THE UNPUBLISHED RULES OF THE ARKANSAS COURT OF APPEALS: THE INTERNAL RULES AND PROCEDURES OF THE ARKANSAS COURT OF APPEALS

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Members of the Arkansas bar often ask me, as a sitting judge on the Arkansas Court of Appeals, how cases are assigned to panels of judges. In the past, that process was outlined in various statutory provisions. Because those provisions are all now repealed, the bar is thus left with no written account of the procedures the court of appeals follows in assigning cases. The court of appeals, however, has set forth "Internal Rules and Procedures"—which are unpublished—that it follows to ensure consistency from case to case. As these "Internal Rules and Procedures" are not readily available to the bar, my aim here is to provide a historical outline of how cases have been assigned in the Arkansas Court of Appeals and discuss the court of appeals's "Internal Rules and Procedures" as they pertain to assignment of cases. Further, I will briefly discuss problems that may arise in the future if changes are made to these rules without the advice of the bar.

In the 2009–2010 term, the twelve-member court of appeals submitted 829 cases and 165 unbriefed employment security cases for a total of 994 submissions. We handed down 759 majority opinions, 25 concurring opinions, 27 dissenting opinions, and 175 employment cases without opinions. Of these, 21 cases were decided by six-judge panels and 7 cases were decided by nine-judge panels. The court also handed down 23 per curiam orders, 28 rebriefing orders, and certified to the Arkansas Supreme Court 32 cases. There were also 100 petitions for rehearing, 748 motions, and 14 calls for dismissal for failure to file briefs.[1] All told, a judge on the court of appeals averaged about 72 written opinions and orders, a heavy load.

A heavy caseload in the Arkansas Supreme Court was the basis for the creation of the court of appeals. In 1978, the Arkansas Supreme Court wrote 539 majority opinions, with each Justice on the court averaging 77 majority opinions.[2] The court remained current in its caseload only by sitting in divi-

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1. E-mail from Rita Cunningham, Chief Staff Attorney, Ar. Ct. App., to Josephine Linker Hart, J., & Guilford Dudley, Law Clerk to the Honorable Josephine Linker Hart (Jul. 14, 2010 11:16 AM CST) (on file with author). These numbers were gleaned from internal sources of the Arkansas Court of Appeals.

2. James D. Gingerich, *The Arkansas Court of Appeals, Was It Worth the Trouble?*, ARK. . LAW., July 1984, at 143 tbl. 4. The article further notes that in 1978, the justices also wrote 95 "other opinions" for a total of 634 opinions, with each justice averaging 91 opinions. *Id.*

sions.[3] To reduce the workload, the Arkansas Court of Appeals was created.[4] This was done in 1978, when the voters approved Amendment 58 to the Arkansas Constitution, which created the court of appeals.[5] Amendment 58 empowered the General Assembly to "create and establish" the court of appeals, which would have "such appellate jurisdiction as the Supreme Court shall by rule determine, and shall be subject to the general superintending control of the Supreme Court."[6]

Following the adoption of Amendment 58, Act 208 of 1979 was passed by the General Assembly to provide for the selection of six members from six districts for the court.[7] The Arkansas Supreme Court noted that Amendment 58 entrusted to the Arkansas Supreme Court "complete responsibility for determining both the initial jurisdiction of the court of appeals and the extent to which its decisions are reviewable."[8] The Arkansas Supreme Court further adopted the proposition that the court of appeals was "a court of final authority in the particular area of its own jurisdiction."[9] It wrote, "Ideally, each court will in effect be a court of last resort, with its decisions having a desirable finality."[10]

The Arkansas Supreme Court further noted that Amendment 58 "authorized the General Assembly to create divisions within the court of ap-

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3. Act 205 of 1925 as permitted by Amendment 9 to the Arkansas Constitution authorized the court to sit in two divisions, with the Chief Justice alternating in presiding over the two divisions. ARK. CODE ANN. § 16-11-103 (West 2010). When the Chief Justice was not presiding over the division, the associate justice with the highest seniority presided. *Id.* A "[c]apital criminal case" or cases involving interpretation of the Arkansas Constitution were required to be heard en banc. ARK. CODE ANN. § 16-11-104 (West 2010). When there was a tie, the case was transferred to the court en banc for decision. ARK. CODE ANN. § 16-11-103 (West 2010). On July 19, 1976, the court issued a per curiam noting that the court's caseload had more than doubled in fifteen years, and in order to keep current on the docket, the court determined that it would sit in two divisions, with each consisting of the Chief Justice and three associate justices, with the divisions rotating justices from time to time. *In re* Supreme Court Procedure for Sitting in Divisions, 260 Ark. 380 (1976) (per curiam). The per curiam required that cases be heard by the full court when the division was not unanimous, when the case presented a substantial question arising under the Arkansas Constitution, criminal cases in which capital punishment had been imposed, in cases involving the court's original jurisdiction, and other cases designated by the court. *Id.*

