The Judging Business: Does the Court of Appeals Follow Precedent?

by Katherine White

This regular Insight *department examines policymaking and the decision-making process in the judicial branch of state government. In this installment,* Insight *reports that the state Supreme Court is insisting that panels on the state Court of Appeals be consistent—and stop trying to overrule what previous panels have held.*

If the North Carolina Supreme Court gets its way—and so far it hasn't—the North Carolina Court of Appeals is going to have to change its ways. It's going to have to make sure that its three-judge panels don't overturn one another and that it follows the precedents set down by earlier panels.

If that sounds like basic civics, it is. But the fact is that the Court of Appeals has been told on more than one occasion in recent years that it will have to mend its ways. What's the Court of Appeals to do? Its 12 judges sit in panels of three to decide cases appealed from the state's trial courts and directly from quasi-judicial government agencies, such as the N.C. Utilities Commission or the N.C. Department of Insurance. Collectively, the Court of Appeals judges write as many as 1,500 opinions a year, ranging from decisions on rapes to robberies, divorces to contract claims, zoning to workers compensation, and banking to welfare.[1] That's as many as five times the number of decisions the seven-member Supreme Court must make, but the Appeals Court has five more judges to do it. To handle its workload, the Court of Appeals hears cases in panels of three judges—in effect in four different Courts of Appeals—rather than *en banc* like the Supremes. The Supreme Court—which never sits in panels—reviews the work of the Court of Appeals and is the final arbiter of what the law is in North Carolina. It decides up to 700 petitions for review each year, and hands down from 200 to 300 decisions annually.

At times, the Court of Appeals' opinions have reached different results—findings in one case that directly contradict or ignore findings in a similar case. Sometimes it happens on purpose, some appeals judges say privately, when the Court of Appeals wants the Supreme Court to referee an issue it can't decide. And sometimes it happens because one panel of judges is simply unaware of what another panel has written on the same point of law. And now the N.C. Supreme Court is telling the Court of Appeals judges that they have to keep up with what their colleagues write and follow those opinions—even though they may disagree with them.

The Supreme Court's latest directive came in May 1989 in what was an eyebrow-raising aside—for judicial writing, anyway—in an important environmental decision having to do with sedimentation control laws.[2] The Supreme Court in that case reversed a decision by the Court of Appeals which had made front-page news across the state and had plunged the state bureaucracy into turmoil.[3] The Court of Appeals decision, written by Judge K. Edward Greene, concluded that state government lacked the authority under

Katherine White is a Raleigh lawyer with the firm of Everett, Hancock and Stevens. She is a frequent contributor to North Carolina Insight.

the N.C. Constitution to levy fines in administrative cases. To reach that result, Judge Greene did not follow an earlier Court of Appeals decision.[4] Greene's decision—had it been upheld—would have meant an end to penalties for violations of air and water pollution regulations and for others who violated the state's administrative rules. It would have been, in the words of one state official, "a goat roping of cosmic proportions. We would have had to rewrite several hundred laws and God knows how many cases would have been thrown back in our faces."[5]

But the Supreme Court, in a unanimous decision written by Associate Justice Louis B. Meyer, concluded that Judge Greene had erred. The General Assembly could, too, give state agencies the authority to exercise discretion in determining civil penalties, the Supreme Court held. The Supreme Court further noted that Judge Greene had ruled contrary to an earlier decision by another Court of Appeals panel—something the Supreme Court said that Greene's panel cannot do. Wrote Meyer, "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."[6]

Anytime the Supreme Court gives *public* direction to the Court of Appeals, it means that the Supreme Court cannot conjure up a more subtle way to convey a strong message. Associate Justice Burley B. Mitchell Jr. says that the less-than-gentle prod by the Supreme Court to the Court of Appeals was necessary because some Court of Appeals judges "have just ignored each other" in recent years. In other cases, they have overstepped their bounds, as the late Justice Earl Vaughn wrote in an unusually terse three-paragraph order in 1985 in response to a Court of Appeals decision striking down the state's alienation of affection laws. Vaughn wrote that "the panel of Judges of the Court of Appeals to which this case was assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court."[7]

For most judges, the Supreme Court's edict in the sedimentation case was neither a rhetorical revelation nor a judicial bolt from the blue—but seeing it in print was still a jolt even though judges know they're supposed to follow precedent. "It was just hard to find in black and white until Justice Meyer wrote it down," says Appeals Judge Sidney S. Eagles Jr. The Court of Appeals judges are somewhat philosophical about the Supreme Court's get-tough language. As one judge blithely put it, "They're not Supreme because they're right; it's just that they're right because they are Supreme."

