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Collegiality and Technology

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THE CHANGING CULTURE

COLLEGIALITY AND TECHNOLOGY

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I. INTRODUCTION

Collegiality and communications are essential and related components of appellate court infrastructure. Technological progress in communications, however, does not necessarily promote collegiality. Some innovations may benefit communications with speed or cost containment, but they do not necessarily advance the quality of communication and can even generate friction with collegiality. By way of example, this essay focuses on two technological advances to which appellate courts are now adapting: teleconferencing and electronic mail. Before probing this tension between technology and collegiality, however, it is necessary to first reflect upon the nature, sources, and benefits of collegiality on an appellate court.

II. APPELLATE COLLEGIALITY

The very nature of an appellate court, a collection of judges

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jointly resolving individual cases and controversies, suggests the need for collegiality. The product of a collegial court, its opinions, are "better in substance, style, and tone" than those of a court which expends little effort to harmonize diverse views.[1] Thus, a collegial court better manifests the bedrock principle upon which appellate courts rest: multiple minds are better than one.[2]

On the other hand, many of the very qualities which distinguish an appellate court correspondingly create tension with collegiality. For example, groups of judges on a single court usually have been appointed by presidents or governors from different political parties or elected by different constituencies; most of the judges are strong-willed, intellectually capable, and products of an adversary system; and the judges tend to be of diverse backgrounds, cultures, and expertise.[3] Additionally, unlike the parties in a partnership or a marriage, an appellate judge does not choose her colleagues.[4]

The tension with collegiality flowing from the very composition of a court ensures that collegiality is neither a romanticized notion resulting in institutional bliss nor a brutalized concept sacrificing independence and individuality to a collective persona. One practitioner of the art of appellate collegiality for some thirty-five years, Judge Frank Coffin,[5] described collegiality as:

> [t]he deliberately cultivated attitude among judges of equal status and sometimes widely differing views
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> working in intimate, continuing, open, and noncompetitive relationship with each other,

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1. Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 228 (W.W. Norton 1994); *see generally* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 Va. L. Rev. 1335, 1361 (1998) (discussing the benefits of ideologically diverse judges sharing their views with one another); Patricia M. Wald, *Collegiality on a Court: Its Practices, Problems, and Pitfalls*, 40 Fed. B. News & J. 521, 528 (1993) (discussing the effects of collegiality, or the lack thereof, on the appellate decisionmaking process).

2. *See* Coffin, *supra* n. 1, at 220.

3. *See id.*; *see also* Wald, *supra* n. 1, at 522; Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the* Harvard Law Review *and Other Great Books*, 100 Harv. L. Rev. 887, 906-07 (1987).

4. *See* Wald, *supra* n. 1, at 522; *see also* Rudolph J. Gerber, *Collegiality on the Court of Appeals*, 32 Ariz. Atty. 19, 19 (1995).

5. Senior Judge, United States Court of Appeals for the First Circuit.

> which manifests respect for the strengths of the others,
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> restrains one's pride of authorship, while respecting one's own deepest convictions,
>
> values patience in understanding and compromise in nonessentials,
>
> and seeks as much excellence in the court's decision as the combined talents, experience, insight, and energy of the judges permit.[6]

Judge Coffin's description of appellate collegiality would seemingly portray an adherent as Christ-like. That, however, is merely the result of the aspirational nature of collegiality. No court or judge is always collegial. Collegiality is not "instinctive or natural" to judges serendipitously comprising an appellate court.[7] Collegiality needs attention, exercise, and development. It is a dynamic, not static, state. Because it is so fragile and delicate, anything which might affect collegiality need be viewed with caution. That is particularly so when the subject matter is tools of communication, the daily bread of an appellate judge.

III. ORAL ARGUMENT AND TELECONFERENCING

In the interests of convenience and cost control, appellate courts are beginning to adopt teleconferencing technology for oral argument. Among the federal circuits, the Second, Third, Ninth, and Tenth Circuits[8] are now using this technology for selected cases.[9] In the Tenth Circuit, counsel present their arguments from remote locations[10] to the panel sitting together in Denver.[11] The Tenth Circuit, along with the Third and Ninth

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6. Coffin, *supra* n. 1, at 215.

