
COGITATIONS ON APPELLATE DECISION-MAKING

by The Honorable Hugh R. Jones *

The thirty-fifth Benjamin N. Cardozo Lecture was delivered before the Association of the Bar of the City of New York on November 28, 1979.

In responding to the invitation to deliver this lecture, deliberation suggested that I might perhaps best discharge my very considerable responsibility by addressing subject matter to which I have had peculiar access rather than by exploring a topic on which the sources were equally available to others. ^[1] Applying that guideline I have chosen to organize thoughts and views with respect to appellate decision-making which I have come to hold in consequence of my nearly seven years of service on the Court of Appeals. I even presume to suggest that my perspectives and insights may be different from those of members of the Court with prior judicial service because I had been an active practicing attorney until I came to this bench in 1973.

Given this focus, I must insist that what I say be heard and accepted only as an expression of my individual views. I shall speak forthrightly. Nonetheless I fully recognize that others, as well or better qualified than I, may and probably do hold divergent or opposing views which in the end may prove to be more perceptive and wise than mine. Least of all do I wish to be misunderstood as aiming criticism at any individual or court. Preoccupation to avoid all risk of such interpretation of my remarks, however, could substantially inhibit my expression and impair the usefulness of what I say. My objective is to be a responsible contributor to informed consideration of appellate decision-making, not to be combative and certainly never to be offensive. In this spirit I beg your attention.

Preliminarily I confirm to you that there is a significant difference between discharging the responsibilities of a practicing attorney and those of a judge—a greater difference than I had foreseen. ^[2] We both deal in the same raw materials—human problems and legal principles designed for their solution. But the lawyer is engaged in responsible partisan representation. His client's, and thus his own, destination is preset. The challenge is to select and then to follow through with good and likely means, if not the best, to achieve that goal. I can testify to the doubts, the anxieties and the inner stress to which the lawyer is not infrequently subjected.

By contrast, in the disposition of matters by the judge there is no predetermined destination. He approaches a case with no prior commitment to its outcome. As a judge I am led to the conclusion that I eventually reach by consideration and weighing of the merits; it is not my responsibility to produce a particular result to suit the purposes of a client who has engaged me. My concern is only for the best result available, consistent with a proper view of the facts, the prescriptions of statute, the impact of precedential authority, the persuasion of reason and, where applicable, the perception of policy considerations, all subjects, of course, to recognition of constitutional mandate.

I do not suggest that this poses an easier task than that of the practicing lawyer; the contrary is more often true. The demand for knowledge, wisdom and human compassion is greater, and the responsibility of decision-making adds a dimension of pressure unknown to the practicing attorney.

I do say, however, that we judges are exposed to less internal strife, combustion and wear and tear. This may explain in part why, having served until required by our constitution to retire at age 70, there are now living and

thriving three former Chief Judges and seven retired Associate Judges of our Court! There is no gain or loss in reputation or status to me or to the others within our Court either from persistent holding to the same position or from changing views during the course of preparation, argument and deliberation on an appeal. Flip-flopping in response to whim or casuistry would, of course, be revealing, but change based on additional insight, reason, further consideration, care and ripened judgment is always acceptable, even praiseworthy.

As a member of a collegial state court of last resort, I am aware that my responsibility to the Court as an institution commands the subordination of my personal interests. The coordinates by which I make choices in individual instances as to how I shall participate in the disposition of a matter before the Court are those of the best interests of the Court and of the public perception of the institution as I understand them. I am not speaking of the substantive decision on the merits of an appeal or motion; I am addressing what my role should be in the decision-making process, both internally as the decision is being reached and externally when it is announced. In the latter respect in particular I would seek, within human bounds, the submergence of individual image and status to the good of the Court

While this is an articulable goal, progress to it will inescapably encounter some understandable individual counter-considerations. I do not say that they should be obliterated; I do say they should consciously be kept in responsible check. The frame of reference for the consideration and resolution of questions as to the extent and manner of personal participation in the announcement of the Court's decision must be an awareness of the likely consequences to the institution.

