

ADDRESS FROM CHIEF JUDGE EAGLES

SIDNEY S. EAGLES, JR.*

Good morning, ladies and gentlemen.

I appreciate you remaining here for the final segment of this extraordinary seminar on the “work horse courts”—the state intermediate appellate courts.

First, I would like to say “thank you” to Judge Najam and Chief Judge Sharpnack for inviting me to talk about the experiences of a relatively new court (thirty-three years old)—the North Carolina Court of Appeals—and how we see ourselves serving our various constituencies.

There are many opportunities for service at the state court of appeals. I am pleased and flattered to have been a court of appeals’ judge for over eighteen years. Never in my wildest dreams as a student planning to be a lawyer, or even as a young lawyer, did I imagine that I would ever be a judge of the second highest court of my home state. Most certainly, I never imagined that I would be chief judge of that court. There are days even now when I stop and think, usually not aloud, “What am I doing here?” Those of you who have experience in court administration may have some sympathy for my situation and may be amenable to offering a quiet prayer on my behalf. In any event, there are many opportunities for excellence at the state court of appeals. There are also many quiet problems which afflict us each day as we do our job.

The North Carolina Court of Appeals is, though not in law, the court of last resort for ninety-eight percent of the cases that come up on appeal. Except for capital cases in which the death penalty is actually part of the sentence imposed and general rate cases before the state utilities commission, *all appeals* come to the court of appeals.¹ Because we are relatively infrequently overruled, the North Carolina Court of Appeals is the court of last resort in fact for all other decisions of the district and superior court, the property tax commission, the utilities commission, the industrial commission (which hears claims against the State and workers’ compensation matters), the state personnel commission, and administrative law appeals from the office of administrative hearings.²

The breadth of our assignments is substantial. We hear almost all criminal cases, all family law cases, all juvenile cases, all administrative law cases, and every other litigated matter in state court except those few cases where the North Carolina Supreme Court chooses to consider a case on appeal or discretionary review prior to our determination. Our rules provide that the supreme court may reach down and take a case before or after our determination.³ That has happened on occasion in the past, but it is not a frequent occurrence.

That means that the fifteen judges on my court (we have just been enlarged from twelve) can expect to write upwards of 1600 written opinions each year (not counting special concurrences and dissents)—amounting to over one hundred

* Chief Judge, North Carolina Court of Appeals. B.A., 1961, Wake Forest College; J.D., 1964, Wake Forest College of Law.

1. See *State v. Black*, 172 S.E.2d 217 (N.C. Ct. App. 1970); N.C. R. App. P. 4(d).

2. N.C. GEN. STAT. § 7A-27 (2001).

3. *Id.* § 7A-31.

cases per year, per judge. Our cases come from every level of court, quasi-judicial forum, and administrative agency, sometimes directly to us and sometimes through the superior court—our top trial court. The variety of work is wonderful, the diversity of written and oral advocacy is extraordinary and the creativity of our bar is refreshing. The precedential barriers in our work are fairly confining but manageable. As you might expect, we are bound by the doctrine of *stare decisis* to follow the precedents of our state supreme court in matters of state law. We must *consider* the opinions of the federal courts in matters of federal administrative agency determinations.

Our state supreme court decisions require us to follow prior decisions of panels of our own court on the same issue. This is sometimes quite interesting as we struggle to achieve justice without defying the rule of *stare decisis* and the mandate of *In re Civil Penalty*⁴ in these instances where two panels of our court have reached arguably conflicting results as to the same rule of law. Often, in analyzing competing cases, there may be room to distinguish the cases factually or on the legal issues. Sometimes there is room to point out inconsistencies and injustices as we grudgingly follow the higher court or prior court of appeals' precedent, without endorsing it enthusiastically.

Our fifteen judges all have offices in one building in Raleigh, North Carolina, and usually sit in the capital city. We see one another several times each week. We sit in constantly changing, rotating panels of three judges. The genius of this system is that the panels change every third court week. Although we may only rarely sit with the precise combination of judges that we would choose as our ideal or perfect panel, and we may have at least one person on our panel that we would prefer to swap for a judge who is more compatible and sympathetic to our way of evaluating cases, any of us can get along with anyone, no matter how intractable, for three weeks—some say that a seasoned court of appeals judge can hold her breath for three weeks.

