



## TEXAS SUPREME COURT

BY KENT RUTTER

“The day you see a camera come into our courtroom it’s going to roll over my dead body.” So said U.S. Supreme Court Justice David Souter in 1996.

Fortunately for observers of the Texas Supreme Court, its justices see the matter differently. On March 20, 2007, the court welcomed cameras into its courtroom and began streaming live video of oral arguments over the Internet.

The court sought for several years to enter the age of video webcasting. After the Legislature failed to fund the project in 2005, St. Mary’s University School of Law offered to supply equipment and personnel.

The production quality is comparable to a professionally televised proceeding. When a justice asks a question, a camera at the back of the courtroom zooms in to show whether the justice is wearing a smile, a furrowed brow, or a look of disbelief. When the advocate responds, a camera at the front of the courtroom shows the advocate from the chief justice’s perspective. The view from one’s desk is now better than the view from the gallery.

The live webcasts, as well as archived video from past oral arguments, may be viewed at [www.stmarytx.edu/law/webcasts](http://www.stmarytx.edu/law/webcasts).

### A SURGE IN PRODUCTIVITY

Behind the scenes and away from the cameras, the court decided more causes in 2007 than it had in any prior year this decade.<sup>1</sup> Between 2001 and 2004, the court had issued an average of 93 deciding opinions per year.<sup>2</sup> In 2005, and again in 2006, the court issued 108 deciding opinions. In 2007, the court issued 131 deciding opinions — a 21 percent surge in a single year. The most prolific writers in 2007 were Justices Nathan Hecht and Scott Brister, who together authored almost half of the court’s per curiam opinions, in addition to their signed opinions. Justices Harriet O’Neill and Phil Johnson authored the most concurring and dissenting opinions.

In part, the court’s increased productivity was a result of its recent stability. The first part of the decade saw frequent turnover at the court. Indeed, six of the nine justices currently serving on the court arrived between 2003 and 2005. Since then, the makeup of the court has remained unchanged.

Another likely reason for the court’s increased productivity was that the justices agreed far more than they disagreed. Between 2001 and 2006, concurring and dissenting opinions, expressed as a percentage of deciding opinions, declined from 58 percent to 33 percent. In 2007, the percentage dropped still further, to 28 percent. A third likely factor was the court’s use of per curiam opinions. Per curiam opinions typically are short-

er than signed opinions and are issued without oral argument. Between 2001 and 2007, the percentage of causes decided with per curiam opinions, rather than signed opinions, climbed from 33 percent to 53 percent.

While the court disposed of an unusually large number of causes in 2007, it also added an unusually large number to its docket. Between 2003 and 2007, the percentage of petitions for review granted by the court climbed steadily from 10 percent to 15 percent. The court added more new causes to its docket in 2007 than it had in any year since 1994.

### MORE “ERROR CORRECTION”

Taken together, all of these trends — more petitions being granted, more causes being decided, fewer concurrences and dissents, and more per curiam opinions — signal a greater willingness by the court to grant review for purposes of error correction.

Although the court’s primary function has always been to resolve close issues that are important to the jurisprudence of the state, at times the court has granted review in cases that do

Serving the National Legal Community for Over 20 Years!



- Discovery & Notification
- Claims Administration
- Fund Disbursement
- Media/Publication Campaigns
- Data Management & Reporting
- 24-Hour Secure User Access to Case Documents & Reporting Online



Collective Action Administrators

8500 North Stemmons  
Suite 5030G  
Dallas, TX 75247

Barry Shelton, Esq.  
Director, Business Development

P: 214-905-4990  
F: 214-905-4992  
barry@cptgroup.com

[www.cptgroup.com](http://www.cptgroup.com)  
800.542.0900

California (National Headquarters) / Delaware / Illinois / Texas



not present such issues, simply to correct clear errors by the lower courts. At the start of the decade, a number of justices felt the court generally should grant review only if the case presented an issue of importance to the state's jurisprudence.<sup>3</sup> By 2003, however, sharp-eyed observers had spotted a possible "trend toward error correction," although they cautioned that "[o]nly time will tell if the new supreme court will continue this trend."<sup>4</sup>

In the year those words were written, the court issued 29 per curiam opinions. In 2007, it issued 69 — an increase of 138 percent. The primary function of those opinions is error correction. As Justice Hecht once explained, "Per curiams are ... supposed to be on issues that at least six judges and usually eight or nine of us think are so clear-cut that one can scarcely argue about them."<sup>5</sup>

Recognizing the trend toward error correction, the astute practitioner will consider whether his or her case is suitable for per curiam disposition. If so, the petition for review should emphasize that the lower court committed a clear-cut error that may be corrected quickly and easily to prevent a serious injustice.