It is evident to me that injury to the Court works damage to each of its members. The status of the individual cannot be advanced at the expense of the Court or to the detriment of the sound development of the law.

I lay down what I perceive as these general ground rules by way of background and prerequisite to the understanding of my views on the more specific topics I am about to discuss.

Without in any way presuming to describe or analyze the judicial decision-making process (on which so very much has been written), I would only identify three of what I think are significant factors in that process which may not always be fully comprehended.

First, when one bears the responsibility as a member of a court for the actual decision in a case it is different from when his role as a commentator or advocate is only to suggest or urge what the right decision should be or have been. Thus, the writing of an opinion in a case involves dynamics not present in the writing of a treatise or law review article, or certainly in a brief or law office memorandum. All deal, of course, with factual analysis, legal authorities and precedents, policy considerations, sound reasoning and wisdom. The work of scholarly and thoughtful analysis and exposition, however, somehow comes vibrantly alive when people will be, commanded to live by the result which is produced.

Additionally, there is not only the dimension of human involvement and dynamics; each case has an independent life of its own. Account must be taken of its evolution, both prelitigative and after the action or proceeding is commenced. Significance may come from its progress through the courts below before it reaches us. I am not speaking now of procedural steps and postures, but rather of factors, nuances, overtones which give each case its own identity and which may affect the ultimate disposition.

Second, I have become increasingly aware of a special difficulty in making decisions at our level. Ours is a responsibility both of reviewing individual determinations for the correction of error below and of preserving and strengthening the fabric of the law. Because in New York there is assurance in most cases of the availability of intermediate appellate review by a court with broad interest-of-justice jurisdiction, I attach great importance to our responsibility to develop the fabric of the law, more so, perhaps, than to other concern for remedying what may be claimed to be unjust results in individual cases. In the best common-law tradition this responsibility is discharged, of course, through case-by-case evolution and refinement.

When the individual case comes to us, however, there are inescapable considerations of ramification and ripple. And here lies the difficulty. Counsel properly focus on the disposition of the particular case, and quite understandably are only minimally interested in its implications and possible radiations, unless, of course, projection of the holding brings spectres or consequences which bear directly on the desirability of one result rather than another. My experience has been that appellate briefs and arguments on the whole insufficiently set the case in the broader contexts of the legal and jurisprudential mosaic. Because of the volume of our work, ever

increasing, the individual members of the Court have little time to indulge in research and cogitation beyond the close borders of the case at hand. It is here that the multi-varied backgrounds of knowledge and experience of the members of a seven-member court can be most helpful. In attempting to discharge what I believe is my responsibility in looking beyond the particular litigants and the particular litigation, I have been enormously aided by the American Law Institute. I refer to the Several Restatements of the Law, but perhaps even more to the benefits I enjoy as a member to participate in the annual deliberations of the members of the Institute.

In the third place, and I surely claim no originality whatsoever, I have become totally persuaded that if care is taken in objective, rigorous analysis (this is critical and usually determinative) and if there is then painstaking attention to the procedural aspects of the case, the correct substantive conclusion emerges with less difficulty. It serves further to reduce the risk of result-oriented decision-making.

Finally, as to decision-making, I would venture a word or two as to the scope of a decision. I brought with me to judicial duty two competing persuasions. As a student in a seminar at Harvard Law School from which Felix Frankfurter was called to serve on the Supreme Court of the United States, I was imbued with a deep belief in the wisdom of judicial restraint. On the other hand, as a practicing attorney I sought from judicial decisions the announcement of black-letter law on the basis of which I could predictably rely and advise my clients. When, most often, there was no authoritative precedent in point, I wished to be spared the uncertainty and responsibility of extrapolation. A common-law disciple, I wanted to be a code practitioner.

My judicial experience has convinced me beyond recall, as similar experience has persuaded others, that judges lack the competence or clairvoyance to anticipate the implications and ramifications of broad announcements and as well the wisdom to formulate them. The genius of the common law as I first learned it years ago has very much come alive. While I understand, of course, the yearning of the practicing lawyer for comprehensive declaration, and I sympathize with him, he will not find in me a congenial spirit or a useful colleague.