4. The Arkansas Supreme Court, in Moose v. Gregory, 267 Ark. 86, 88–89, 590 S.W.2d 662, 664 (1979), noted that "the volume of litigation in Arkansas had grown to such an extent that it could not be handled promptly and properly by a single appellate court," and that "Amendment 58 addressed the problem by authorizing the General Assembly to create a court of appeals to shoulder part of the burden."

5. ARK. CONST. amend. 58, § 1 (repealed 2001).

6. *Id.*

7. Act of Feb. 23, 1979, No. 208, 1979 Ark. Acts 208.

8. Moose v. Gregory, 267 Ark. 86, 87, 590 S.W.2d 662, 663 (1979).

9. *Id.* at 88, 590 S.W.2d at 663–64.

10. *Id.* at 89, 590 S.W.2d at 664.

peals, to provide for a still greater caseload in the future."[11] The General Assembly ultimately did so by passing Act 410 of 1983, which created two divisions of the court of appeals, each consisting of three judges, with the judges who constituted the respective divisions rotating "not less frequently than semi-annually under rules prescribed by the Arkansas Court of Appeals."[12] The Act further provided that the decision of a division had to be unanimous, and if not unanimous, the case was to be submitted to the court en banc for a decision.[13] Petitions for rehearing would be granted by a majority of the full court, with the rehearing submitted to the court of appeals en banc.[14]

The authority of the Arkansas Court of Appeals to sit in divisions pursuant to Act 410 was challenged in *Citizens Bank of Batesville v. Estate of Pettyjohn*.[15] The appellant argued that three members of a six-member court could not reverse a trial court because the decision would not be by a majority of the six-member court.[16] The Arkansas Supreme Court simply noted that Amendment 58 specifically conferred authority for the General Assembly to establish a court of appeals and divisions of that court.[17] The Arkansas Supreme Court, in a subsequent decision, also held that an affirmance by an equally divided court was not entitled to precedential value.[18]

In 1991, the General Assembly passed an emergency measure providing that when "the caseload of the Court of Appeals becomes so demanding that the Chief Judge certifies to the Chief Justice of the Supreme Court that there is a need for additional judges in order to promptly decide pending cases or to reduce backlog," the Chief Justice could designate an Emergency Court of Appeals Judge, who would sit on a panel with two elected members of the court of appeals.[19] Petitions for rehearing en banc and cases heard en banc, however, could only be considered by the elected members of the court of appeals.[20]

The court of appeals, however, continued to grow, with three additional members appointed in 1996 and another three in 1997. A series of acts,[21]

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11. *Id.* at 89, 590 S.W.2d at 664.
12. Act of Mar. 13, 1983, No. 410, 1983 Ark. Acts 410 at sec. 2.
13. *Id.* § 3.
14. *Id.* § 3.
15. 282 Ark. 222, 667 S.W.2d 657 (1984).
16. *Id.* at 225, 667 S.W.2d 657, 659 (1984).
17. *Id.* at 226, 667 S.W.2d at 659.
18. France v. Nelson, 292 Ark. 219, 221, 729 S.W.2d 161, 162 (1987).
19. Act of Mar. 29, 1991, No. 959, 1991 Ark. Acts 959 at sec. 2 (codified at ARK. CODE ANN. § 16-12-106).
20. *Id.*
21. Act 1085 of 1993 anticipated adding six new judges in 1995. Act of Apr. 13, 1993, No. 1085, 1993 Ark. Acts 1085. Act 1323 of 1995 anticipated adding six judges in 1996. Act of Apr. 19, 1995, No. 1323, 1995 Ark. Acts 1323. Acts 11 and 15 of the First Extraordi-

beginning with Act 1085 of 1993, anticipated that the twelve court members would sit in four separate divisions, with each division consisting of three judges, with no judge permanently assigned to any division, and with the judges rotated not less frequently than semiannually.[22] The decision of a division was required to be unanimous, and if not unanimous, the case was to be resubmitted to the original division and a new one.[23] In the event of a tie vote, the decision was affirmed.[24] Rehearings were to be heard by two divisions, one of which was the original division, with the decision of the original division standing in the event of a tie vote.[25] Petitions for rehearings in cases decided by the vote of two divisions sitting together were heard by the same two divisions.[26] Act 1323 of 1995 echoed these same rules.[27]