### IMMUNITY, INSURANCE, ARBITRATION, AND MEDICAL MALPRACTICE

The court focused considerable attention in 2007 on issues relating to immunity, insurance, arbitration, and medical malpractice.<sup>6</sup> Significant decisions in these areas include:

**Immunity** — In *City of Galveston v. State*, the court held that the state might not sue a Texas city for money damages unless the city's immunity has been waived. In *Texas A&M University System v. Koseoglu*, the court held that appellate courts have jurisdiction to consider a government official's appeal of a trial court's denial of a plea to the jurisdiction based on sovereign immunity.

**Insurance** — In *Lamar Homes Inc. v. Mid-Continent Casualty Co.*, the court held that the "Prompt Payment of Claims"

statute, which provides for additional damages when an insurer wrongfully refuses or delays payment of a claim, applies to an insurer's breach of the duty to defend. In *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*, the court held that a primary carrier that paid less than its proportionate share of a settlement against its insured did not owe a duty to reimburse the carrier that paid the greater portion.

**Arbitration** — In *In re Merrill Lynch Trust Co. FSB* and *In re Kaplan Higher Education Corp.*, the court addressed the circumstances in which non-signatories to an arbitration agreement may be compelled to arbitrate and when they may compel arbitration against a signatory.

**Medical Malpractice** — In *Ogletree v. Matthews*, the court held that an interlocutory appeal is not available to challenge the trial court's decision to deny a dismissal motion based on an expert report's deficiency, when the court grants an extension to cure the deficiency.

### CHIEF JUSTICE JOHN L. HILL, JR., 1923-2007

In July, the court mourned the passing of former Chief Justice John L. Hill, Jr. A former secretary of state and attorney general of Texas, Hill served as chief justice from 1985 until 1988. As chief justice, and following his retirement from the court, Hill was a passionate advocate for judicial selection reform.

### NOTES

1. Unless otherwise noted, the years referenced in this article are fiscal years, which end on Aug. 31. The statistics are based on figures from the Office of Court Administration as well as the author's own analysis.
2. The term "deciding opinions," as used by the Office of Court Administration, includes per curiam opinions and signed majority and plurality opinions. The term excludes concurring and dissenting opinions.
3. See John Sirman, "Greg Abbott: Texas Supreme Court Justice," 63 Tex. B.J. 248, 253 (2000) ("Today, [Justice Abbott] says, the court concentrates less on error correction. ..."); Deborah Hankinson, "Framing Issues Under the New Rules: A View from the Supreme Court," *The Appellate Lawyer* 6 (Houston Bar Ass'n Appellate Practice Section, Winter 1998-99) ("A number of the justices on the Texas Supreme Court believe that the primary purpose of the supreme court is not error correction, but to focus on the state's jurisprudence.").
4. Alan Wright, LaDawn H. Conway, Debra J. McComas, & Heather D. Bailey, "Appellate Practice and Procedure," 56 SMU L. Rev. 1061, 1061 (2003).
5. Meeting of the Supreme Court Advisory Committee, May 10, 1994, at 4770 (quoted in Pamela Stanton Baron, "Drafting Issues In The Texas Supreme Court," State Bar of Tex. Advanced Civil Appellate Practice Course (2001)).
6. These cases were decided between Jan. 1 and Nov. 30, 2007.

### KENT RUTTER

is a partner in the appellate group of Haynes and Boone, L.L.P. in Houston.

**\$1.00 eFiling**

- ProDoc's unsurpassed reputation
- FREE training
- Unbelievable customer support

**www.prodocefile.com**