Let me turn now to make an observation or two as to the writing of opinions. This is an area in which individual preference and style properly play a major part. Accordingly comments on this topic would be better made by those who use the opinions. But let me reveal my own perspectives.

As you are aware, in recent years it has been the practice in our Court to assure a writing in every case; we no longer have recourse to the once familiar acronym, "ANOPAC" (Affirmed, No Opinion, All Concur). In general our present practice is as follows. If there is a writing in a court below, in the intermediate appellate court or at *nisi prius*, which adequately articulates the grounds for the correct disposition, we rely on and refer to that opinion, both for affirmance or for reversal. If there is no such writing and the case is judged to have little precedential value (no case has none!) a very brief memorandum is prepared which without elaboration informs counsel and the litigants why we reached the result we did. It is my practice generally to include in such memoranda no citations, either of statute or case law, to spare hard-working Shepardizers excursions into blind alleys. If the decision involves the application of recognized concepts but may be expected significantly to affect others than the parties to the particular litigation, the result may be announced in a *Per Curiam* opinion. This will not ordinarily be of extended length or elaborate exposition but will contain citation to the applicable statute, if any, and to a leading case or two, again with the interests of the researcher in mind.

If, however, the case involves the articulation of new law or a new application of recognized principles, it is usually appropriate that there be a fully developed, individually signed opinion. The pertinent facts will be recited, the problem will be identified and described, there will be a treatment of the relevant authorities and in exposition of the rationale by which the result is reached:

You may have identified personal preferences which I indulge in writing my own opinions. I think it useful, for instance, in the first sentence or paragraph, by way of orientation to the beleaguered reader, to identify the area of the law to be addressed and to summarize the holding. I think it appropriate to recite only those facts which I judge to be material to an understanding of the problems presented and an appreciation of the resolution reached,

save that occasionally there may be included as well a selective scattering of animating but otherwise immaterial data to bring the case to life. In the exposition of the legal reasoning I strive to use citations precisely but sparsely. I leave it to law reviews and text writers to collect the authorities; I do not view the function of an opinion as an aid to research. I would be less than honest if I did not confess that this practice was first dictated by necessary concessions to limitations of time, energy and resources. I am now persuaded of its inherent worth and accordingly seldom have recourse to string citation.

"Jones — Cogitations on Appellate Decision-Making"

I would say a word about dissenting. I am not referring to the form or content of a dissenting opinion. As has often been observed, the role of a dissent permits, indeed invites, a freedom of individual expression and the unveiling of views strongly held in a manner which is denied the author of a majority writing. I speak now rather of what I have perhaps found the most troublesome aspects of the performance of my judicial duties—deciding when to dissent, or, more precisely, deciding when not to dissent, despite my disagreement with the position reached by the majority!

At the outset let me distinguish sharply between the internally circulated writing expressing disagreement with the views of another member or members of the Court and the external, published dissenting opinion. The two serve different, although sometimes overlapping functions. Careful, powerful writings advancing differing analysis and reasoning, or invoking new or contrary authorities, or both, circulated among the members of the Court while the case is under consideration can have significant impact on the eventual disposition.^[3] Any member of a collegial appellate court can recall instances in which foment has been stirred up and the outcome has been changed or substantially affected by such writings. The function, and thus the appropriateness of the internal dissent, depends on the nature and dynamics of the court's own deliberative procedures. In our Court at least an internally circulated dissent serves the purposes sometimes ascribed to the published dissent, e.g., of giving assurance that the case has been fully considered and is not the product of a single member of the court,^[4] or of improving the craftsmanship of the majority opinion.^[5]

With respect to external dissents, three practical factors deserve identification in consideration of what I think is the responsibility not to dissent from the published opinion of the Court. First, as Chief Judge Breitel occasionally observed, a dissenting writing exposes beyond peradventure that its author has been unable to persuade the members of the majority of the correctness or wisdom of his articulated analysis and rationale. Second, a dissent may often serve to harden or even to extend the position of the majority, to drive it in beyond any probable future redemption.