Act 924 of 1999 dispensed with the troublesome problem of tie votes. The Act required that division decisions be decided unanimously.[28] If not unanimous, the decision was to be submitted to the original division and an additional division. In the event of a tie vote, however, the case was to be "resubmitted under rules prescribed by the Court of Appeals" to the first two divisions and a third division, with the case decided by a majority vote.[29] Rehearings from a single panel were to be decided by the original and an added division, and the rehearing would be decided by the majority vote of the two divisions. If there was a tie, a third division would be added.[30] Rehearings from a two-division case were to be decided by the two divisions, with a third division added in the event of a tie vote.[31] Rehearings from a three-division case were to be heard by the same three divisions.[32]

In the November 2000 general election, the voters approved Amendment 80 to the Arkansas Constitution. Generally, Amendment 80 provides that the "Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts."[33] Amendment 80 provided for a court of appeals, "which may have divisions thereof as established by Supreme Court rule."[34] The court of appeals is to have "such appellate jurisdiction as the Supreme

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nary Session of 1995 settled the matter by having three judges appointed in 1996 and three in 1997. Act of Oct. 24, 1995, No. 15, 1995 Ark. Acts Vol. II 15.

22. 1993 Ark. Acts 1085 at sec. 7.
23. *Id.* § 10.
24. *Id.*
25. *Id.* § 11.
26. *Id.*
27. 1995 Ark. Acts 1323.
28. Act of Mar. 29, 1999, No. 924, 1999 Ark. Acts 924 at sec. 1.
29. *Id.*
30. *Id.* § 2.
31. *Id.*
32. *Id.*
33. ARK. CONST. amend. 80, § 3.
34. *Id.* § 5. The language was identical to that in Amendment 77, a 1999 amendment.

Court shall by rule determine and shall be subject to the general superintending control of the Supreme Court."[35] According to Amendment 80, however, "[a]ny rules promulgated by the Supreme Court" with respect to the court of appeals—specifically section 5 of Amendment 80—"may be annulled or amended, in whole or in part, by a two-thirds (2/3) vote of the membership of each house of the General Assembly."[36]

Act 1185 of 2003 implemented Amendment 80 and provided that "[a]ll statutes concerning pleading, practice, and procedure in all courts shall be deemed superseded by rules adopted by the Supreme Court pursuant to Amendment 80, § 3 of the Arkansas Constitution or pursuant to the Court's constitutional, inherent, or statutory authority prior to the effective date of Amendment 80."[37] The Act also specifically repealed statutes relating to divisions and how they were to hear cases.[38]

As of now, there is only one Supreme Court rule—a rule which in fact predates Amendment 80—that generally speaks to the procedures of the court of appeals in assigning cases. It simply notes that "[i]n cases where no provision is made by statute or other rule, proceedings in the [court of appeals] shall be in accordance with existing practice."[39] But what is the court of appeals's "existing practice" with regard to assignment of cases? This brings us to our unpublished rules.

In its unpublished Internal Rules and Procedures, the Arkansas Court of Appeals has outlined for itself the procedure it will follow in assigning and deciding cases. These are not "rules" per se, in that the court of appeals has no constitutional or statutory rulemaking authority. And the Arkansas Supreme Court has neither issued rules governing these practices in the court of appeals, nor specifically authorized the court of appeals to fashion its own rules. But these "rules," fashioned over time by the various and changing membership of the court of appeals, govern the court of appeals's internal practices and ensure consistency from case to case. And these rules follow previous existing practice as set forth in the newly repealed statutes.