Failure to follow precedent is *not* considered a big problem for the Court of Appeals, but it happens just often enough for the Supreme Court to have to dredge the subject up again. But most judges interviewed for this article say that the Court of Appeals' heavy workload makes it difficult to know what other judges are writing. "Most of us try our dead-level best to follow others' opinions," says Judge S. Gerald Arnold, and inconsistent opinions are rare. Still, he concedes, "It happens more often than we like .... This particular situation is becoming more of a problem. We have such a turnover of judges that we have no long collective history .... They [the judges] have different philosophies in terms of how to approach cases."[8]

In addition to the turnover of judges, the increase in the size of the court from nine to 12 judges in 1977 is blamed for the difficulty of judges to keep abreast of all the decisions doled out by the Appeals Court. "At one time I thought I basically knew what was going on with the other judges," says Arnold. "Now, I'd say I don't."

Adds Judge Robert F. Orr, "If you consider that when things are really rolling, that there is a lot of pressure to get the opinions out, it's certainly easy to miss a case."

Several Supreme Court justices who have had earlier experience on the Court of Appeals say that conflicting opinions by the court panels are bound to occur. "Some are inadvertent," says Mitchell. "There are some where they [the judges] just have a conflict." Mitchell, a member of the Court of Appeals from 1977-79, says such conflicting opinions "inevitably are going to happen. When I was on the Court [of Appeals], we used to keep a notebook of recent opinions in the library so the last thing you did was check off that nothing had happened in the last week or so by another panel."

Justices Harry Martin and Willis Whichard, both serving as Associate Judges on the Court of Appeals in 1981, left a clear trail of conflicting opinions. On May 19, 1981, the two judges filed their respective opinions in separate cases on whether the constitutional prohibition of double jeopardy precluded convictions for larceny and possession of stolen goods, both of which

stemmed from the same set of facts. Judge Martin allowed both convictions, saying that they had different elements and therefore were separate crimes.[9] Judge Whichard disallowed the two, saying that the prosecutor had relied on the same evidence to prove both the crimes.[10]

In December of the same year, Judge Whichard reiterated his opinion and Judge Vaughn (then also on the Court of Appeals) dissented in the same case, citing Justice Martin's May 19, 1981 decision. But then, Judge Whichard did too, citing *his* own earlier case—but also Martin's decision, to show the dichotomy of opinion on the issue.[11] "It was clear we were not two ships passing in the night," now-Justice Whichard says. The Supreme Court upheld Judge Martin's conclusion—at least on the double jeopardy point.[12]

Another example is currently pending before the Supreme Court. The issue: does one need a physical injury before he can seek damages for the tort of negligent infliction of emotional distress, a mental injury? According to one panel of the Court of Appeals, which has admitted difficulty with the subject, "mental anguish" *is* a physical injury and is sufficient to allow a claim for negligent infliction of emotional distress.[13] According to another panel, a physical injury is just that—a physical injury and nothing more.[14]

And then there's another set of cases illustrating further confusion over the law. Judge Orr in March 1988 observed that a section of the workers compensation statute is "a morass of confusion and needs to be intelligibly redrafted."[15] Judge Jack Cozort, several months later in another case, declared a subsection of the same part of the statute to be "clear and unambiguous."[16]

Court of Appeals Chief Judge Robert A. Hedrick says the conflicting decision situation is not a problem for the court. Rather, he says, it is a personal problem for the judges who chose to disagree with their colleagues' previous decisions. "We have no problem," Judge Hedrick says. "There was no problem in that case [involving the civil penalty for administrative violations]. The problem was that Judge Greene just refused to follow [precedent]. It was his mistake, his personal mistake, and we've talked about that case, but he wouldn't listen."

Hedrick was equally adamant about the alienation of affection decision—originally written by Court of Appeals Judge Clifton Johnson—that was so abruptly vacated by the Supreme Court. "He ignored precedent. That was his personal mistake," says Hedrick. "We have no trouble keeping that [precedent] straight."