Third, but looking in the opposite direction, in some circumstances one may be denied the opportunity not to dissent; he may be obliged to expose his disagreement with the majority. Thus, while it is often the part of responsibility silently to acquiesce in the majority position and to refrain from dissenting for some of the reasons I shall presently discuss, that alternative is lost if another member of the court concludes that there must be a dissenting opinion. Then intellectual honesty demands that one choose between two writings; silence would permit the inference not only that one may be willing to go along with the majority but in addition that he rejects the views expressed in the dissent. Any advantage perceived to attach to no dissent is no longer available, and any disadvantage feared to attend the publication of a dissent is inescapable. In such a circumstance acceptance of his proper share of responsibility for court writings may dictate that the disagreeing judge, who would otherwise be disposed to hold his silence, write the dissenting opinion.

Turning then to substantive considerations (and absent the publication of a dissenting opinion at the instance of another member of the court), it is my view that the decision as to when to dissent should be made in the perspective of what is seen to be in the best interests of the court and the law. Here, as I have suggested above, the personal interests of the individual judge should yield to the interests of the court. "Judicial custom once permitted each judge on a multi-judge court to deliver his individual opinion in each case. Then Chief Justice Marshall undertook to achieve a sort of collegial unity by having a single opinion rendered as that of his entire

court. Marshall's approach fostered an appearance of certainty in the law."^[6] It is increasingly desirable, if it may properly be done, for the opinions of a court of last resort to be perceived as the expression of an institutional position rather than as reflecting a collection of individual points of view.

When the Canons of Judicial Ethics were adopted by American Bar Association in 1924, Canon 19, entitled "Judicial Opinions," provided in part:

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusions and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle dissenting opinions should be discouraged in courts of last resort.

This provision was not carried forward into the Code of Judicial Conduct in 1972. The subject of judicial opinions is nowhere addressed in the present Code. This may reflect a conclusion that the subject, although a matter for serious judicial deliberation, is not one to be resolved by reference to ethical considerations.

Be that as it may, the determination of whether to dissent in the particular case should be made with principal awareness of its impact on the court. Again, considerations of personal interest should be identified and consciously subordinated.

At the extremes, the issue is relatively clear.^[7] Perhaps the kind of case in which it appears nearly impossible to justify a published dissent is that involving a determination with respect to the procedures or rules of practice of the appellate court on which the disagreeing judge sits. When the majority announces such a procedural decision, that really should be the end of it. Certainty and predictability are highly desirable for the attorneys practicing before the court as well as for lower courts. To the extent that published dissents sow seeds of uncertainty this objective is frustrated. Beyond that, inasmuch as it is the court itself which may revise its own rules, internally expressed supplications, fortified by wisdom born of experience, are at least as effective, and entail none of the disadvantages of public disclosure. That I see so unerringly where truth lies in this category may be attributed to at least one egregious transgression of the rule on my own part. Whatever may be other attributes of sin, it often has a way of clarifying the sinner's perception of virtue! Mea culpa!^[8]

I would normally not think it responsible, either, to publish a difference of opinion over what is essentially the application of undisputed legal principles to a factual situation which the members of the Court may view differently. Similarly I would withhold dissent over the interpretation or construction of *ad hoc* writings-an individually drafted will, a particular contract. Decisions in such cases have little precedential value and a published dissent would serve little useful purpose. I am likewise hesitant to dissent in matters of statutory construction or interpretation, here because the question lies in the legislative province and, if the majority is indeed in error as to what was intended, procedures for correction by way of legislative amendment are available.

At the other extreme, if the case before our court presents questions of federal constitutional dimension which have a chance of reaching the Supreme Court of the United States a dissent then may serve a useful purpose as revealing more fully the analysis differing views in our Court-a more particularized ventilation of the deliberations which preceded our disposition and on which it was predicated.