There are thirty-three numbered paragraphs contained within the rules. These rules govern such matters as the court's structure, weekly conferences, opinion preparation, and other matters. I will mainly focus only on the few paragraphs relating to assignment of cases. Our cases are assigned randomly by the Clerk of the Court of Appeals.[40] But there are non-random aspects to the assignment as well. For example, each division is typically assigned nine cases each week, and of that nine, three of the cases are usual-

35. *Id.*
36. *Id.* § 9.
37. Act of Apr. 9, 2003, No. 1185, 2003 Ark. Acts 1185 at sec. 68.
38. *Id.* §§ 71–72.
39. ARK. S. CT. R. 1-7.
40. ARK. CT. APP. INTERNAL R. & P. ¶ 5.

ly civil cases on any number of topics, three are either criminal cases or workers' compensation cases, and three are unbriefed employment security cases. In addition to those cases, we are responsible for any en banc cases to which we have been assigned. Each division has a chief who presides over oral argument and panel discussions and records the individual judges' votes.[41] Each division's chief is either the Chief Judge of the court of appeals or a randomly assigned judge.[42]

The rules stipulate that the Arkansas Court of Appeals sits in four divisions of three judges each.[43] On an annual basis, the chief deputy clerk of the court of appeals randomly draws ten sets of four divisions, with each set to serve for not more than four weeks of case submissions before rotation.[44] The divisions are designated as Divisions I, II, III, and IV.[45] If a decision of the division is not unanimous, the case is heard by two divisions, the original division and the next enumerated division.[46] If, in a six-member division, a judge not in the original division is disqualified, the case is nevertheless conferenced with a 4-1 vote being final and a 3-2 vote requiring the addition of a new judge.[47] Public Service Commission cases are always heard by two divisions.[48] If the decision of the en banc group is a tie, then the case is conferenced by a nine-judge panel, known—presumably because of its large size—as a "Super En Banc" panel.[49]

One to two weeks before the submission date—the day a case is paneled—judges begin the hard and solitary work of preparing a case for conference.[50] Each judge must read the nine assigned cases, each of which, excluding the unbriefed employment security cases, typically includes an appellant's brief, an appellee's brief, and sometimes a reply brief. Judges also must go to the transcript if some relevant material is missing from the abstract or addendum of the briefs. The judges, in reading, studying, and analyzing these cases, follow individual paths, though I believe that this process is best accomplished in seclusion. I adhere to the method followed by Associate Justice George Rose Smith of the Arkansas Supreme Court and take all the sets of briefs to a private study to complete this process unimpeded by the influence of any judge or staff member. (I clerked for Justice Frank Holt of the Arkansas Supreme Court from January 1971 until

41. ARK. CT. APP. INTERNAL R. & P. ¶ 4.
42. ARK. CT. APP. INTERNAL R. & P. ¶¶ 3–4.
43. ARK. CT. APP. INTERNAL R. & P. ¶ 1.
44. *Id.*
45. *Id.*
46. ARK. CT. APP. INTERNAL R. & P. ¶ 2.
47. ARK. CT. APP. INTERNAL R. & P. ¶ 16.
48. ARK. CT. APP. INTERNAL R. & P. ¶ 17.
49. ARK. CT. APP. INTERNAL R. & P. ¶ 2.
50. ARK. CT. APP. INTERNAL R. & P. ¶ 6.

June 1972 and observed the practices of the justices while clerking there.) Other judges may work in chambers individually or collectively with their staffs. Whatever process is followed, the judge must be able to discuss the cases intelligently with the other two division judges on the submission date, including not only the two cases that the judge has been assigned to write, but also the remaining cases on which the judge is to vote. If the division agrees as to the outcome, it circulates a proposed opinion to the whole court the following week.[51]

In addition to hearing oral arguments, we typically meet four times a week. First, we meet in an opinions conference to approve form opinions that were decided two weeks earlier.[52] At the Arkansas Court of Appeals, we traditionally make suggestions, grammatical or otherwise, as to how to improve the circulated opinions by other judges.[53] The stated goal of the court of appeals is to circulate a proposed opinion the week after it has been submitted, to be approved for release the week after the opinion has circulated.[54] In the event of a concurrence or dissent, those opinions are to be circulated no later than two weeks after the majority opinion has circulated.[55] And at that conference, any judge, after reading a circulated opinion, may ask that a case be heard by an expanded panel, and the following week a vote is taken on the request.[56] Only if at least six judges vote for the case to be reconferenced will an additional division be added.[57] Second, we meet in a motions conference during which we decide motions before the court, and these motions are decided by the whole court.[58] Petitions for rehearing are also heard at that conference, but only by two divisions; if the motion is not denied, it is scheduled as an en banc case during which any issue that was properly raised before the original division may be heard.[59] In the event of a tie, a third division is added.[60] Third, we meet with our three-member panel to decide the cases.[61] And fourth, we meet to discuss en banc and super en banc cases.[62] We may also meet at special meetings called by the