Currently, however, our court is very collegial—all very friendly. The 2000 November elections having passed, we are pretty much at ease and not bitterly divided about the partisan politics of the world. There is, however, the potential for conflict since we are twelve Democrats and three Republicans, ten men and five women, eleven Caucasians and four African Americans, and are graduated from a variety of universities and colleges to which we have strong ties and loyalties. At least during basketball season, the rivalries among Duke University, the University of North Carolina, North Carolina State University, which does not have a law school, and Wake Forest University are pitched and somewhat strident, but almost always in good humor and bound up in the sense of friendly rivalry that good sportsmanship will dictate. Even this far from home, there is acknowledgment of the Atlantic Coast Conference and its legendary intra-conference basketball rivalry.

Because North Carolina Court of Appeals judges are elected on a partisan

4. *In re Civil Penalty*, 379 S.E.2d 30, 36-37 (N.C. 1989) (where panel of 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).

ballot and statewide, we sometimes tend to whine about our situation. We are bound by our state's Code of Judicial Conduct and therefore may take no public position on controversial issues which many come before our court.⁵ That pretty well denies us of any really controversial speaking engagements and deprives us of any real public attention of a favorable sort. Now, let me hasten to say that if I or any other judge of our court does something strange or goofy, you can count on our being on the front page of the state's major newspapers.

There is great professional rivalry and friendly contests between the North Carolina Supreme Court and the North Carolina Court of Appeals. Our softball teams and our tennis tournament encounters have produced t-shirts where the high court referred to itself as "The Magnificent 7" and the court of appeals referred to ourselves, when we numbered only twelve, as "The Dirty Dozen." Off the sporting fields, however, we are, practically speaking, anonymous. The judges of the court of appeals often sardonically refer to ourselves as "The Invisible Court." As long as we produce well-reasoned and timely opinions obedient to the law and constitution, we are taken for granted. Usually then, we are anonymous.

Twenty years ago, a judge of our court was being sworn in by the Chief Judge, the late Earl Vaughn. Chief Judge Vaughn told a story, which he declared was true. He told of the widow lady from the small town of Eden in Rockingham County in rural North Carolina. She had two sons. One of the sons went away to sea and the other became a judge of the court of appeals. They shared a similar fate. Alas, neither one was ever heard from again. That is the plight of North Carolina Court of Appeals judges even today.

Being bound as we are by the principles of *stare decisis*, at the court of appeals we find ourselves often in the situation where fine distinctions are utilized to try to avoid what less impassioned thinkers might perceive as binding precedent. We try to avoid the disingenuous distinguishing of cases. Occasionally, however, even the best of us finds himself or herself in the difficult position of seeking to achieve justice and adherence to the spirit of the law, but having to distinguish a previous case on its facts.

In writing our opinions we find that we are writing for a great variety of separate audiences or constituencies—more in some cases than in others. First, we are writing to satisfy ourselves—to satisfy ourselves that this opinion is the best work we can do and is a correct application of the law to the relevant facts of this case. We need a clear conscience. We need to be personally comfortable that we have abided by our oath to follow the law and the North Carolina Constitution as well as the U.S. Constitution. We are writing to clarify the law, to state what the law is and to apply what we believe the law is to the facts as we understand them in the case.

Once we are satisfied personally, we turn to the task of satisfying our panel-mates. Opinions are circulated to the junior judge first and then to the more senior judge. The theory supporting this order of circulation is that a junior judge might be intimidated or unfairly influenced by the more senior colleague.

5. N.C. R. Ct. C.J.C. CANON 3A(6) (2001).

Undoubtedly, this is a notion of an earlier day, but we still hold on to the tradition, though not rigidly. In the interest of time, where the case is old—approaching ninety days from oral argument—it may be circulated simultaneously with an appropriate disclaimer accompanying the opinion. At our court, immediately after oral argument, we conference to vote tentatively on disposition of the case. At that time each judge votes and may share her notions of what theory the opinion should rely upon and what theories will not suit a judge and any personal preferences or ideas about how the opinion ought to be framed.

Sometimes, after more in-depth research we find that our initial vote is not legally or logically sustainable. That is to say our research discloses a flaw in our logic, a failing in one of our premises or the absence of some key fact. In the parlance of my rural roots, we discover “that dog won’t hunt,” or put another way, “you just can’t get there from here.”

The consequence is that the opinion being circulated among the panel may bear scant resemblance to the post-argument conference discussion and vote. In any event, the opinion must be especially clear and self-sufficient—since there is no residual goodwill from conference that might have aided an opinion written and circulated as we voted initially.