There are instances, too, although perhaps not many in number, in which responsibility to one's own sense of integrity compels that customary guidelines be ignored and that a dissent be filed-on matters of high principle or instances of deep, irresistible visceral compulsion, where the blood rushes to the back of one's neck, as Holmes phrased it. But here, too, care must be taken not to go too far and in general to indulge sparingly-for to do

otherwise risks dissipation of effectiveness. It can be therapeutic, and instructive, as I have found, to write a dissent-incisive, cutting, devastating, without restraint-and then to destroy it before publication.

In those cases which do not fall within the reach of the rubrics that apply at either end of the spectrum, my disposition is to refrain from publishing a dissent. Others will differ with me.

At least two writers have suggested that cases involving articulated reliance on the doctrine of *stare decisis* raise special considerations for the public dissenter.^[9] I am not certain that I agree. The nature of the substantive issues under consideration will probably be more determinative, although the force of *stare decisis* may add a special component to be weighed. Analytically, I suppose, there might be a differentiation between the dissenter whose writing deplores the majority's departure from what he perceives as controlling precedent, on the one hand, and, on the other, the dissenter who writes to urge that the bonds of precedent be burst asunder. It would seem that a dissent that seeks to point to the majority's disregard for *stare decisis* serves chiefly as a safety valve to avoid the writer's own explosion, although the vehemence of his argument may also be expressed internally. The point of law will in fact be changed in consequence of the majority position, and the force of the doctrine dissipated in the particular instance. Moreover, respect for *stare decisis* will oblige the dissenter to move over to the majority view on the next occasion the issue is presented. His own fidelity will lead him to the position exemplified by Mr. Justice Holmes. Having authored a dissent on behalf of four members of the Court in one case, two years later writing for a unanimous court in the second case, he opened his opinion with the statement that the issue had been settled in the first case.^[10]

The dissenter who urges departure from precedent is in a stronger position; his is truly an appeal to a revised and wiser view of the law. His dissent may further serve incidentally to underscore the institutional sense of stability and continuity being demonstrated by the majority.

Chief Justice Hughes extended a majestic invitation. "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."^[11] Chief Judge Traynor similarly has observed that a well-reasoned dissent is "aimed at winning the day in the future."^[12] But as Chief Judge Fuld, one whose powerful dissents have later carried the day,^[13] has observed, dissents do not usually do well as leading to changing the law. Less than one-tenth of Mr. Justice Holmes' dissents eventually attained recognition in subsequently declared law.^[14]

A fair estimate of his own jurisprudential prescience or of his individual powers of persuasion seldom encourages the busy appellate judge to jump into the fray in the expectation of planting the seed for a later departure from the majority position. This natural reticence is fed too, by a realistic awareness that if the position the dissenter would espouse is so very sound or wise, this fact will be recognized in due course, whatever the would-be dissenter may choose to do or to refrain from doing. It does not diminish the standing of the great dissents of judicial history to suggest that it has been the inherent merit of the position expressed by the dissenter which eventually carried the day; the significant contribution of the dissenter was effectively to invite attention to that merit.

The proposition has been advanced that an absence of dissents from a court of last resort risks impairment of public confidence in the character and independence of the judges. This might follow if there were never any dissenting opinions. Even if that were a consummation devoutly to be wished, however, no pragmatist would ever anticipate its realization. I am hesitant, however, to accept the suggestion that dissents may serve "to give assurance that a case has received careful attention."^[15] An appearance, yes; in assurance, more questionable. Certainly the reverse cannot be accepted-that from their absence an inference is available that a case was not carefully considered! One of the basic functions of a majority opinion is to demonstrate that the cases has been

thoroughly considered, to identify contentions of substance which have been rejected and to expose the reasoning which has led to the conclusion reached. In our Court we recognize the limited right of one who will be in dissent constructively to criticize the majority writing before publication. Several instances come to my mind (which I may not fittingly identify here) in which the Court's opinion has been clarified and strengthened in consequence of the participation and suggestion of a judge who has nonetheless remained in dissent.

