Are There Too Many, or Too Few, Separate Opinions on Appeal?

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Upon Further Review

In a recent issue of *Pennsylvania Law Weekly*, Leo Strupczewski had an interesting article (read here) considering the impact of the increasing number of separate opinions that the justices serving on the Supreme Court of Pennsylvania have been issuing over the past few months.

It is interesting to remember that the legal tradition in effect in England when the United States declared its independence in 1776 was that appellate judges would issue so–called seriatim opinions, whereby each judge serving on an appellate court would express his separate views in every case. It was then the job of the lawyers and lower court judges to evaluate what views a majority on the appellate court shared based on the statements found in those separate opinions.

One of the reasons that Chief Justice John Marshall is considered the greatest leader of the U.S. Supreme Court is that he persuaded his colleagues on the court to abolish the seriatim opinion tradition in favor of the practice that persists today, whereby appellate courts endeavor to speak through a single majority opinion. As the *Law Weekly's* article about separate opinions explained, sometimes appellate judges cannot resist the temptation to opine individually, but at least today separate opinions from each appellate judge are not the manner in which all appeals are decided.

The purpose of today's column is not to discuss the phenomenon of separate appellate opinions in general, but rather to focus on three specific types of separate opinions, two of which I believe should be discouraged and one of which I believe should be encouraged.

The first type of separate opinion on appeal that I believe should be discouraged are opinions that judges on an appellate court issue in support of affirmance or reversal when the judges participating in the decision are evenly divided. For example, when one justice on the state Supreme Court is recused, the remaining six justices may — and sometimes do — divide three–to–three over whether the judgment that has been appealed should be affirmed or reversed.

The effect of a tie vote on appeal is that the judgment of the lower court is affirmed, but the affirmance is without precedential value. For this reason — the lack of any precedential value for the appellate court's affirmance — most appellate courts refrain from issuing opinions in support of affirmance and reversal.

Thus, when the U.S. Supreme Court is divided four–to–four over the outcome of an appeal, the court will simply issue a one–line order stating that the judgment appealed from has been affirmed by an equally divided court. No separate opinions accompany that order. The en banc 3rd U.S. Circuit Court of Appeals follows the same practice, refraining from separate opinions in support of affirmance or reversal when the judgment is affirmed by an equally divided en banc court.

By contrast, when the state Supreme Court is evenly divided over the outcome of a case, the justices ordinarily

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invest considerable time and effort into drafting opinions in support of affirmance or reversal to explain why they have voted as they did. What makes this a complete waste of time, however, is that neither the opinion in support of affirmance nor the opinion in support of reversal has any precedential value whatsoever. Moreover, it often takes many, many months, if not longer, to formally issue the outcome of the case, whereas a simple order stating that the judgment appealed is affirmed by an equally divided court could have been issued much sooner.

The second type of separate appellate court opinion that should be abolished are opinions concurring in a federal appellate court's order denying rehearing en banc. This type of concurring opinion is of no use whatsoever, because by definition the appellate court has issued an order denying further review of the original three–judge panel's decision. Thus, whatever an appellate judge writes in an opinion concurring in the denial of rehearing en banc can neither limit nor expand the force and effect of that court's original three–judge panel ruling. By contrast, at least an opinion dissenting from a federal appellate court's order denying rehearing en banc may provide the U.S. Supreme Court with valuable insight into whether the case is a legitimate candidate for review.

Recently, a federal appellate judge took the unusual step of criticizing opinions that accompany orders denying rehearing en banc. Judge Rosemary S. Pooler of the New York City–based 2nd U.S. Circuit Court of Appeals issued her own separate opinion in the case captioned *United States v. Stewart* , wherein she observed that judges' opinions accompanying a federal appellate court's order denying rehearing en banc have "as much force of law as if those views were published in a letter to the editor of their favorite local newspaper." Pooler went on to describe such opinions as "an exercise in free speech rather than an exercise of any judicial function."

Fortunately, here in the 3rd Circuit, we have not seen any such proliferation of these types of unnecessary opinions, but they have arisen with greater frequency in recent years in two neighboring federal appellate courts, the 2nd and the 4th circuits.

There is one type of separate opinion that I enthusiastically encourage. From time to time, an appellate judge will note at the conclusion of a colleague's majority opinion simply that "Judge X concurs in the result" or that "Judge X dissents" without offering any further explanation whatsoever. I can appreciate that appellate judges may feel severely overworked, making it impractical to compose a full–length explanation of their differing views in every single case.

Nevertheless, if an appellate judge disagrees with the majority's resolution or reasoning enough to note that he or she dissents or concurs only in the result, the least that the disagreeing judge can do is compose one or two short paragraphs to communicate the basis for his or her disagreement with the majority's outcome or approach. That is, in my view, the minimum burden that an appellate judge must shoulder for noting his or her disagreement with the majority's resolution of or approach to the case.

In sum, I believe that appellate court judges should avoid issuing separate opinions when they are truly meaningless, such as when the appellate court has evenly divided or when the appellate judge merely concurs in the denial of rehearing. But when an appellate judge who is assigned to decide a given appeal on the merits actually disagrees with how or why his or her colleagues are deciding a case, that judge should at least briefly explain the basis for any such disagreement if the disagreement is to be publicly noted. •

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