During circulation, our fellow panel members may offer critical comments, suggestions, concurring opinions or dissenting opinions—all of which may stimulate clarification to our original circulated opinion. Since we all sit in one place, personal conferences and discussions often can render unnecessary additional memoranda being exchanged.

At this writing, the North Carolina Court of Appeals does not sit en banc. There is legislation pending to authorize en banc consideration, but a strong majority of our court (fourteen of fifteen) opposes the change.⁶ The North Carolina General Assembly is in session now so our practice may be changed by legislative enactment and an implementing supreme court rule, amended in response to enactment of authorizing legislation. I have survived the arrival of seven new appellate judges since January 1 (out of a total of fifteen judges), so I think I can survive en banc authority.

Once a court of appeals opinion is filed and survives a motion to rehear and, perhaps in the future, a petition for en banc consideration, it may be taken by the North Carolina Supreme Court. Actually, it could be considered by the supreme court at *any* time, but usually it waits until we have done our best. The routes to the supreme court vary according to whether the court of appeals opinion was unanimous. If there is a dissent, the losing party may appeal *as a matter of right* as to the issues in the dissent.⁷ As to other issues, review is by certiorari or petition for discretionary review—discretionary with the supreme court. Where there is no dissent, the court of appeals opinion is the last word unless the

6. S.B. 93, 2001 Leg. (N.C. 2001). On April 26, 2001, the bill was returned by the North Carolina House of Representatives to the Committee on the Judiciary. No further action has been taken on the bill since then.

7. N.C. GEN. STAT. § 7A-27 (2001); *id.* § 7A-30.

supreme court allows discretionary review.

Court of appeals' opinions must be straightforward, clear, and unambiguous so that when the supreme court is faced with a petition for discretionary review or certiorari to examine our work, or when our work is reviewed on appeal, it can build on what we have already accomplished. In those cases in which there is a dissent, we hope the supreme court will have no problem recognizing from the clear text of the opinion and the dissent, just what *we* think the controlling law is. One would think that the level of effort involved in making our view of the law clear to the supreme court would be less demanding than the amount of effort required to make our decision self-explanatory to the bar at large.

In addition, we write to point out errors and give instructions to the judges of the superior court and the district court. They are one of our most important audiences. If we are not clearly understandable to the trial court judges, the chances of further errors increase. The consequences for us are more second and subsequent appeals based on the trial courts' misunderstanding of our first opinion. Although we struggle to speak clearly to the trial court, I cannot count the times the trial transcript has revealed the trial court's frustration with our unclear, incomplete or imprecise direction.

We write our opinions to explain our decisions, not only for the supreme court and the trial courts, but also for the parties and their lawyers. Some of my judicial and academic colleagues suggest that we are writing to explain our decision to parties and lawyers on both sides of each appellate case. I suggest that in most cases, in reality, we are writing only for the losers on appeal. The winners of the cases often do not really care why they won. They are just very pleased that they did. The lawyers on the losing side, however, need to be satisfied that we have carefully analyzed the law and applied it in a clear and straightforward fashion to their case. They want to be assured that we understood all the facts (especially the facts favorable to their side) and that we understood the law and applied the law in a way that it is logical, coherent, and consistent with precedent and statutory intent, if applicable. The winner, as I say, really does not seem to care why she won as long as she won.

A wise, long since anonymous judge once disparaged the role of the appellate court as mere seekers of error while the trial court was immersed in the search for truth. Appellate judges want to be sure that our seeking to discover any prejudicial error serves the end of facilitating the search for the truth. Sometimes, however, even a winning litigant wants to understand our rationale, especially if the case may be the first of a series of cases or the critical basis for a client's major business decision. Actually, we must write to explain to both sides. The parties are one of our most important constituencies. Their satisfaction with the process is critical to public confidence in the courts.

The bar at large and the law news publishers also want to be able to read our opinions and understand what we have done to the law. Lawyers want to be able to rely on our decisions as understandable guidance for their current litigation as well as for litigation-avoidance advice to clients. They want our logic to be so clean, so clear, so unambiguous that their opponents cannot possibly misunderstand. But more important, the bar wants the trial judge to whom they present our decisions as precedents to immediately see the merit of the lawyer's

arguments and determine that their case is to be resolved in their client's favor because of our opinions. Any good litigator will concede, however, that she has often been able to settle a case (in the interests of justice, she would say) based on an ambiguity in an appellate opinion.

