

Appellate Issues



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THE ART OF DISSENT

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One panel at the 2013 Appellate Judges Education Institute Summit focused on dissenting opinions: reasons to write them, their role and possible impact, and the preservation of court collegiality when dissenting. Moderated by Ninth Circuit Judge Margaret McKeown, the panel featured jurists who represent a range of tendencies to write separately: Judge James Wynn of the U.S. Court of Appeals, Fourth Circuit (separate opinion rate of approximately 30 percent), Justice Goodwin Liu of the California Supreme Court (separate opinion rate of approximately 20 percent in two years on the court), and Justice Eileen Moore of the California Court of Appeal, Fourth Appellate District, Division Three (ten dissents and partial dissents in over twenty years on the court).

Why dissent?

The panelists described seven reasons to dissent: legal correction, principle and posterity, letter to another court, letter to the legislature, development of the law, message to losing party, and damage control (i.e., "this court's ruling is effective for this day only and this case only"). Justice Moore, who expressed a strong preference for unanimity in decisions in order to provide solid guidance for those governed by the court's rulings, added some nuances to these reasons, including: sending a message to the

legislature or a higher court to change the current legal rule; sending a message to the losing party that, even though the party lost, the unfairness of the result is still acknowledged; and planting a seed to change the law later.

Justice Liu observed that dissents should be approached cautiously not only because their presence means the court does not speak with one voice, but because once a justice dissents, he has no influence over the majority anymore – not only can he no longer seek to soften that opinion, but if the majority rejects the views set forth in the dissent related to the potential impact of the majority's decision, the dissenter could end up enhancing the majority opinion's impact. Judge Wynn noted that in North Carolina, where he previously sat as a state appellate judge, the court rules allow an appeal as of right if there is a dissenting appellate court opinion in a case; this rule tends to encourage dissents.

Role and impact of a dissent

The panel also discussed the interplay between the majority opinion and the dissent. For example, sometimes the dissenting opinion can become the majority opinion or influence the wording of the majority opinion. Other times, the dissenting opinion can be used to cabin the majority opinion and do "damage control" for future cases. Judge Wynn noted that he never views the dissent as "opposing" the majority's

position; it is not personal, just a different view of the precedent and law, and a recognition that there can be two different approaches.

Crafting the dissent

All observed that a concurrence or dissent can speak more directly to policy than a majority opinion and that, when crafting a dissent, collegiality is of paramount importance. The panel made a number of recommendations in this regard: Acknowledge that the majority got some points right, and hone in on the points with which the dissent disagrees; avoid sharp language; focus on substance; put the majority opinion in the absolute best light possible — do not belittle the other side or misstate the majority position. Write with a tone that says: "These are all matters of reasonable disagreement — not bad faith, arbitrariness, or wrongheadedness."

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