It is also sometimes said that the failure to file a dissent may convey a false impression of unanimity.^[16] If this be a considerable risk, my rejoinder would be that the word should be widely spread that because a judge does not dissent it should not necessarily be understood that the majority opinion expresses his preferred view of the case. By failing to dissent he does represent that the opinion expresses the decision of his court, that he accepts that decision and, if he is in disagreement, that he has concluded that no sufficiently useful purpose would be served by a public disclosure of his disagreement. If this practice is not understood, it surely should be, for in my experience I can recall truly numerous instances in which a vigorous internal dissenter has publicly held his peace.

It has also been suggested that the publication of dissents facilitates prophesy as to how the same court will decide a subsequent case.^[17] That dissents invite speculation and even nourish what may prove to be false hopes in the hearts of particularly situated litigants cannot be denied. I am not persuaded, however, that this predictive possibility is either sufficiently reliable or worthy, standing alone, to justify publishing more than a very occasional dissent in a particular situation.

The wide publication of dissenting opinions does serve one worthwhile purpose. The readers of such opinions will thereby be afforded a dependable basis on which to evaluate the competence and caliber of the sitting judge. This will be particularly useful if at the end of his present term the question arises as to the wisdom of his reappointment or reelection.^[18] For this purpose dissenting opinions will likely be more revealing than majority opinions written by the same judge, for in composing the latter the author will often properly have made accommodations to the views of other members of the majority.

Similarly the publication of dissenting and concurring opinions will afford practitioners and the public generally trustworthy source materials on which to appraise the quality and stature of the entire court—for better or for worse as the membership of the court may warrant.

One writer has identified a collateral advantage which may attend the publication of dissenting opinions—revealed in the undisguised enthusiasm with which they are greeted by law school professors.^[19] They are said to provide a special grist for law school discussion and instruction. Even assuming this to be true, the argument is less than imperative.

Although categorical rules as to when to dissent cannot and should not be prescribed, when the decision to write a dissent has been made, one standard is immutable. A dissent may challenge the reasoning of other members of the court;^[20] no opinion, however, can be permitted to assault the person or integrity of another judge. *Ad rem* or *ad causam*, yes; *ad hominem*, never.

Let me make it abundantly clear—by what I have said I do not suggest that one who differs with the majority does not have the right to file a dissent.^[21] Quite the contrary, this is a very nearly absolute right which inheres in the office and derives from the election or appointment of the individual as a member of the court.^[22] I have addressed, rather, the criteria which I have come to think pertinent to deciding when the right of dissent is responsibly to be exercised. The ever present risk is that, even if a dissent is not intended to advance personal visibility rather than public good, it may be so perceived, in which event there is risk of injury to the court. Nothing in my own experience would lead me to subscribe to the observation made by Mr. Justice Douglas that

"the right to dissent is the only thing that makes life tolerable for a judge of an appellate court."^[23]

A not dissimilar quandary is posed as to when to file a concurring opinion. Here, too, judicial wisdom and responsibility place the focus on the best interests of the court and the law. There is, however, an alternative to a separate writing not available to the dissenter: the would-be concurree is often able to persuade the author of the court's opinion to incorporate what was to have been the substance of the concurrence. Even if the author does not personally subscribe to the addition, felicitous diction and phrasing can often accommodate both points of view with fairness and without compromise of either and without derangement of the majority writing. In confronting the possible desirability of a separate concurring opinion, sensitive care must be taken to assure that the desire to file such a writing does not spring from a pride of analysis or expression, however warranted such pride may be. Here there is great opportunity for exercise of the privilege of diplomatic suggestion, accompanied by an unhesitating recognition of the prerogatives which must accompany assignment of responsibility for writing the court's opinion.

If, however, the theory of proposed concurrence is inconsistent or incongruent with that of the majority writing, accommodation in drafting then becomes impossible. In that situation the same criteria and considerations as apply to dissents should be invoked.

So much for published dissents and concurrences. As must be evident, my own relish is for vigorous participation in the deliberations of the court while the case is still under consideration.

