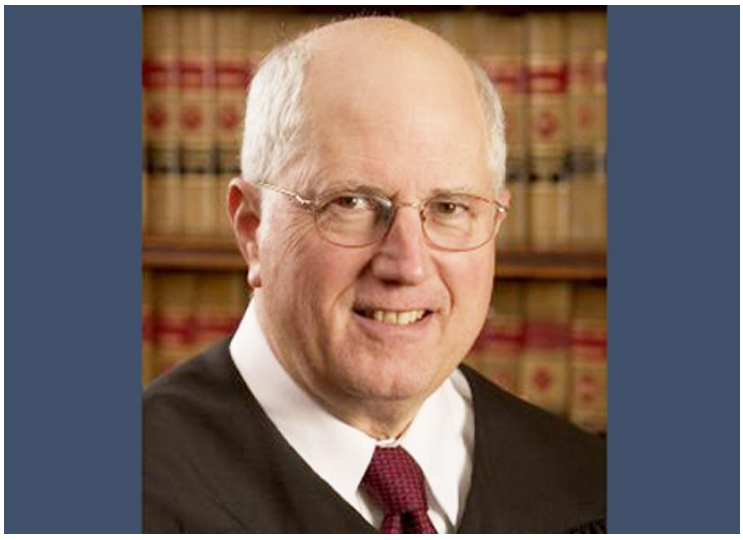
New York Law Journal

Why the Appellate Division Shouldn't Have To Speak in a Unified Voice

Every case that comes before an appellate court (or every case where there is some dissension) brings with it the tension between the value of the court speaking with one unified voice versus one or more individual member's duty or obligation to speak from his or her own personal perspective.

By **Richard Andrias** | January 23, 2019

In contemplating what I might contribute to an informed discussion of issues confronting our state court system after 35 years on the bench, twenty-two of which were on the Appellate Division, First Department, one subject immediately came to mind: the role and importance of dissent at the appellate divisions, our intermediate appellate courts.



Richard Andrais. COURTESY PHOTO

Every case that comes before an appellate court (or every case where there is some dissension) brings with it the tension between the value of the court speaking with one unified voice versus one or more individual member's duty or obligation to speak from his or her own personal perspective. Every appellate judge is first and foremost a judicial officer who must swear or affirm to "support the constitution of the United States and the constitution of the State of New York, and . . . [to] faithfully discharge the duties of [his or her] office." Thus while appellate judges often work towards unanimity, they reserve the right to adopt a different view, based on their interpretation of the law as applied to the facts**,** when the matter before the court warrants it.

When are dissents appropriate? Repeatedly revisiting well-settled precedents, letting off steam in frustration, or merely wanting one's name in print in a high profile case, are certainly not legitimate grounds for issuing a public dissent. Rather, there are several important questions a judge contemplating a dissent must ask.

The first and most obvious one is, will my point of view attract another vote (or votes)? If one is constantly a lone dissenter it may be time to step back and take stock.

Another important benchmark is how the judge's dissents have fared at the higher reviewing court. A little research will reveal how one's dissents stand up upon review, but there are also excellent law review articles analyzing the "vindication rate" of Appellate Division judges (Deveraux-Lewis, 74 Alb.L.Rev 875). While there are limitations to these studies, particularly since most appellate decisions (divided or otherwise) do not get reviewed by the Court of Appeals, over time enough do go up to give an Appellate Division judge a measure of how his or her dissents hold up on review.

Ultimately, an appellate judge must ask, "Am I dissenting on a new issue or matter of broad importance, or merely because I don't agree with the majority's interpretation or application of a long-settled precedent to a peculiar or new set of facts?" However, in

the appropriate case, the importance of a dissenting opinion cannot be underestimated, with the dissent serving several important purposes.

The Importance of Appellate Division Dissent to the Court of Appeals

Where an order finally determines the action and there is "a dissent by at least two justices on a question of law in favor of the party taking such appeal," an "appeal may be taken to the Court of Appeals as of right." (CPLR 5601). The granting of leave to the Court of Appeals by permission of the Appellate Division in non-final matters is also governed by statute (CPLR 5602) and by the rules of that appellate division.