Of course, neither Judge Johnson nor Judge Greene believed they were overruling established precedent of either the Court of Appeals or the Supreme Court. Both men thought they had distinguished material differences in the cases—differences that did not amount to either overruling or ignoring precedent—until the Supreme Court declared the Court of Appeals decisions to be in error. In addition, neither Greene nor Johnson was alone in their thinking. In the civil penalty case, Appeals Judge Eugene Phillips voted with Greene, while Judge Charles Becton dissented in a 2-1 decision; in the alienation of affection case, Appeals Judges Hugh Wells and Becton joined Johnson in a unanimous decision.

Whatever the reason for conflicting opinions from the Court of Appeals, Judge Arnold says the court does want to resolve the matter. Other states have resolved the issue—or avoided it—by requiring all reported opinions to be circulated and approved by all judges on the intermediate appellate court. In Maryland, for example, the Court of Special Appeals, with 13 judges, holds conferences at which all opinions to be published must be approved by a majority of the court. Court of Special Appeals Chief Judge Richard P. Gilbert says the 13 judges "take the facts as given by the judges on the panel, but we don't accept their say in the law." The review is independent and designed to keep the court's decisions consistent—to reflect the entire court's position, not just a majority of a three-judge panel.

When the majority of the court disagrees with the majority of the panel responsible for the opinion, the Maryland appeals court will have additional arguments before the entire court and a new opinion will be written for the entire court. The unpublished opinions are approved by a majority of the three-judge panel which heard the arguments and, as a further check, by the chief judge. And, when Judge Gilbert spots potential problems in proposed unpublished opinions, he sends that draft out to the entire court for its review. "When you let these panels go into business for themselves, you get problems," says Gilbert. "We're not going to have two judges telling the other 11 what to do."

The National Center for State Courts and Public Policy in Williamsburg, Va. does not keep records on how many courts of appeals sit *en banc* to review decisions for consistency, but that practice "is fairly common," says a spokesman, and

New York and Michigan have procedures similar to Maryland's.

Unlike its Maryland counterpart, the North Carolina Court of Appeals does not have an established system for internal review of its opinions. The court was set up with the understanding that "the Supreme Court would reconcile the differences," says Judge Eagles, where the Court of Appeals had difficulty. But the Supreme Court's unwillingness to referee the Court of Appeals panels—as outlined most recently in the sedimentation case—points up the clear need for some sort of system to make sure that the court's panels don't contradict one another in the future. In fact, the Supreme Court has mentioned the problems more than once, going back at least six years to a 1983 bank case in which the Supreme Court held that one panel of the Court of Appeals was bound by another. The high court wrote that "once a panel of the Court of Appeals has decided a question in a given case, that decision becomes the law of the case and governs other panels which may thereafter consider the case."[17]

The Supreme Court said that did not mean the Court of Appeals could not change its mind, but if it wanted to do so, it first had to declare the original panel's decision to be in error—and such a decision should be handed down by the original panel if possible. "Otherwise," lectured the Supreme Court, "a party against whom a decision was made by one panel of the Court of Appeals could simply continue to press a point in that court hoping that some other panel would eventually decide it favorably, as indeed the plaintiff did in this case; and we would not have that 'orderly administration of the law by the courts' ... which litigants have a right to expect."

How can the Court of Appeals ensure that "orderly administration?" Several alternatives suggest themselves:

- The Court could sit *en banc* to review decisions for consistency, which might be the safest way to approach the problem. But several judges who discussed the subject with *Insight* felt the *en banc* approach might only add to the Court's already heavy workload without producing measurable improvements.
- The Court might be expanded from 12 to 15 or more members, reducing the individual caseload somewhat and allowing more time for research for consistency. This alternative may do more to reduce caseload than to prevent conflicting opinions by multiple panels. That is, in providing for more judges, it also creates more opportunities for missing precedent already established by earlier panels. What's more, it might be politically difficult to achieve. The Court of Appeals was last expanded in 1977, and persuading the legislature to increase the number of appeals judges is harder than creating new trial court judgeships.
- The Court might set up a sort of super-panel of four to six judges whose job it would be to keep a sharp judicial eye out for precedent and consistency. This, of course, would add to the workload of the judges involved, but that extra workload could be somewhat alleviated if the Court were also to:
- Add professional staff whose key job it would be to review all panel decisions for consistency and precedent and to work with the super-panel to make sure that all 1,500 Court of Appeals decisions pass the litmus test of consistency before they are published. This latter recommendation, combined with the super-panel, seems to be the most practical alternative and would not add to the entire court's workload. It could be implemented at least on an interim basis with existing staff until the Court could persuade the General Assembly to fund more staff positions.

