CURRENT DISSENTING STATE SUPREME COURT JUSTICES WILL SOON LEAD THE MAJORITY

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Generally, although not always, when State Supreme Courts rule unanimously on an issue, they are right. However, when one or more of the Justices Dissent there is a high probability they are correct and the majority wrong. In some States, the concept of a dissenting opinion in favor of a Bar Applicant, even being written is a total oddity. Specifically, the Justices on State Supreme Courts in Ohio, Florida, Louisiana, and Georgia have become so indoctrinated into a group thought mentality and function so cohesively that the individual Justices have been divested of the cognitive ability to think and reason for themselves. In these States there is almost no such thing as a dissenting opinion in cases pertaining to the legal profession. This is because the mere possibility that a particular Justice might dissent is considered to be a virtual offense against the other Justices.

It is important to understand what a dissenting opinion really is. The concept applies to all appellate Courts, as well as the U.S. Supreme Court. When a Justice writes a dissenting opinion they are basically saying the other Justices in the majority are violating the law. That's a pretty strong charge.

As indicated in Chapter 19, page 25 of the first part of this book the mere existence of dissenting opinions cannot sustain scrutiny under the State Bar's moral character admission standard for the following reason. To justify their position, dissenting Justices typically accuse the majority of misstating the law, misinterpreting the law, or failing to disclose (nondisclosure) material facts or aspects of the law. Since it is logically impossible for two diametrically opposing positions to be correct, whenever the majority and the dissent disagree on a particular issue it is inescapable that at least one of the sides must be stating a falsehood. The quintessence of the admissions process is the character trait of "truthfulness." Such being the case, the fact that some Justices in split opinions must be stating a "falsehood" would mandate denial of a law license to them if the good moral character standard of admission were applied to them.

Consequently, it is easy to see that when a Justice writes a dissenting opinion they assume an immense professional risk. The reason is that the dissenting opinion they write gives rise to an ideological alienation between themselves and their peers. It effectively erects a wall between the Justices on the Court. The best example I've come across, demonstrating this concept is the

Fieger case discussed previously. Justice Weaver stood alone in her dissent. Her dissent was predicated upon the assertion that the other Justices should have disqualified themselves. The impact of her dissent was to cause the Justices in the majority to band together like a street gang, which then lambasted her. If ever there was a case clearly exemplifying the plight of a Justice alienated from her Court, it was in that case. No doubt what she did was incredibly brave. Her dissent was a testament to the fact that there are State Supreme Court Justices who are aware of the immoral nature of what is transpiring. These State Supreme Court Justices know how manipulative and deceptive the other Justices are. These dissenting Justices are the guardians of the Constitution who the public should provide unwavering support to.

It can fairly be anticipated that since Judges are nothing more than humans, they are subject to the emotions, weaknesses, frailties, personality flaws, and irrationalities that all humans are characterized by at various points in their lives. Furthermore, the essence of being a Judge and the most important aspect of their career consists of the opinions they render. In accordance, it should be anticipated that Justices in the majority will conduct themselves defensively when one of their peers attacks their opinions. Ultimately, it becomes a matter of professional self-preservation. Historically, it has been demonstrated that defensive postures in any context often manifest themselves through imposition of offensive action.

The most effective offensive action available to State Supreme Court Justices in the majority, who find their opinions being subjected to well-grounded rational attack by dissenting Justices is to impose judicial discipline upon their dissenting peer. One Justice in the majority acting alone cannot accomplish this. Instead, since the members of the Judiciary strive to function as a cohesive unit rather than through promotion of individual spirit, imposition of discipline upon a dissenting peer requires Justices in the majority to join together to neutralize a dissenting Justice.

Once the decision to impose discipline upon a dissenting Justice is made by a judicial cabal, the implementation of such is wholly simplistic. All it involves is finding some aspect of the dissenting Justice's conduct that justifies imposition of judicial discipline. That's the easy part because everybody engages in some type of conduct in their professional or personal life, which can be subjectively determined as demonstrative of a lack of good character. The reason is that no one is perfect and as stated, Judges are human. Certainly, they're also quite far from being perfect. Thus, the tough part for any Justice in the majority seeking to impose discipline upon a dissenting Justice is to convince the other Justices. He needs to get the gang together so to speak. Once the gang is assembled and on board with the plan, the task of finding some

aspect of the dissenting Justice's conduct, which purportedly justifies imposition of professional discipline is a foregone conclusion.

Of course, this situation is unfortunate for the general public. The public tends to mistakenly, albeit understandably, believe that when a State Supreme Court Justice is disciplined, they have really done something wrong. In fact however, quite often the reverse is true. It is often the dissenting Justice who has engaged in the bravest and most moral conduct, and those who imposed the discipline are the ones who acted immorally.