Nonetheless, having said all these things, I must confess that I am heartened by the anticipation that whatever discouragement I or others may offer to the publication of dissenting and concurring opinions will have little effect. My head tells me that the standards I have described, if not correct in all details, at least point sound direction. My heart reminds me that a court remains essentially a human institution. The vitality of its dynamic, even vibrant existence should not, and happily never will be, stultified by the mechanical application of any rational justification system. I would view with real dismay and distress the emergence of a totally disciplined court from which there poured forth nothing but unanimous opinions. I am persuaded, however, that this is a risk which merits no anxiety!

Because of the very healthy respect I have for the distribution of powers in our governmental polity I am led to insert an observation or two concerning comment in judicial opinions on the desirability of statutory amendment. Because the courts are often in a peculiar position to measure the effect of legislative enactments in operation, albeit in individual instances, they have some responsibility to identify areas in which difficulties or inadequacies are of such substance as to warrant, or perhaps even cry out for, statutory amendment. When such a situation is detected our Court has often recognized that there immediately is imposed on its members an obligation to resist the temptation not only to identify the problem but as well to intimate, suggest or recommend the substantive solution. This is precisely what the court should refrain from doing, whatever may be the competence, wisdom or conviction of its members.

To this general rule there is one obvious exception. If the particular statutory trouble involves access to the judicial process or addresses that process itself, the conduct of litigation or the conduct of court business, then the courts have a responsibility to speak out. Whether, however, a judicial opinion is the proper vehicle even for such communication is a matter to be determined case by case, having respect for the function of the judicial opinion in an individual case and judging the effectiveness of this means of expression. In any event the court is not confronted with the bar to addressing the merits of possible amendments which must be observed in other areas of legislative responsibility.

Permit me to conclude with a few personal observations. Happily, I have been conscious of relatively little difficulty or discomfort in making the transition from advocate to arbiter.^[24] I did encounter real difficulty in teaming the work of the Court of Appeals, but time and application, and particularly the guidance, assistance and

patience of the other members of the Court and staff have been helpful. It may not surprise you when I report that I have never worked harder or been so deeply satisfied and excited in what I am doing. I have teamed the great advantage of collegial deliberation and the stimulation of sharing in it. I shall continue to work diligently, with humility, enthusiasm and gratitude.

Footnotes

Footnote 1: In any event I would be foreclosed from discussing any legal question which might come before our Court.

Footnote 2: On the transition from lawyer to judge, I have found most interesting the recent article by the Honorable Robert Satter, *The Quality of a Judge's Experience* (65 A.B.A. J. 325 (June 1979)). I detect, however, a note of melancholy to which I would not subscribe. From another perspective, see Alport, Athens and Ziller, *Becoming a Judge: the Transition from Advocate to Arbiter*, *Judicature* (Vol 62, No. 7. P 325).

Footnote 3: Stephens, *The Functions of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U Fla. L. Rev. 394, 401-402.

Footnote 4: Fuld, *The Voices of Dissent*, 62 Col. L. Rev. R 923, 927.

Footnote 5: Moorhead, *Concurring and Dissenting Opinions*, 38 Amer Bar Assn J 281, 823; Stephens, *op. cit.* 5 U. Fla. L. Rev. 394, 401-404.

Footnote 6: Leflar, *Appellate Judicial Opinions* 203 (1974).

Footnote 7: It must be recognized that I write as a judge of a State Court of last resort. Quite different criteria may be applicable in intermediate appellate courts, where, for instance, a dissenting opinion may create a right to further appeal (*cf.* CPLR 5601 [a] [i]). As to the pertinent considerations in the Supreme Court, see Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A. J. 361,

Footnote 8: I seek an even broader tolerance from my listeners. I ask for understanding when scrutiny of my own writings over the past seven years reveals discrepancies and deviations from or violations of the standards that I now proffer. My views as to the role of one member of a collegial appellate court are the produce of an evolutionary process; experience and exposure are persuasive instructors. Indeed, certain principles have only now emerged in greater clarity as I have prepared this very paper.

Footnote 9: Moorhead, *op. cit.*, A.B.A. J. 821, 884; Stephens, *op. cit.*, 5 U OF Fla L. Rev. 394, 408-409.

