Should an *En Banc* Motion Be Filed? A Concurring Opinion in the First Court of Appeals gives Some Guidance.

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To paraphrase the fictional Judge Chamberlain Haller of *My Cousin Vinny*, an appellate lawyer who loses an appeal is not a "unique position." Justice David Gunn, joined by Chief Justice Terry Adams and Justice Jennifer Caughey, recently authored an opinion all but telling the appellate bar that the First Court of Appeals is "not about to revamp the entire" TRAPs to accommodate such a lawyer's *en banc* petition. Reviewing this opinion will be eminently useful to appellate practitioners.

Before turning to the opinion itself, the rule controlling the *en banc* procedure should be familiar to every appellate practitioner (and is worth recounting):

> A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within the time prescribed by Rule 49.1 for filing a motion for rehearing. The motion should address the standard for en banc consideration in Rule 41.2(c). No response to a motion for en banc reconsideration need be filed unless the court so requests. While the court has plenary power, a majority of the en banc court may, on its own initiative, order en banc reconsideration of a decision. If a majority orders reconsideration, the judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition. The court may dispose of the case with or without rebriefing and oral argument.

Tex. R. App. P. 49.5.

And every appellate practitioner should be well-aware that *en banc* review is "disfavored":

> *En Banc Consideration Disfavored*. En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration.

Tex. R. App. P. 49.5.

Justice Gunn recently concurred in the denial of an *en banc* petition in *Campbell v. State*, No. 01-23-00389-CR, Slip Op. (Tex. App.—Houston [1st Dist.] Dec. 16, 2025,

pet. filed). The opinion made enough of an impression among the criminal law bar that a group of *amici curiae* took the unusual step of filing a "Motion to Publish" because, according to this group of appellate practitioners, "as a general rule, because opinions are designated unpublished when 'the issues are settled,' they are rarely read by the vast majority of appellate practitioners[.]" *Campbell v. State*, No. 01-23-00389-CR, *Amicus* Mot. to Publish at 2-3 (Dec. 22, 2025). This group of *amici* asserted that this "concurring opinion does not deal with settled issues, but deals with a matter of significant import to both the bench and bar, to wit: when to seek reconsideration of an opinion by the *en banc* Court of Appeals, rather than filing (1) a motion for rehearing pointing out to the particular panel why the submitting lawyer(s) believe the panel decision to be incorrect, or (2) a petition to the Court of Criminal Appeals seeking discretionary review of the panel decision." *Id.* The First Court shortly thereafter granted the motion to publish. *See Campbell v. State*, No. 01-23-00389-CR, Order of Jan. 6, 2026.

For largely the same reasons given by the *amici*, this author suggests that a review of this concurring opinion would be useful to the civil appellate bar as well.

It is noteworthy that this concurring opinion praised the motion that was filed by the party who lost the appeal. "The motion is respectful and well written; it cites the correct standard; and it offers clear legal arguments in making its case." *Campbell*, Slip Op. at 7. Nonetheless, the motion was unsuccessful—it appears for reasons not all that interesting to the civil bar. What is of interest is that the concurring justices offered "a few comments" to guide practitioners in navigating the preparation of *en banc* petitions.

First, the concurring opinion suggested that practitioners "start with a simple statement of no more than a page, presented without argument and standing apart from the body of the argument, just to hit the standard head-on." *Id.* at 2. Taking the motion in that case, it suggested that an author include a "Rule 41 Statement" that looked something like the following:

RULE 41 STATEMENT

> The criteria in Tex. R. App. P. 41.2(c) focus on the following questions to evaluate the case's fitness for en banc reconsideration:
>
> 1. Does the motion allege a conflict in the Court's decisions (and if so, what decisions conflict)?
>
> 2. Does it allege any extraordinary circumstances (and if so, what circumstances qualify)?

The answers here are as follows:

1. The motion alleges a conflict within the Court's decisional law. The Panel opinion conflicts with the Court's prior decision in *Baskerville v. Moriarty* and *In re Baker Street* on [*state the relevant holdings*].

2. The motion alleges extraordinary circumstances. The circumstances at hand qualify as extraordinary because [*state the circumstances succinctly*].

Id. at 3.

(As a side note, of course, such a section is not mandated by the TRAPs. But practitioners would be well served to heed this advice when a third of the members of a Court have strongly suggested that such a section would be useful to their decision-making.)

Second, the concurring opinion gives guidance as to when to seek panel rehearing versus *en banc* review. "[A] conflict in a court's own decisional law is a classic ground for an *en banc* motion, while the motion probably has no hope if it contends that the panel misapplied a correctly-stated rule to a given record." *Id.* at 4. "Seeking *en banc* review for mere misapplication of known law generally constitutes a road to nowhere." *Id.* at 5. While "one could always imagine error so egregious that the full court would perceive extraordinary circumstances," "caution is appropriate." *Id.*

Third, the concurring opinion tries to give some guidance as to when circumstances—other than a conflict in the Court's own case law—warrants *en banc* review. It gives some specific examples—"[p]erhaps one must look at the stakes in the case at hand, the recurring nature of the issue, the views of authorities from the academy or other jurisdictions"—but then ends with the indefinite catch-all phrase "and the like." *Id.* But whatever the "and the like" means, the concurring opinion is clear that "it normally will not include error correction." *Id.*; *see also Maritime Overseas Corp. v. Ellis*, 977 S.W.2d 536, 536-37 (Tex. 1996) (Hecht, J., dissenting).

The remainder of the opinion is useful to practitioners in giving an example of the application of this guidance. One of the issues in the case before the Court was the interpretation of North Carolina law. That was not fit for an *en banc* motion: "whatever North Carolina law may say, and whatever the panel may have done in applying it here, that issue seems unlikely to recur in Texas and does not fit my conception of extraordinary circumstances." *Id.* at 6. While the other issue—a "complaint about the 'wrong standard' applied to an issue about the jury charge"—looked more promising ("causes me to read more closely"), a closer inspection also revealed it was not fit for an *en banc* motion (at least in the concurring justices' view).

This, in part, because "the motion does not point to any conflict with our own decisions [and] when read as a whole, the argument seems to be that the panel took the controlling precedents . . . and misapplied them to this record." *Id.* at 6-7.

En banc review is rarely successful. Practitioners who seek such review would be well-served to review this concurring opinion's recommendations in seeking the "disfavored" *en banc* procedure. *See* Tex. R. App. P. 49.5.