Notably, it is not only fellow Justices on a State Supreme Court who have an incentive to neutralize the professional career of a Justice who dissents. Judges are a very closely-knit group, except in the most populous States. State Supreme Court Justices fraternize with Court of Appeals Justices and trial court Judges and they even associate with the ignorant attorneys comprising the rest of the State Bar. Thus, any State Supreme Court Justice whose record demonstrates a propensity toward making Judges on the lower courts look bad with his opinions (whether he is in the majority or dissenting) can be expected to make political enemies of those lower court Judges. This is particularly the case if that Justice's opinions are logically formidable in a legalistic sense. People tend to become more annoyed when proven wrong compared to when they are simply told they are wrong. The result of this is often a tendency for lower court Judges to band together to bring down a State Supreme Court Justice who continuously makes them look unfair or unethical. Typically, this requires the lower court Judges to enlist support of other State Supreme Court Justices to their cause, but such is not always the case.

There are also a few States where imposition of judicial discipline upon State Supreme Court Justices is taken out of the hands of the State Supreme Court itself and the power vested in lower court Judges. That is obviously the most stupid system imaginable because it ignores the essence of human nature. There is more incentive for lower court Judges who regularly have their illegal conduct exposed to the public in a judicial opinion to impose discipline upon those responsible for exposing their immorality, than the incentive that exists for a State Supreme Court Justice in the majority to impose discipline upon a dissenting Justice. The reason for this disparity is that State Supreme Court Justices can always respond to allegations of the dissent concurrently in their majority opinion. In contrast, a lower court Judge is helpless to comment on the issue once the case is out of his court. Unable to respond to a Supreme Court Justice whose opinions expose their irrationality, immorality or illegality, the lower Court Judge's only recourse is an attempt to impose judicial discipline on the State Supreme Court Justice.

The point is that any Justice who writes a stinging dissent that makes the majority look bad, or who writes an opinion as either the dissent or majority that makes lower court Judges look bad, can be expected to incur the wrath of those lower Court Judges. Just like litigants get mad at Judges, the Judges get mad at each other. One or two dissenting opinions won't do it. But, the more opinions a Justice writes making others look bad, the more he is treated by his peers as a traitor to self-serving interests of the Judiciary and legal profession. This has the impact of functionally increasing the probability he will be neutralized by his judicial peers through imposition of judicial discipline, even though in fact he is probably the best Justice on the bench. He's the one the general public can rely on.

It is undeniable that writing dissenting opinions carries great professional risk whereas simply "going to get along" with the majority; or rubber-stamping irrational lower Court opinions by affirming them is the easiest route to a successful judicial career. Ultimately, it becomes clear that a Justice who writes dissents (whether he is liberal or conservative) risks his own professional standing in favor of a belief in justice. Conversely, a Justice who is consistently in the majority may or may not be correct on the issue, but he definitely minimizes personal professional risk by his opinion.

Since the writing of dissenting opinions carries an element of professional risk that is markedly absent when joining majority opinions, it can be anticipated that basic principles of Risk-Reward analysis provide greater reward to dissenting Justices who ultimately prove the majority wrong. This does occur. When a Justice who has been in the dissent ultimately has his viewpoint adopted in a majority opinion years down the road, he is recognized by virtually everyone as a Hero.

Arguably, the best example of this was the lone dissent in Plessy v Ferguson in 1896 written by U.S. Supreme Court Justice John Harlan. His position became the majority in Brown v Board of Education in the 1950s. Of course, that didn't do him a lot of good in his life because he was dead by the time Brown was published. But, it probably did play a role in getting his Grandson John Marshall Harlan appointed to the Court. And it definitely won him a place of acclaim in American history. In contrast, Chief Justice Roger Taney who wrote the Court's opinion in the Dred Scott case that led to the Civil War is now pretty much universally recognized as a Judicial Dog.

In honor of those who have the courage to write dissenting opinions at the State Supreme Court level, I have selected three cases dealing with Bar admissions to briefly review. I then comment upon a related fourth case that raises a disturbing eyebrow with its unfortunate twist. The first three cases are

not even close calls. I submit that any rational person must conclude the dissent was absolutely correct.