Footnote 10: *Mason City & Fort Dodge R.R. v Boynton*, 204 U.S. 570, 578, following *Madisonville Traction Co. v St. Bernard Mining Co.*, 196 U.S. 239, 257.

Footnote 11: Hughes, *The Supreme Court of the United States* 68 (1928).

Footnote 12: Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 218.

Footnote 13: See, e.g., *Badigian v Badigian* (9 N.Y.2d 472, 474) which became the majority view in *Gelbman v Gelbman*, 23 NY2d 434); *Pleasant Valley Packing Co. v Talarsco* (5 N.Y.2d 40, 49) which was followed by the majority in *Columbia Broadcasting System, Inc. v McDonough* (6 N.Y.2d 962); *Matter of International Assn. of Machinists (Cutter-Hammer, Inc.)* (297 N.Y. 519, 520) which was given legislative validation by enactment of Civil Practice Act, §1448-a (L 1952, ch 346, § 1).

Footnote 14: Fuld, *op. cit.*, 62 Col. L. Rev. 923, 928-929. Mr Justice Holmes himself observed that "... it is useless and undesirable, as a rule, to express dissent" (*Northern Securities Co. v United States*, 193 U.S. 197. 400 [diss opn]). But see Stephens, *op. cit.*, 5 U. Fla. L. Rev. 394, 405-408, 409-410.

Footnote 15: Moorhead, *op. cit.*, 38 A.B.A. J. 821, 822; Stephens, *op. cit.*, 5 U. FLA. L. Rev. 394, 395-396.

Footnote 16: Stephens, *op. cit.*, 5 U. OF FLA. L. REV. 394, 397.

Footnote 17: Moorhead, *op. cit.*, 38 A.B.A. J. 821, 823.

Footnote 18: Moorhead, *op. cit.*, 38 A.B.A. J. 821, 822. As a staunch adherent of the independence of the judiciary I find appalling, of course, the suggestion of Thomas Jefferson (advanced in implementation of his view that the power of the court should be curtailed and that the Congress should be the final arbiter of the meaning of the Constitution) that each member of the Supreme Court of the United States should be required to announce his view in a separate opinion in each case; that the Congress should formally denounce such judicial views as it disagreed with; and that, if the justices failed to adopt the conclusion reached by the Congress, impeachment should follow. Warren, *The Supreme Court in United States History*, vol. 1, p. 655 (1935).

Footnote 19: Evans, *The Dissenting Opinion-Its Use and Abuse*, 3 Mo. L. Rev. This interesting article, written by the Honorable Evan A. Evans of the United States Circuit Court of Appeals, Seventh Circuit, in 1928, contains a good collection of statements disfavoring the publication of dissenting opinions and reports that an informal survey among lawyers then disclosed a near unanimity of opposition to them.

Footnote 20: The appeal of a dissent "can properly be only to scholarship, history and reason, and if the business of judging is an intellectual process, as we are entitled to believe that it is, it must be capable of withstanding and surviving these critical tests Stone, *op. cit.*, 26 J. Am. Jud. Soc'y 78.

Footnote 21: I do not, however, subscribe to what strikes me as an overdrawn formulation-"Freedom of expression for the appellate court is closely related to the constitutional guarantee of freedom of speech." Stephens *op. cit.*, 5 U. Fla. L. Rev. 394, 400.

Footnote 22: I must add, with all respect, that it is difficult to understand what constructive institutional purpose is served by public expressions of no more than doubt See, e.g., Holmes, J. in *Richardson v Shaw* (209 U.S. 365, 385): "A just deference to the views of my brethren prevents my dissenting from the conclusion reached, although I cannot but feel a lingering doubt." Again, in *Bernheimer v Converse* (206 U.S. 516, 535), Mr. Justice Holmes wrote, "... under the circumstances I shall say no more than that I doubt the result."

Footnote 23: Douglas, *America Challenged* 4 (1960).

Footnote 24: See note 2, *supra*.
