The Roles of Separate Opinions in a Collegial Court

Remarks of Chief Judge Frank M. Coffin, U.S. Court of Appeals for the First Circuit, to Federal Appellate Judges' Seminar, Federal Judicial Center, Washington, D.C., December 15, 1982

Any discussion of the role of separate opinions in a collegial court should begin with a healthy appreciation of the value of unanimity. But it obviously should not end there. Chief Justice Hughes put the matter memorably well:

> "When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided; and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice." Quoted in Leflar, Appellate Judicial Opinions, p. 210. (St. Paul, Minn., West Pub. Co., 1974

The general propositions that can be safely advanced about separate opinions -- concurring, dissenting, concurring and dissenting, concurring in part, dissenting in part, dubitante -- are few. There are three propositions meeting the tests of safety and generality. The first is: do it only after considerable thought. The second is: make it as brief as possible. And the third is: after you write, let it simmer, then eliminate all the snide innuendoes and pejorative adjectives and adverbs.

A subordinate set of propositions for concurring and dissenting opinions might be generally agreed on as follows:

<u>Concurring Opinions are justified</u>

1. When a judge strongly prefers a different theory or ground to support the result, e.g., the judge would not reach the merits because of a procedural bar.
2. When a judge wishes to attempt to limit the holding, e.g., the judge concurs in this case involving the interstate transfer of prisoners but an intrastate transfer might not be so resolved.
3. When a judge wishes to attempt to expand a holding, e.g., the judge points out that the instant case by its reasoning and holding effectively overrules a precedent.
4. When a judge wishes to expand the majority's reasoning on a particular point -- to drive home a point to the bar, the trial courts, or to address a dissenter's argument in a more thorough manner than would fit the court's opinion.

<u>Concurring Opinions are not justified</u>

1. When a judge merely declares that he concurs. This is little more illuminating than two examples collated for an appellate judges' seminar 10 years ago by Judge Walter Gewin

(63 F.R.D. 453):

> "I concur in the result and so much of the opinion as supports the result." Wirtz v. Fowler, 372 F.2d 315, 335 (5th Cir. 1966, Jones, dissenting). Id. at 595.

The Irish Chief Justice who, after hearing his two colleagues give their views, delivered this gem:

> "I agree with the decision of my brother on the right for the reasons stated by my brother on the left." Quoted from Fuld, The Voices of Dissent, 62 Columbia L. Rev. 923 (1962). Id. at 599.

2. When a judge restates the facts and the essential reasoning in the majority opinion. In such a case any valid additions should be incorporated into the court's opinion. If there are none, there is no sufficient excuse ab initio for a separate opinion.

Dissenting Opinions are justified

1. When a judge feels, to quote Chief Justice Traynor, "that the majority has so misapplied settled law or so erroneously devised a new rule as to foster a malignant growth of the law." Leflar, supra at 204.

2. When a judge feels strongly that his views are significant enough to

-- alert the remaining judges on his court to a likely en banc request;

-- inform Justices of the Supreme Court in reviewing a probable petition for certiorari;

-- communicate on a close and significant issue with the trial bench, the parties, the bar, law schools and commentators, and the appropriate legislature.

Sometimes, in a very close case, the majority welcomes the filing of an able dissent. Sometimes, if the point of disagreement is a very narrow one, it can be reflected in a footnote in the court's opinion. And sometimes it happens that the writer of the opinion, having mastered the record and the authorities, but unable to persuade his colleagues, will write a majority opinion as they dictate but annex his own dissent.

3. When a judge wishes to keep his brethren honest, and, to quote Karl Llewellyn ("Common Law Tradition: Deciding Appeals", Little, Brown & Co.: Boston,(1960), p. 26), "rides herd on the majority".

During the past two calendar years I count 30 cases decided by our court in which there was either a dissent or a concurrence. This translates into a rate of about six or seven per cent.

Here, in the words of the writer, is the justification for his separate concurrence in a given case:

-- "I feel more comfortable with a different route."

-- "I concur in the result and much of the analysis of the court's opinion but disagree with the definition of 'home'."

-- "I confess that I do not understand the regulatory network applying to student loans enough to agree or disagree with the court." This was my edifying contribution. I labelled it a "dubitante".

-- "I find troubling one point that is unnecessary to decide."

-- "While I, of course, fully concur in the court's opinion as I have drafted it above, insofar as it goes, I feel that more should be said than my colleagues are prepared to say."

-- "I join fully . . . but wish to comment separately on the dissent."

-- "While I accept the result I cannot agree with the opinion in this case, which seems to rest upon a necessary function test which I view as no test at all."

-- "I join the court's opinion and concur only lest the 'assumption' about consideration be taken as allowing the district court's decision to stand as precedent on this point."

-- "For right or wrong, this circuit now seems firmly set on a particular path. Under the principle of stare decisis it seems appropriate for me to accept that interpretation even though I disagree with it. I therefore concur."

The nature of some of our dissenting opinions can be gleaned from the following summaries:

-- The majority dismissed a critical precedent with a conclusory reference in a footnote. The dissenter believes there was not a reasonable basis for seizure.

-- The majority draws too fine a distinction.

-- The dissenter does not want to expand the scope of a prior holding.

-- The dissenter does not believe punitive damages should be assessed against a public body. (He was right, as the Supreme Court later made clear.)

-- The dissenter believed the Establishment Clause was violated. This became the position of the court in an en banc consideration. Decision is now pending in the Supreme Court.

-- The dissenter believes the conduct of the government was so bad that the indictment should be dismissed under the exercise of the court's supervisory power. (Although this position did not carry the day, prosecutors will be well advised to heed the warning.)

-- The dissenter disagrees with the court's interpretation of the statutory scheme.

-- Finally, this plaintive quote:

> "With respect, I wonder whether sympathy for petitioner's physical misfortune may have led the court away from the principle at issue."