The first case actually consists of two judicial opinions involving the same Bar Applicant in the cases In Re Paul Thomas Demos II, 564 A2d 1147 (1989) and 579 A2d 668 (1990). Mr. Demos case is discussed in detail in Chapter 20, pages 302 - 304 of the first part of this book. Demos had one conviction for contempt of court. It was apparently a product of his admirable sense of justice and a lot of "attitude", which was improperly perceived by the majority as warranting denial of admission to the District of Columbia Bar. The two Justices in the majority on the three Judge panel denying admission to Demos had previously granted admission to three Bar Applicants who were a murderer, bank robber and drug pusher. In light of such there is really no way those two Justices can fairly be perceived as rational. To deny admission to one Applicant due to his "attitude" and one minor contempt conviction, yet grant admission to a convicted murderer, bank robber and drug pusher, is the equivalent of those Justices formally requesting recognition as imbelic buffoons. Such recognition is hereby granted. More importantly, the lone courageous slam-dunk correct dissenting opinion of Justice Terry included the following statement:

> "I think the contempt conviction is too unimportant to stand in the way of his admission - especially when this court (over two dissents, including mine) saw fit to admit three convicted felons - a murderer, a bank robber, and a drug pusher. . . . What the court is doing is plainly at odds. . . . If we admitted the three petitioners in that case to our bar, I cannot understand why we deny admission to <Applicant>. . . ." [24]

The second great dissent is in the Washington State case of In the Matter of Petition of Jimi Wright, 690 P2d 1134 (1984) discussed in Chapter 20, pages 541- 542 of the first part of this book. The majority denied admission to the Applicant for multiple reasons. The reasons included the Applicant's criminal conviction for second-degree murder, a conviction for heroin possession, and also for engaging in the Unauthorized Practice of Law by preparing articles of incorporation. The dissent written by Chief Justice Williams addresses the lame allegation that the Applicant engaged in the Unauthorized Practice of Law as follows:

" . . . the question I must ask is, is the majority really denying <Applicant> admission to practice based on this fact? I cannot believe that it is.

. . . The bar association has been involved with this case for over 4 years, and not one member of that organization has ever charged that <Applicant> illegally practice law. The counsel for the bar association never notified <Applicant> that this would be an issue. <Applicant> had no opportunity to rebut charges that he was not qualified to practice based on this incident. The Board of Governors made no finding on this issue. . . . The majority has raised this issue for the first time on appeal, and then decided it without a fair hearing." [25]

The third great dissent is the Nebraska case of In Re Gary M. Lane for Admission, Case No. S-34-950002 (1996) discussed in Chapter 20, pages 417-421 of the first part of this book. This case is one of the increasingly pervasive "attitude" cases that have become characteristic of admission denials in recent times. The majority denied admission on the ground that the Applicant was obnoxious. Justices Wright and Connolly state in their dissent:

". . . Until today . . . being obnoxious . . . and being hard to get along with were not grounds for the extreme sanction of denial of admission. . . . The majority reaches far beyond the current rules governing admission. . .
. . . there are no bar admission rules for excluding an applicant on such grounds.
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. . . <Applicant> . . . has practiced law in a number of states since being admitted to practice in 1977. Whatever interpersonal problems <he> . . . may have, they apparently have not led to injury to his clients." [26]

This case is particularly important for an unusual reason. The dissent was written by Justices Wright and Connolly in 1996. Their opinion is a courageous testimony to constitutional freedom. It's phenomenal. Yet, three years later in 1999 both Justices Wright and Connolly sold out. They adopted a "Converse" position to the one they had stated previously. Remarkably, the case was even called Application of Converse, 258 Neb. 159 (1999). It's yet another of the "attitude" cases and is discussed in greater detail on pages 422 - 425 of the first part of this book. In the Converse case the Nebraska Supreme Court rendered a unanimous opinion, which included Justices Wright and Connolly, and that relied on the majority opinion in the Lane case where Wright and Connolly had dissented.

The Converse case basically nullifies the First Amendment. As I pointed out on pages 422-425 of the first part of this book when describing the case, the Court in Converse engaged in a deceptive and dishonest misrepresentation of the U.S. Supreme Court's opinion in the Wadmond case, which was decided in 1971. The Converse opinion written in 1999, just three years after the Lane case, is one of the most constitutionally repugnant State Supreme Court opinions I've come across. Converse substantively establishes a blanket exemption for the State Bar from complying with the First Amendment.

But, the real question applicable to this chapter is why did Justices Wright and Connolly sell out? Why did they abandon the brave opinion they wrote in Lane? It is positively irrefutable that they changed their opinion within just three years. They joined the majority in Converse, which relied on Lane, and they had dissented in Lane. Admittedly, I don't know the answer giving rise to their sellout. But, I can speculate that it is possible their peers got to them. Not a certainty, but definitely a possibility.

This exemplifies the difficulty of being a dissenting Justice. You become a target of your peers on the bench. You're placed in a position where either you change to become part of them, even if it means writing what you don't believe constitutes the law. The alternative is that they get you as occurred to Justice Weaver in the Fieger case in Michigan.

It is for this reason that dissenting State Supreme Court Justices (meaning those who stick to their opinions whether such be liberal or conservative) need the public's support. They are up against a lot. The pressure is intense and without public support not all of them can be expected to withstand it. Ultimately, many of the dissenting Justices will lead the majority and when such occurs it will constitute an actualization of a true rule of law.

But, until that time arrives, they are merely the greatest hope for the rule of law and America.