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51. *Id.*
52. ARK. CT. APP. INTERNAL R. & P. ¶ 7.
53. ARK. CT. APP. INTERNAL R. & P. ¶ 11.
54. ARK. CT. APP. INTERNAL R. & P. ¶ 8.
55. ARK. CT. APP. INTERNAL R. & P. ¶ 12.
56. ARK. CT. APP. INTERNAL R. & P. ¶ 7.
57. *Id.*
58. ARK. CT. APP. INTERNAL R. & P. ¶¶ 7, 18.
59. ARK. CT. APP. INTERNAL R. & P. ¶ 21.
60. *Id.*
61. ARK. CT. APP. INTERNAL R. & P. ¶ 6.
62. ARK. CT. APP. INTERNAL R. & P. ¶¶ 14–15. The procedure which we are to follow within these meetings is rigorously detailed within our rules. ARK. CT. APP. INTERNAL R. & P. ¶ 15.

chief judge on court business or meet in separate committees to handle specific administrative matters.[63]

But turning back to the previously stated Arkansas Supreme Court rule, I note that proceedings in the Arkansas Court of Appeals shall be in accordance with "existing practice."[64] While the court of appeals's "existing practice" regarding assignment of cases mirrors that previously described in the now-repealed statutes, that is not to say that these "rules" have not changed in degrees over the course of time. So, it begs the question of what is meant by "existing practice" if "existing practice" is allowed to change over time. There is no Arkansas Supreme Court rule governing the changing of an "existing practice." And while there are no specific provisions in the court of appeals's "rules" governing how its members are to go about altering the rules, the rules do require a vote of seven judges to change court rules or policy.[65]

I submit that, in the day-to-day operation of the Arkansas Court of Appeals, procedural issues arise—some far reaching, others mundane—that must be dealt with by the court in a consistent manner. For these issues, the court of appeals has fashioned "rules" to organize its affairs. Neither the General Assembly nor the Arkansas Supreme Court should be required to anticipate all of these issues and address such matters. Perhaps, then, an "existing practice," as set forth in the Arkansas Supreme Court rules, describes not only the practices that have heretofore been the basis for deciding cases, but also an inherent ability to alter that "existing practice" if the Arkansas Court of Appeals's needs require a change.

But in the past, there have been efforts by members of the Arkansas Court of Appeals to substantially alter the method by which we determine how cases are to be decided. For instance, it has been suggested that when a panel of three judges disagrees, rather than add an additional panel of three judges to the case for a total of six judges, the court of appeals should add only two judges to the panel—for a total of five judges. The five-judge vote would eliminate tie votes that could occur when six judges are hearing the case and thus eliminate the need for a super en banc hearing.

I suggest, however, that such a change in "existing practice" requires the blessing of a higher authority—the consent of the Arkansas Supreme Court, with the advice of the Arkansas bar at large. A five-member panel, while perhaps more efficient, would fail to capture the broader range of experience provided by a six- or nine-member panel. And it is these six- or nine-member panel cases that are typically the most difficult and contentious cases and thus require the insight gained from the addition of judges.

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63. ARK. CT. APP. INTERNAL R. & P. ¶¶ 31–32.
64. ARK. S. CT. R. 1-7.
65. ARK. CT. APP. INTERNAL R. & P. ¶ 30.

Moreover, one might challenge the wisdom of allowing a five-judge panel to overrule the decision of a six- or nine-judge panel in a later case. Also, it may be questioned whether a five-judge panel should be able to bind the other seven judges—a majority of the court—when an issue decided by the five-judge panel arises again in a later case. Further, five-judge panels could disagree with one another, resulting in five-judge panels overruling other five-judge panels. Or, alternatively, five-judge panels may feel constrained to overrule another panel, possibly limiting development of the law. And finally, since en banc cases are rarely unanimous, in reality a three-judge majority would bind the entire court.

When such momentous rule changes are suggested, the Arkansas bar should be invited to discuss the pros and cons of such changes. But as the Arkansas Court of Appeals's "Internal Rules and Procedures" are unpublished, the bar can only infer what our rules are. And there is no rule or procedure requiring the Arkansas Court of Appeals to either notify the bar of changes to these rules or notify the bar that the court of appeals is considering a change. My effort here is limited to describing the rules now governing the court of appeals's assignment of cases, but I believe that, at a minimum, the bar should be apprised of our rules, and that, ideally, it should participate in the development of rules that have far reach.