We also serve the legal media, including the specialized law publications, the West Reporter system, Lexis-Nexis and their various rivals, the official appellate reports of North Carolina, the statutory publishers' annotation editors, the Horn Book publishers and editors, and the law review editors and writers (students and faculty alike). Last, but not least, the *North Carolina Lawyers Weekly* is a splendid weekly publication that summarizes and comments on the holdings of the state courts, the federal courts, and the state administrative agencies. They present their work weekly in a lucid and timely fashion—a splendid tool for litigants and business lawyers dealing with high volume courts. Their reporting comes with early editorial analysis of our opinions that is not otherwise available even on the Internet. We electronically file all our published opinions and are in the process of resolving how to deal with our unpublished opinions. The ultimate decision will come from our rule-making authority—our state supreme court.⁸

In North Carolina, we are blessed by the presence of five excellent law schools.⁹ All have talented faculty and student writers who analyze, criticize and editorially discuss our opinions in law reviews and journals. The *North Carolina Law Review* does a year-end synopsis of our impact on North Carolina law—changes in the law by the supreme court and the sometimes subtle divergencies in competing opinions of the court of appeals. Our newest law school¹⁰ has for over twenty years prepared and mailed to the entire bar a free bimonthly newspaper¹¹ containing synopsis briefs of opinions of the court of appeals and the supreme court. While not as timely as *Lawyers Weekly*, it helps the bar to keep up with our decisions and the development of North Carolina law. This academic focus gives us much appreciated critical insight and not so subtle suggestions.

The general media reports and editors, however, tend not to be lawyers. They often are looking for what I refer to as “shout words,” which will be attention grabbers for the general public. In North Carolina most reporters covering the courts, certainly those reporters covering the appellate courts, by and large are extraordinarily well-informed. Though generally not legally educated or trained, they are longtime experienced career reporters who do their homework and expend considerable effort to be sure that what they report is both factually and interpretatively correct, or at least “in the ballpark.”

I hasten to say that the good reporters also solicit and welcome input from knowledgeable lawyers, sometimes off the record, to clarify their understanding about our decisions. This sort of healthy relationship between the media, the

8. *Id.* § 7A-25.

9. The five North Carolina law schools are Campbell University, Duke University, North Carolina Central University, the University of North Carolina, and Wake Forest University.

10. Norman Adrian Wiggins School of Law, Campbell University.

11. THE CAMPBELL OBSERVER.

practicing bar, and the courts has been indispensable to our success in assuring that the public is well informed. All parties are careful to respect the exclusive province of each other. Most appellate judges adhere scrupulously to the tradition that we do not comment for the record about our opinions—our opinion must speak for itself.

The court of appeals as an institution is faced by two realities. As Justice Robert Jackson suggested about the U.S. Supreme Court, we too know that in North Carolina the supreme court is not last just because they are right, but they are right because they are last.¹²

I believe that Justice Jackson's comment presents us with a dose of reality and is a good reason why our state's supreme court is very careful to be sure, as much as they can be, that they are logically and legally right whenever they reverse our decisions. Some observers might suggest that their capital case review function so completely occupies their energies that they are more lenient in their review of our work than they could be. I disagree.

The second reality is that the court of appeals, while not the "top dog," still has tremendous responsibility. Of our cases, fewer than two percent are reversed by the supreme court.

In calendar year 2000, of the 1500 plus cases which were determined in the court of appeals, fewer than thirty cases were reversed or modified and remanded by the high court. We would like it to be a perfect record but, of course, occasionally we disagree among ourselves and there are some continuing areas of the law whose development is being shaped by our state's highest court.

On the other hand, I want to hasten to remind myself, my colleagues on the state court of appeals, and you, that the state supreme court, at least in North Carolina, is very conscious of its prerogatives. For example, about fifteen years ago, an overambitious panel of our court determined that public policy required that the ancient torts of alienation of affections and criminal conversation should be abolished.¹³ As you may recall from your law school days, alienation of affections involves the right of redress by a spouse against a person who has seduced the aggrieved party's spouse who theretofore was happily married.¹⁴ The tort of criminal conversation gives the aggrieved spouse redress against one who has had sexual intercourse with his or her spouse.¹⁵ The court of appeals' panel, in some thirty odd pages of scholarly opinion, discussed the social policy, the change in society, modern trends and analytical failure of the cases involving early prosecutions for alienation of affections and criminal conversation. The supreme court in record speed, and with remarkable clarity and succinctness (three short paragraphs), summarily reversed the court of appeals, rejected the court of appeals opinion outright, and remanded the case for execution on the

12. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

13. *Cannon v. Miller*, 322 S.E.2d 780 (N.C. Ct. App. 1984), *vacated by* 327 S.E.2d 888 (N.C. 1985).

