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## The Collegial Chief

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# The Collegial Chief

*Justice Max Baer\**

After being elected to the Pennsylvania Supreme Court, I faced the daunting but thrilling task of transitioning from trial court judge to Supreme Court Justice. The process, however, was rendered inordinately easier by the benevolence of then-reigning Chief Justice Ralph J. Cappy.<sup>1</sup> As one of the acknowledged titans of the Pennsylvania bench, the Chief surely could have been gracious and warm without expending much of his precious time or energy. In fact, he was so much more. The day after the election, he telephoned and invited me to his chambers. Not surprisingly to anyone who knew his personality, he gladly revealed the secrets of his well-run office and explained the steep learning curve that new justices experience in becoming familiar with the variety of topics covered in the opinions, as well as the intricacies of the various dockets, committees, boards, and commissions. He generously offered me his chamber's allocatur reports, and, before our first argument session, his bench memos, so that my clerks and I could get an idea of what information was useful to the other justices in reviewing requests for allowance of appeal and how to best prepare for oral argument. He showed me his elaborate system of colored folders, which remains a rainbow-hued blur to me even now. While I may not have adopted the intricacies of his filing and circulation system, I took careful notes of his advice. The Chief was even kind enough to offer a couple of his very precious employees to assist me in being successful on our Court. To this day, my chief law clerk, who worked for Chief Justice Zappala and Chief Justice Cappy, remains a close adviser and friend.

Beyond the nuts and bolts of the filing systems, reports, and bench memos, and beyond his willingness to part with his employees, the Chief spoke to me of his passionate goal for the Court to become a collegial body that could produce clear majority deci-

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\* Justice, Pennsylvania Supreme Court.

1. I penned this article before Ralph's untimely passing, and what was written to be a tribute is now, sadly, a memorial. I revised the article only slightly following Ralph's death, as it was intended above all to extol his unparalleled professional and personal graciousness, and those qualities will continue to burn bright with all who were touched by this special man, notwithstanding retirement, death, or time's passage.

sions. One of the paths to this goal was to rid the Court's opinions of disparaging comments aimed at justices in disagreement, trial or intermediate appellate courts, counsel, or the parties appearing before our Court. I took this advice to heart as I considered my responses to opinions drafted by other justices and in drafting my own opinions. Moreover, I respected the Chief's efforts when he would write letters asking the other justices to tone down any questionable commentary. Indeed, he was always quick to revise his own work if another justice pointed out any incivility. As with many of his innovations on the Court, civility has been a hallmark that has endured even after his retirement and, now, his passing. Moreover, the professionalism in the writing spilled over into personal interactions among the justices and their staffs, allowing the individual chambers to hold true to their legal philosophies, yet remain courteous in disagreement.

During those early discussions in my tenure, the Chief also expressed his goal of reducing the number of plurality decisions as well as splintered decisions in hopes of creating clear, binding precedent to guide the bench and bar. Too many of the Court's decisions had been plagued by multiple concurring opinions, which blurred the holdings without necessarily advancing the law or adding useful legal analysis. The Chief recommended that I file concurring opinions only when absolutely necessary to express my differing view, and to avoid drafting concurrences on minor points. Of course, he would never have asked that I compromise my views to the extent of joining a result with which I disagreed, because that is the heart of judicial freedom. The Chief's concern was not in reducing the number of dissents, but only in reducing the number of unnecessary concurrences that dilute the holdings of the Court. Unfortunately, anyone who has watched the Court of late may realize that this goal has been more elusive than the goal of civility.