Particularly now, where the Court of Appeals and/or its Chief Judge is reportedly pressing the Appellate Divisions to grant fewer leave applications in non-final matters (Hamilton and DeSantis, N.Y.L.J., Nov. 26, 2018), (https://www.law.com/newyorklawjournal/2018/11/26/difiore-presses-appellate-judges-to-send-fewer-appeals-to-high-court/) one can make the case that dissenters should still air their views, possibly even more so than before. While I certainly respect the Court of Appeal's desire to control its own docket, I submit that non-final orders can, on occasion, be of equal importance to the operation of the court system and to the bar as the matters of broad societal significance that the Court of Appeals prefers to review. These non-final matters deserve attention too when they are ripe for review.

There are numerous experienced appellate advocates who will more than adequately present the issues to the Court of Appeals from their clients' unique point of view. The benefit to the Court of Appeals from having two points of view of the Appellate Division is that the majority and dissenting writings will present the analysis of comparably experienced appellate jurists who have struggled with the issues from a judicial point of view. All appellate division judges have been Supreme Court trial judges and have experienced how these issues percolate up through the court system.

The First Department on its own hears, on average, over 2,700 appeals a year including many complex matters from the commercial division. A particular judge may sit between 35 and 40 times a year, reviewing and voting on 700 to 800 matters and elects to write signed majority opinion or a dissent in only a few. It is from these few heavily debated cases that leave to appeal to the Court of Appeals is usually granted. Even where a divided appellate division writing does not reach the Court of Appeals, other appellate divisions may be wrestling with a similar issue and they may be aided by seeing the treatment given to the issue by one of its coordinate courts.

The Importance of Dissent to the Internal Dynamics of the Court

A judge's informal indication that he or she may dissent or the circulation of a draft dissent will have a number of positive salutary effects on the inner workings of that court.

Once circulated to the panel, a dissent sharpens the discussion and forces the majority to take a closer look at its own position. While it does not occur frequently, occasionally one or more of the majority may change their mind and the dissent becomes the majority opinion or even the unanimous opinion of the court. More often, the dissenter's view leads to important revisions in the majority writing. Thus, even if the dissent doesn't prevail, it sharpens the treatment of the issues.

The argument that dissenters slow down the efficient operation at the appellate division misses the entire point of the process. A final vote is taken only when the majority and dissenting judges have satisfied their respective colleagues and all are ready to sign on and vote. The end product benefits from the back and forth debate and the exchange of (even endless) drafts. The final product in virtually all cases is a better product, whether or not any member actually changes his or her original position.

Signed Opinions and Dissents Benefit the Parties, Their Counsel and the Bar

Notwithstanding the workup and attention each case receives, given the immense volume of work, the vast majority of First Department cases, whether an affirmance, reversal or modification, are issued as unanimous unsigned memorandum decisions in the name of the panel that heard the appeal after a conference and a final vote.

Considering the great amount of time expended by the lawyers during the lengthy appeals process, it is not surprising that they and their clients (whether they are the prevailing party or not) are often disheartened by the courts' seemly cursory disposition of the appeal in the brief unsigned memorandum decisions.

Given this state of affairs, the practice of issuing lengthy, signed opinions, often accompanied by signed dissents, is an important counterbalance to the prevalence of unsigned memorandum decisions. When signed majority and dissenting opinions are published, the final product is on full public display and helps dispel the impression that the court is merely cranking out "a result." Everyone knows that both sides have been heard and no argument was ignored. Where there is a signed published opinion, not only are the parties reassured, but the members of the bar read the decision not only for its reasoning but to see how it might affect their matters or future clients.

In concluding, I again return to the inevitable tension between the appellate institutions' obligation to speak with one voice and the individual judge's view that his or her duty and oath mandates speaking out where warranted. As I have previously noted, for most appellate division decisions, whether with a dissent or not, it is the end of the line for that case.

Should the policy of limiting the granting of leave pressed by the Court of Appeals or its chief judge become common practice, it may be that Appellate Division judges will come to lament that few or none of their dissents become law (a world without

"vindication"). Nevertheless, this will not lessen the importance of their dissents for the development and future of the law.

The airing of legal and policy arguments from both (or all) sides of the issue, is a vitally important function of a dissent. Lawyers read the published decisions—the majority and the dissent—and the public learns of the decisions. The issue may raise its head again in a different stance or the decision may inform different or related issues. Times change: segregation, gay rights, environmental concerns come to mind. All of our societal progress benefits from healthy debate and discussion within or outside a courtroom.

Richard Andrias was a Criminal Court judge, an elected Supreme Court justice and an associate justice of the Appellate Division, First Department.