14. *Hankins v. Hankins*, 162 S.E. 766 (N.C. 1932).

15. *Sebastian v. Kluttz*, 170 S.E.2d 104 (N.C. Ct. App. 1969).

judgment.¹⁶ At least in North Carolina the court of appeals is very conscious of the high court's prerogative.

In my state our supreme court is constitutionally bound to sit at the state capital and may not conduct its business elsewhere around the state.¹⁷ Ours is a geographically large state, some 400 miles by 600 miles, with a population approaching eleven million. The work of educating and enhancing public appreciation of the courts and the administration of justice outside the state capital therefore must fall on the lesser courts. The North Carolina Court of Appeals routinely, in the dispatch of its regular business, sits at least once annually at each of the five law schools in North Carolina when we are invited. Our purpose is to demonstrate to young, soon-to-be lawyers, to the local media, and to the citizens of the geographic area in which these law schools are located that the administration of justice is the public's business and that the courts are attentive and sympathetic to the public's desire to know about its business firsthand.

In addition, budget constraints and the supreme court permitting,¹⁸ we have adopted a practice of sending a panel of three judges out to various local bar associations at the joint invitation of the senior resident superior court (the top local trial judge) and the president of the district bar. We send a panel to hear cases at remote locations, usually two or three times each year, in the western part of the state in the mountains, or in the western Piedmont, and two or three locations in the less populous agricultural regions of the eastern coastal plain of North Carolina. I confess to you that I prefer to go to the mountains in the fall and to the coast in the late spring. Those of you who are familiar with our climate can understand my logic.

As part of that traveling practice, we also ask that the local bar come together in a meeting where we can meet personally with them, informally hear their comments, listen to their criticisms of our work, and give them an opportunity to share with us their suggestions for improvement of our end of the administration of justice.

In addition, we make a real effort to make ourselves available to the local media, radio, newspaper, cable television, and in the cities, live network television. We are not in the same league with Judge Judy or Court TV, but we are reaching out to the citizens and especially students in high schools and colleges.

We invite students and their teachers to hear oral arguments. On occasion we have held our court sessions in facilities provided by the community colleges. In North Carolina, there are fifty-nine community colleges, all of which are splendid additions to local educational resources and great fora from which to demonstrate the justice system at work.

As part of the conduct of hearings in the local areas, the panel of judges usually, after the cases are heard, will answer questions from students about the

16. Cannon v. Miller, 327 S.E.2d 888 (1985).

17. N.C. CONST. art. IV, § 6(2).

18. N.C. GEN. STAT. § 7A-19(a) (2001).

process. We do not discuss the individual cases, of course, but talk about the process by which the cases are heard and the methodology by which they will be decided. All of this is available for radio or television broadcast, either live or taped for future use. By reaching out, we carry the complementary gospels of “open courts,” “independence of the judiciary,” and “the rule of law” all across the state to our ultimate constituency—the general public. Our goal is that even those who may not be among the educational elite will know that even the least of our citizens will have his or her rights protected in the North Carolina courts.

In addition to our primary audiences or constituencies, we have an indirect or collateral audience—the state legislature or “the General Assembly” as it is known in North Carolina. We all believe in the doctrine of “separation of powers” and our legislators usually profess not to be influenced by our opinions, reserving to themselves the ultimate prerogative of determining what the law is or ought to be. Even so, on occasion, a skillfully crafted opinion pointing out inequities in the application of a statutory enactment can produce some activity in the halls of the legislature. Sometimes even a dissent has a useful purpose when it refocuses legislative attention on a troublesome area of the law.

The telltale mark of a legislatively-aimed opinion often begins with this prefatory language: “Were we writing on a blank slate, we might find for the applicant but here we are bound by the strictures of the legislature to hold otherwise. The competing policies and arguments are persuasive, etc. but”¹⁹ Believe it or not, sometimes the legislators read and heed our expressions of concern.

In sum, we write to be true to ourselves and to our oath of office, but even the most high-minded among us is sensitive to the practical effects, intended and otherwise, that we sometimes have on our other audiences or constituencies.

19. See, e.g., *Stikeleather v. Willard*, 348 S.E.2d 607, 609 (N.C. Ct. App. 1986).