However, I, for one, took the Chief's advice seriously and withheld my impulse to demonstrate any alleged intellect by writing on every case when I differed only slightly with the legal reasoning of the majority, restraining my concurrences to only those cases where I had a fundamental difference of opinion with the logic of the decision, but still agreed with the result. As I began to circulate my first majority opinions, I was quite surprised to find concurring opinions flying at me from left and right, especially when they came from the Chief himself. Some of the concurrences were welcomed additions to my proposed majority opinions, addressing issues I had not encountered as a trial judge, such as the

ever-present appellate waiver issues attendant to Pennsylvania Rule of Appellate Procedure 1925, or the Court's long-standing conflicts regarding layered claims of counsel ineffectiveness in criminal matters. When possible, I modified my opinions to adopt the Chief's and other justices' comments, and I thanked them for improving my work. Nonetheless, I could not help but wonder if I was the subject of some hazing ritual for all newbie justices from the sheer volume of concurrences as well as dissents and "flips."<sup>2</sup> I was reassured that it was not just me, as I looked at the many auxiliary opinions streaming into my chambers in response to all justices' proposed majority opinions.

Although I never quantified the concurring opinions during Chief Justice Cappy's tenure, I felt that he was particularly quick to concur, in contravention of his own admonitions. Indeed, in writing this article (to which I am sure the Chief would have concurred or dissented), I endeavored to determine if this theory was just in my head. In looking at the statistics,<sup>3</sup> I concurred in only 6% of other justices' majority opinions, while the Chief concurred in 14% of those opinions.<sup>4</sup> Only one other justice on the Court had a higher percentage of concurrences. Neither time nor space permits a review of all my majority opinions that provoked a concurrence from the Chief, but I would respectfully suggest that some were at odds with the Chief's goal of reducing concurrences to only

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2. A flip occurs when a majority opinion is circulated, the case is held for dissent, a new vote is then taken on the merits of the proposed majority and dissenting opinions, and a dissenting opinion receives at least four votes. When a case flips, the justice authoring the dissenting opinion transforms it into the majority opinion, and the justice authoring the original proposed majority opinion then has the option to revise it into a dissenting opinion.

3. I calculated the percentages by searching Westlaw for the total number of opinions filed by the Court between January 2004, when I came on the Court, and December 2007, when the Chief left the bench. I then subtracted the number of majority opinions each justice wrote (as one can assume that a justice would not concur to his or her own opinion) to arrive at a number signifying the majority opinions drafted by other justices. After calculating the total concurrences filed by each justice in that same period, I divided by the number of majority opinions penned by other justices to obtain the percentages of concurring opinions for each justice. Being infamous for my lack of mathematical acumen, I enlisted my staff's assistance. At this juncture, they demand that I place a disclaimer herein that they are also lawyers—not statisticians. Nevertheless, after laborious effort, we believe that our numbers are valid and reflect what we have witnessed on the Court. I did not calculate dissenting opinions, because unlike concurring opinions, dissents reflect a fundamental disagreement in the result of the decision, which no judge or justice should compromise merely to seek a larger majority vote.

4. The Chief concurred in 17% of the cases in which I wrote the majority opinion, but I may be able to explain this. Ralph and I had a long-running philosophical disagreement concerning the propriety of policy discussions in the Court's opinions. So, many of the Chief's concurrences to my majority opinions were to disassociate himself from my policy digressions.

those that where substantively necessary. Nevertheless, I acknowledge that, as I spend more time on the Court, I, too, have a greater impulse to parse words based on my own previous writings and the personal, nuanced views I have developed. Thus, while I might disagree with some of the Chief's musings in my cases, I cannot deny that his responsive opinions revealed his insight into the effect that our decisions would have on the body of Pennsylvania law, nor can I deny his careful, nuanced analysis of the facts and the law of each case.

Without any doubt, I have taken my model for being a justice and, indeed, an administrative leader, from insights gained by talking with and watching Chief Justice Cappy. Now that Ralph is no longer with us, I can confess that I have modified my day-to-day behavior in deference to the virtue and style I learned from him. As I am sure many others will comment in this tribute, my respect for Ralph's intellect, work ethic, personality, and leadership is unbridled. To me, he will always be the Chief Justice. His service benefitted this Court and this Commonwealth beyond measure, and improved all who knew him. I have no doubt that history will remember the five years he served as Pennsylvania's Chief Justice as a shining moment in the Court's long lineage, and history will remember Ralph Cappy, the man, as a shining example of what we can aspire to be.