Panels of the Court of Appeals have disagreed on at least a half-dozen occasions in recent years, and the Supreme Court has told the Court of Appeals at least three times that it would have to follow precedent. The Supreme Court's 1983 language seems clear enough. And no doubt judges of the Court of Appeals understand what the Supreme Court meant. But as the sedimentation case showed, clarity and perspicacity aren't enough. Following precedent, for the Court of Appeals, is harder than it sounds.

FOOTNOTES

[1] For the year ending Dec. 31, 1988, the Court of Appeals handed down 1,155 decisions. For the same period in 1987, the Court decided 1,209; in 1986, 1,210; in 1985, 1,523; in 1984, 1,343. The caseload depends upon the number of appeals filed with the court. By comparison, the Supreme Court decides about 225 cases a year, and reviews about 600-700 petitions, says Supreme Court Clerk Gregory Wallace.

[2] *In The Matter of A Civil Penalty*, 324 N.C. 373, 379 SE 2d 31 (1989).

[3] *In The Matter of A Civil Penalty*, 92 N.C. App. 1, 373 SE 2d 572 (1988).

[4] *N.C. Private Protective Services Bd. v. Gray, Inc.*, 87 N.C. App. 143, 360 SE 2d 135 (1987).

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to find out how much money the state was spending to employ public information officers (PIOs). Their job sometimes was to answer public inquiries, and sometimes, it seemed to Effron, to be apologists and press agents for their bosses. The cost for this cadre of PIOs wasn't available any other way than through poring over computer printouts and tracking down the spokespersons for each of scores of state agencies. The grand total, in an article published June 18, 1989, came to more than $9.2 million for 362 official government PIOs on the payroll.[7]

Effron's story was unusual not so much because of its importance or its originality, but because the paper was willing to devote so much time to a single investigative story when there was plenty of other news cover. That story came at the height of the General Assembly, when, as the late Sen. Ralph Scott (D-Alamance) would have put it, the throat-cutting had just begun. Most other reporters were still in the traces covering the budget process, the debate over teacher pay raises, or the highway funding imbroglio. And here was Effron, blithely ignoring the legislature to do what was, after all, a splashy story guaranteed to make the taxpayers' teeth gnash. Other reporters were envious as well. "Where's Effron and what's he doing, anyway?" wondered a fellow scribe while Effron was off chasing his story.

The Greensboro paper had been planning to do that story for some time, says Effron. "Some [legislative] issues might have gone uncovered," concedes Effron, "but the *News & Record* as much as any newspaper has been making an effort in not having its own reporters duplicate others, especially the wire services. We look at the AP (The Associated Press) as another staffer for us, and we use them."

So, the paper used more copy than normal from the AP and stories from its other Raleigh reporter to cover the legislature while Effron pursued the story on PIOs. Little, if anything, in legislative coverage was sacrificed, Effron says, and the *News & Record* got a big Sunday spread out of it.

"Still, I think there are parts of government that do go uncovered," Effron says. "I don't want to imply that people get away with murder. But there are stories of significance that don't get written—changes in eligibility for government programs, how the state day care commission is handling the question of what to do about when kids get sick, how the state's investment portfolio is being managed."

Martin's former Chief of Staff Phil Kirk—who became president of N.C. Citizens for Business and Industry on December 1—agrees, but only to a point. "I think it's more a quantitative thing. They [readers] get the information [about other state government stories] ultimately, but I don't think they get it nearly so soon or in such quantity when the General Assembly is in session."

While accepting the notion that some stories may go unreported while the legislature commands the attention of most newspapers, Guillory points out that the General Assembly is, after all, an important story—particularly for those newspapers that don't maintain full-time offices in Raleigh. "I don't blame *The Asheville Citizen* or *The Fayetteville Observer* for paying attention to the legislature, because this is a democracy," Guillory says. "The legislature is an expression of democracy, and there ought to be a lot of coverage. But you do need to find some balance, and I'd argue that we have got to do a better job overall. One of the real issues in journalism these days is whether there is a diminishing of government news and political news of all kinds. There's a danger that we will *People* magazine ourselves too much."

Finding that proper balance—between what the public is interested in reading and what they should know about—is a journalistic challenge, and one that reporters sometimes worry about when the legislature seems to go on interminably without making progress. "There are times when I feel like I'm being paid to watch a hamster cage," notes Effron. "Sure, there's a lot of motion on that wheel, and yeah, we can tell the reader that there was movement today on that wheel, but when the end of the session comes, it still seems like we spent a lot of time spinning our wheels when we could have been out covering other stories."

