sup> 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.”<sup>71</sup> 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.<sup>72</sup> 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.”<sup>73</sup>

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.”<sup>74</sup>

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

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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.<sup>75</sup>

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.<sup>76</sup>

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

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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.”<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 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.”<sup>80</sup> 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,<sup>81</sup> 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.”<sup>82</sup> 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](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.<sup>83</sup> 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.<sup>84</sup>

### 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.<sup>85</sup> 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

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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)<sup>86</sup> 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.”<sup>87</sup> 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.<sup>88</sup> 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.

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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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> Depending

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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.<sup>95</sup> 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.”<sup>96</sup> 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.<sup>97</sup>

### 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.<sup>98</sup> 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

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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 40<sup>th</sup> 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.<sup>99</sup> 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.<sup>100</sup> 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. Various described as “judicial modesty,”<sup>101</sup> “a stiff dose of epistemic humility,”<sup>102</sup> and “recogniz[ing] their own fallibility,”<sup>103</sup> 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 50<sup>th</sup> 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.<sup>104</sup> 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,”<sup>105</sup> 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,<sup>106</sup> 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.<sup>107</sup> Moreover, because all the judges participate, and regularly object to

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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.<sup>108</sup> 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.<sup>109</sup> This aspect of our institutional design should enable "outcomes across rotating panels[]sufficiently consistent to promote predictability."<sup>110</sup>

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. . . .”<sup>111</sup> Interdependence is the norm on the Commonwealth Court. I note with interest that this study particularly focused on public law,<sup>112</sup> 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.<sup>113</sup> The survey also found that D.C. Circuit judges were in “a category of their own.”<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> 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

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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,”<sup>117</sup> 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

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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.<sup>118</sup> 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.

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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**

<b>En Banc Composition</b>	<b>Majority Author</b>	<b>Prevailing Party</b>	<b>Dissent</b>	
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.<sup>119</sup> 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%.<sup>120</sup> 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.<sup>121</sup>

### 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.<sup>122</sup> 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)).