7. Frank M. Coffin, *The Anatomy of Judicial Collegiality*, in *Appellate Courts: Structures, Functions, Processes, and Personnel* 551 (Daniel J. Meador et al. eds., Michie 1994).

8. A description of the early use of video conferencing for oral argument in the Tenth Circuit appears at Gary H. Wente, *Courtroom Videoconferencing Comes of Age: A Report from the Tenth Circuit*, 38 Judges' J. 28 (1999).

9. At this writing, the Fourth Circuit is planning to use teleconferencing.

10. The remote locations are limited to Oklahoma City, Oklahoma; Cheyenne, Wyoming; Topeka and Kansas City, Kansas; and Albuquerque, New Mexico.

11. The judges convene in Denver for regular terms of court to hear oral argument by

Circuits,[12] also has the capability to allow judges to be in the remote locations. It is thus not necessary for the panel to be together in the same location.

Only in exceptional circumstances, however, do the judges of the Tenth Circuit not convene in a single location to hear arguments. In the two years since the Tenth Circuit began hearing arguments by video, there have been but two instances when all three judges have not been together. On those occasions, emergencies and health concerns caused a judge to participate in the argument from a remote location.

I participated in one such instance. After concluding the arguments, the panel teleconferenced in private to discuss the cases. At the conclusion of our conference, it was an eerie feeling to bid our colleague farewell, turn off the monitor, and go to lunch—two of us. Because conducting an oral argument with one judge remote from the others was and remains the clear exception in the Tenth Circuit, the incident was remarkable only from a technological perspective.

Some have suggested, however, that the teleconferencing technology will and should be regularly used with judges remote from one another participating as a panel at oral arguments.[13] While the availability of teleconferencing for oral argument makes sense as a cost-containment tool, its regular or frequent use for oral argument with judges remote from one another jeopardizes collegiality.[14] The danger is accentuated because, although direct travel cost savings are measurable, the accompanying cost to collegiality on an appellate court is real but not economically measurable.

Collegiality requires a familiarity with other judges, which

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traditional means. Since January 1998, one or two panels (of some twenty total panels during a term) will hear a series of four to six cases by video.

12. Telephone Interview by Ida Bostian with Kara Ferber, Circuit Executive's Office, United States Court of Appeals for the Third Circuit (Mar. 27, 2000); Telephone Interview by Ida Bostian with Jim Hochstadt, Court of Appeals Clerk's Office, United States Court of Appeals for the Ninth Circuit (Mar. 22, 2000).

13. *See e.g.* Commission on the Future of the California Courts, *Justice in the Balance 2020* (1994), reprinted in *Excerpts from Justice in the Balance 2020*, 45 Hastings L.J. 605, 609 (1994); J. Clark Kelso, *Report on the California Appellate System*, 45 Hastings L.J. 433, 484-85 (1994) (advocating teleconferencing but warning of its potential threat to collegiality).

14. *See* Deanell Reece Tacha, *The Federal Courts in the 21st Century*, 2 Chapman L. Rev. 7, 19 (1999).

occurs only with regular face-to-face contact.[15] When a court convenes for oral arguments, that contact does not generally end when the cases are submitted and the judges have concluded their conferences. Judges frequently dine together and otherwise socialize when they are gathered for terms of court.[16] The loss of this contact, resulting from regular or frequent use of teleconferencing with judges remote from one another, would be at a much higher cost to an appellate court than any possible savings in travel costs. On an appellate court, absence does not make the heart grow fonder, and familiarity does not breed contempt. Absence makes the heart unfamiliar, and it does not breed collegiality.

IV. ELECTRONIC MAIL

In many ways, courts differ little from other organizations in their small group dynamics and interpersonal relations.[17] As with other organizations, the use of e-mail is not the dawn of rudeness and incivility among judges. If not properly perceived, understood, and utilized, however, e-mail can exacerbate the inherent stresses on collegiality in an appellate court.

