Proliferating Opinions Part of Court's Dialogue

Justices' concurrences can have value, experts say

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ANALYSIS

In the last week of 2009, when the state Supreme Court was filing opinions with a ferocious frequency, a simple trend was underscored with each day's crop.

Nearly half the time, the justices could only "sort-of" agree.

Concurring opinions seemed to rule the days between Dec. 28 and Dec. 31. Sixteen were published in relation to the 33 majority opinions issued by the court in that four-day span. Some were as short as one paragraph, others as long as 10 pages. And all of the justices took part in the exercise — each either wrote, or joined, at least one.

Though the sheer amount of concurring opinions was an attention grabber, a study of the court's decisions over the past two years shows it was more status quo than anomaly.

Since Chief Justice Ronald D. Castille took the helm of the high court at the beginning of 2008, justices have published concurring opinions in 38 percent of the 207 cases where the court has issued a signed opinion, an accounting of the Supreme Court's opinions on the AOPC Web site shows.

And of those signed opinions, the justices issued more than one concurring opinion in 23 cases.

The examination by Pennsylvania Law Weekly, which did not include concurring and dissenting opinions in its analysis, shows the justices are more likely to file concurrences in capital appeals and criminal cases than civil cases.

Four of the court's seven members in 2008 and 2009 issued concurring opinions in more than 10 percent of the cases in which they participated.

The two most prolific, Justice Thomas G. Saylor and Castille, did so in 26 percent and 19 percent of the cases in which they participated, respectively. Former Justice Jane Cutler Greenspan wrote concurring opinions 16 percent of the time and Justice Max Baer did so 11 percent of the time.

The other justices — J. Michael Eakin, Seamus McCaffery and Debra Todd — issued concurring opinions 9, 7 and 7 percent of the time, respectively.

That tendency has continued this year — in the five opinions filed by the court so far, there have been concurring opinions in two of them. Both times, there were two concurring opinions. One was related to a capital appeal, the other was related to a criminal case.

More divided — or More Engaged?

Though the opinions have their detractors — some dismiss concurring opinions as lacking precedential value and detracting from the court's overall goal of speaking with a unified voice — most courtwatchers and practitioners say there's value to be had if one studies the opinions hard enough. They also provide access to "the secret world" of what happens behind closed doors, said Shira Goodman, deputy director of Pennsylvanians for Modern Courts.

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Goodman, along with PMC's executive director, Lynn Marks, said it's difficult to tell whether the number of concurring opinions indicates a "more divided" or a "more engaged" court. One thing that is recognizable in concurring opinions, though, is that they're likely left-over pieces of dialogue from when the court was mulling its decision.

"It might give you an idea of who's thinking about what," Goodman said. "It can give insight into what the justices are bothered by and thinking about."

And that can be valuable information, said Abington, Pa.-based appellate lawyer Howard Bashman.

Because it takes less than a majority to grant allocatur in a particular case, Bashman said, concurring opinions can give practitioners a sense of who is open to hearing what types of cases. If two or three justices join a concurring opinion saying there's further need to explore a topic similar to that which the majority has addressed, for example, an attorney with a case that fits the mold already has a strong argument for the justices to review his or her case, Bashman said.

Immediate Impact

In some cases, concurring opinions offer a more immediate impact.

Bashman, along with former Commonwealth Court Judge Robert L. Byer, said there are situations where a concurring opinion can limit the impact of the majority opinion.

Those, said Bashman, are the scenarios in which concurring opinions are "most important."

Bashman painted a hypothetical situation in which three members of the court dissent from the majority and a fourth writes a concurrence to address a specific issue raised by the majority opinion. In such cases, that concurrence is a necessity to create a majority, Bashman said, and can also reel in the potential reach of the majority's ruling.

"[In those cases,] you have to look at the concurring opinion very closely," Bashman said. "Those views may limit the actual holding of the court to the extent they are subtly different than what the other justices would have ruled."

Added Byer: "It might prevent someone from taking something out of context."

Byer, now an appellate lawyer at Duane Morris in Pittsburgh, noted three other scenarios in which concurring opinions offer value.

Concurring opinions can espouse a different legal rationale or call for procedural reform, Byer said, and should be written in both cases.

He also said concurring opinions can offer a "teaching point."

Byer, in recalling his time on the Commonwealth Court, said there were two occasions where the cases before his panel had procedural deficiencies.

In one, Byer said, he agreed with the majority's decision, but thought the result could have been avoided if one of the losing party's attorneys had used a different procedure. In another, Byer thought the appellant had come "perilously close" to waiving issues because of a procedural problem.

He issued concurring opinions in both those cases as an effort to educate the parties and also, in one of the cases, suggest a change to an appellate rule.

The rule in question was ultimately amended, Byer said, and his opinion along with others, was cited as a reason for the change.

"Those can serve a useful purpose," he said.

'Pernicious' Pluralities

The main criticism of concurring opinions, it seems, is that too many reduce the clarity of the court's rulings and, in some cases, prevent a decision from serving as useful precedent at all.

In the last two years, the court has issued three plurality decisions.

Byer called those instances "particularly pernicious" and "terrible, unless there's a valid reason beyond somebody getting their back up in the air."

Marks said her organization also has concerns about opinions lacking precedent, but that the general practice of filing concurring opinions is "not necessarily a bad thing."

"When there's many different opinions, you have to read carefully," Marks said. "It does make it harder to figure out [what the court is ruling]."

Bashman called plurality opinions "bound to happen."

"Each one of these justices has individually taken an oath to apply the law in the way they understand it," Bashman

said. "In many cases, courts reach a unanimous outcome. But the types of cases courts of last resort get tend to be ones that aren't that easy. They legitimately have the ability to disagree over issues."

Cynthia Baldwin, a former state Supreme Court justice, said she understands the frustration when a concurring opinion tips the balance for a court decision from precedential to non-precedential.

Baldwin said she's been in those situations and, in her experience, members of the high court think about the impact of concurring opinions before issuing them.

Though they're not precedential, they might still provide guidance, Baldwin said.

"I understand the frustration in those situations [where the court reaches a plurality opinion,]" Baldwin said. "But I still think that it's important for practitioners to look at that, because that basically means the issue will come up again sometime. You want to know where everybody is, so you can figure out whether it's going to come down your way."

'Me Too'

There are, though, instances in which justices may simply write for the sake of being heard.

Though such concurring opinions don't cause any harm, Byer said, they also lack value. He said he calls those types of concurrences "me too" opinions."

"Sometimes, I read concurring opinions and think, 'What's the point of this? Why bother?'" Byer said. "Most lawyers and most judges don't stay up at night wondering what a particular judge thinks about a particular problem."

Bashman said he views such opinions as "innocuous," so long as the justice's concurrence does not get in the way of achieving a majority.

It's up to the justice to determine whether his or her concurring opinion is useful, Bashman said.

"In that situation, it's difficult to criticize a justice for doing that because it's really inconsequential, Bashman said. "They're really the judges of what's best for their time."

Several of those interviewed, however, recognized that there exists a viewpoint that those opinions detract from the court's goal of achieving a unanimous, authoritative voice.

Every judge — not just those on the state Supreme Court — needs to avoid the temptation to write in every case, Byer said.

But to whom does the responsibility in achieving a unanimous opinion fall — the majority author or the concurring outlier?

Baldwin said it's important to remember each member of the court should be working toward the goal of providing guidance in opinions and Byer agreed that such a responsibility should be shared.

There needs to be a give-and-take, Byer said.

"I just don't know how much that goes on," he said. "I think that varies from court to court and judgeto judge." •