Aggressive coverage of state government begins with a commitment to hard news and not to media consultants and decorators who insist on fluff and soft news. One way to provide that coverage would be to commit more resources—to assign more reporters to state government coverage—and to insist on more interpretive reporting of, say, trends in regulatory issues at the N.C. Utilities Commission, or whether the Milk Commission is an anachronism, or whether the state's administrative rules bureaucracy is a shambles. The state's larger out-of-town newspapers, as well as the state's bigger television stations, could as-

sign more reporters to Raleigh to keep up with the big increases in state government—growth that has been fueled in part by the federal government's ceding of much responsibility to the states in the past eight years as the growth of parts of the federal budget has slowed. And those reporters should be schooled in the arts of aggressive, hard-nosed, and independent reporting—and not just more reporting of the same old spinning wheels.

FOOTNOTES

[1]For more on this subject, see Bill Finger, "The State of the Environment: Do We Need a North Carolina Environmental Index?," *North Carolina Insight*, Vol. 11, No. 1, October 1988, pp. 2-29. The N.C. Center for Public Policy Research proposed the index to chart changes in the quality of the state's environment. Gov. James G. Martin embraced the idea in his 1989 Second Inaugural Address and most newspapers mentioned the index in their next-day coverage, but since then there has been little mention of the subject while the Department of Environment, Health, and Natural Resources has made steady progress in developing the index.

[2]Timothy Crouse, *The Boys On The Bus*, Ballantine Books (New York), 1972, pp. 7-8.

[3]Chapter 692 (HB 399) of the 1989 Session Laws.

[4]"Some road plans in bill questioned," *The News and Observer* of Raleigh, July 30, 1989, p. 1A.

[5]Ferrel Guillory, "Massive road building, but missing questions ," *The News and Observer* of Raleigh, Aug 4, 1989, 1989, p. 10A.

[6]John Drescher, "UNC System's Set-Aside From Grants Questioned," *The Charlotte Observer*, June 25, 1989, p. 1A.

[7]Seth Effron, "Taxes paying for what government voices say," *Greensboro News & Record*, June 18, 1989, p. A-1.

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[5]Don Follmer, spokesman for the N.C. Department of Environment, Health, and Natural Resources (then the Department of Natural Resources and Community Development), as quoted in "Court made the right ruling," the *Winston-Salem Journal*, May 8, 1989, p. 14.

[6]*In The Matter of A Civil Penalty*, 324 N.C. 373 at 384, 379 SE 2d 31 at 37 (1989).

[7]*Cannon v. Miller*, 71 N.C. App. 460, 322 SE 2d 780 (1984); vacated by the N.C. Supreme Court, 313 N.C. 324, 327 SE 2d 888 (1985).

[8] The N.C. Court of Appeals was created by constitutional amendment in 1965 and began with six judges in 1967. The Court was increased to nine judges in 1969 and to its current total of 12 in 1977. Since its creation, 30 judges have been members of the Court, and 18 have been members since the Court was enlarged to 12 in 1977. By contrast, the seven-member N.C. Supreme Court, has also had 18 members since 1977—and seven of the 18 had previously been members of the Court of Appeals. Of the current seven justices on the Supreme Court, four—Associate Justices Burley Mitchell, Willis Whichard, Harry Martin, and John Webb—served on the Court of Appeals prior to joining the high court.

[9]*State v. Andrews*, 52 N.C. App. 26, 277 SE 2d 857 (1981).

[10]*State v. Perry*, 52 N.C. App. 48, 278 SE 2d 273 (1981).

[11]*State v. Garner*, 55 N.C. App. 192, 284 SE 2d 733 (1981).

[12]*State v. Perry*, 305 N.C. 225, 287 SE 2d 872 (1982).

[13]*Johnson v. Ruark Obstetrics*, 89 N.C. App. 154, 365 SE 2d 909 (1988).

[14]*Edwards v. Advo Systems, Inc.*, 97 N.C. App. 154 (1989) 376 SE 2d 765 (1989).

[15]*Williams v. International Paper Co.*, 89 N.C. App. 256, 365 SE 2d 84 (1988).

[16]*Pollard v. Smith*, 90 N.C. App. 585, 365 SE 2d 84 (1988).

[17]*N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 SE 2d 629 (1983).