Because e-mail is a relatively new tool, judges frequently assume it works the same as more traditional means of communication, the spoken and written word. Experience and reflection, however, teach that by allowing instantaneous, spontaneous, and written communication without a face-to-face or oral encounter, e-mail differs from the written memorandum, the telephone call, and the personal conversation. The phone and personal conversation are more forgiving, as they allow for voice inflection and immediate defusing of misinterpreted remarks and do not produce a written record.

For example, a rhetorical question in the spoken word may

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15. *Cf.* Coffin, *supra* n. 1, at 216.

16. *See* Harrison M. Winter, *Goodwill and Dedication*, in *The Federal Appellate Judiciary in the 21st Century* 167-70 (Cynthia Harrison & Russell R. Wheeler eds., Fed. Jud. Ctr. 1989); Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 Ohio St. L.J. 585, 588, 591 (1995); *cf.* Wald, *supra* n. 1, at 527.

17. *See* Walter F. Murphy, *Courts as Small Groups*, 79 Harv. L. Rev. 1565 (1966) (explaining ways in which small group analysis is and is not applicable to appellate courts); *but see* Gerber, *supra* n. 4, at 20 (stating that unlike the situation in small group dynamics, unanimity within an appellate court may muddle nuances of difficult, multi-faceted issues).

appear to be substantive when communicated by e-mail. Upon the receipt of a problematic proposed opinion, a telephone request for the record from a possible dissenter may well be perceived differently than a cold, terse message delivered by e-mail reading: "Send me the record." Additionally, because e-mail, albeit written, is perhaps perceived as essentially a substitute for, if not interchangeable with, oral conversation, it is often not used with the same thoughtful reflection as a more traditional written memorandum. With a click of the mouse, intentionally or otherwise, a spontaneous, instantaneous message can appear on the screen of a judge and possibly the screens of all the judges. A recipient is armed with the same tool for a spontaneous, instantaneous, written response.

While the use of e-mail without reflection and care can be hazardous to collegiality, the benefits of e-mail are so monumental[18] that the risk to collegiality must be undertaken. When the servers malfunction for any significant period in the Tenth Circuit and the court is unable to instantaneously communicate in writing throughout the six-state jurisdiction, an important tool is lost.[19] Thus, to preserve collegiality along with the benefits of instantaneous, written communication, the judges must utilize e-mail with a sensitivity to its potential risk to collegiality and must author thoughtful, reflective messages.

V. CONCLUSION

Challenging the wholesale, uncritical acceptance of technology is not without risk of being perceived as merely resistant to change and innovation. The misgivings expressed in this paper, however, are not directed at technological advances

18. *See* Stephen L. Wasby, *Communication in the Ninth Circuit: A Concern for Collegiality*, 11 U. Puget Sound L. Rev. 73, 103 (1987) (noting both the benefits of e-mail and the danger it poses to collegiality).

19. The telephone is not a satisfactory substitute for e-mail because it interrupts a judge at a time when she "is not likely to be thinking about the case in which the caller is interested." Stephen L. Wasby, *Technology and Communication in a Federal Court: The Ninth Circuit*, 28 Santa Clara L. Rev. 1, 13-14 (1988). "The calling judge perhaps may benefit . . . by obtaining some immediate feedback, but the cost of immediacy may be diminished quality" in the responding judge's analysis of the issue at hand. *Id.* at 13. In contrast, e-mail does not interrupt the recipient and allows that judge to collect her thoughts for a more reflective response.

per se. Nor are they intended as obstacles to the adoption of inventive ways to communicate. They are intended only as a caveat to the manner in which appellate courts use and apply new tools.

Teleconferencing is useful and cost-effective both generally and in its application to oral argument. It should not, however, be a substitute for the regular convocation of an appellate court. Additionally, electronic mail should be used with the same care and reflection as "snail mail." Teleconferencing and e-mail are but mere examples of meaningful advances in communication which should be adopted and applied sensitive to the fragile, collegial underpinnings of an effective appellate court. Judge Coffin is, again, instructive: "[T]he paradox of collegiality among independent peers is eminently worth thinking about, planning for, and struggling to maintain."[20]

20. Coffin, *supra* n. 1, at 229.