

## [The Importance of Dissents in an Intermediate Appellate Court](#)

New York Law Journal Online

August 28, 2025 Thursday

Copyright 2025 Copyright Holder for ALM Media Properties, LLC

### New York Law Journal

Section: JUDGES

Length: 1427 words

### Body

---

The importance of dissent, especially in an intermediate appellate court cannot be overstated. Indeed, a number of former judges on the Appellate Division, First Department have weighed in previously on this issue prompted in part by attempts made by a former Chief Judge to deter the production of dissents by Appellate Division Judges, especially focused at the First Department. (Acosta, "Iron Sharpens Iron: The Value of Dissent and Collegiality in Appellate Courts," *New York Law Journal*, Jan. 11, 2019; Andrias "Why the Appellate Division Shouldn't Have to Speak in a Unified Voice," *New York Law Journal*, Jan. 23, 2019; Saxe, "Chief Judge's Inquiry in to Dissents Intrudes on Judicial Independence," *New York Law Journal*, Jan. 23, 2019; Saxe, "Riding the Learning Curve as a New Appellate Division Judge," 88 *NYSBAJ*, 45, 46 (February 2016) at pg. 46.

Given the importance of this issue, we believe it is an appropriate from time to time to revisit it. Dissents have been referred to in myriad ways: as "the only thing that makes life tolerable for a judge of an appellate court" (Justice William Douglas), as "recording prophecy and shaping history;" (Justice Felix Frankfurter); as a "disastrous" signal of a court's "disunity." (Judge Learned Hand) and as a "bother" that "frays collegiality" and "usually has no effect on the law" (Judge Richard Posner). (See, Bernice B. Donald, "[Madison Lecture: Judicial Independence, Collegiality and the Problem of Dissent in Multi-Member Courts](#), 94 *N.Y.U. L. Rev.* 317 (2019). Other commentators have termed dissents "useless," "undesirable" and even "subversive." [See, Zeckri, "Respectfully Dissenting, etc.," 94 *Florida Bar Journal* 8, No. 5 (2020) and more bluntly, "A dissent is what the law is not," *Id.* at footnote 20.

Initially, it should be pointed out, that although dissenting opinions are important in our view to the development of legal precedent, dissenting opinions should be issued sparingly and reserved for instances where there are fundamental disagreements over legal principles. It is often observed however that dissenting opinions make the existing law less certain because dissents operate to undercut the legitimacy of a court by preventing it from speaking with one voice. The claim is also made that a culture of dissents reflects a breakdown in collegiality in the court.

The dissenting opinion may serve a variety of functions:

• primarily, a dissenting judge writes to persuade those in the majority to adopt his viewpoint and accordingly have his writing accepted as the majority writing;

• the dissenting opinion may operate to improve the majority writing by pointing out errors in analysis or in the application of the law. Justice Ruth Bader Ginsburg emphasized this point when she wrote "My experience teaches

## The Importance of Dissents in an Intermediate Appellate Court

that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation." Ginsburg, *The Role of Dissenting Opinions*, 95 *Minnesota L. Rev.* (2010). A well-crafted dissent will then cause the draftsman of the majority writing to acknowledge the points of claimed error highlighted in the dissent as well as to deal with unfavorable facts forcing a confrontation with the hardest questions urged on by the losing side and incorporate a remediation in the majority writing, thereby improving the quality of the writing.

• a dissent in one of our Appellate Division Departments may persuade a majority in another Department, thereby promoting the role of dissent in sharpening and refining legal thought, requiring eventual adjudication by our highest court, the Court of Appeals.

• a persuasive dissent—one that has dissected a faulty analysis by the majority and pointed out its inconsistency with existing precedent, may result in remedial legislative action through statutory enactments;

• a persuasive dissent may open the way for a more exacting and productive analysis in a future case especially if other legal developments may have affected the legal efficacy of the majority opinion (See, Newman & Ahmuty, "Creative Use of Dissenting Opinions," *NYLJ*, 1-05-2022. This function of a dissent ties in with the view of the dissent as prophecy explained by Justice Cardozo as follows: "The voice of the majority may be that of the force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years." (Cardozo, *Law and Literature and other Essays and Addresses*, 36 (1931));

Dissents have come under attack notwithstanding the foregoing. Among the criticisms leveled are the following:

• dissents add uncertainty to the law as they tend to weaken the force of the majority opinion;

• administratively, dissents add to the workload of an appellate court by causing added work for the majority in responding to seriatim drafts of the dissent as it progresses until a final vote of the panel; and

• dissents may affect collegiality among members of that court.

As to these points it should be noted that dissents, rather than diminishing a court's institutional prestige, may strengthen its legitimacy in its truth-seeking role. (Zekri, *supra*). Additionally, adding some uncertainty to the law should not be considered a disqualifying factor. Justice Douglas explained that judicial dissent is a natural appurtenance to a democratic society. (Douglas, "The Dissent of Safeguard of Democracy," 32, *J. Am. Judicature Soc'y* 104, 105 (1948)) [See, *Madison Lecture*, *supra* at 9]

Collegiality should not suffer because of dissents. It goes without saying that dissenting writing should not include ad hominem attacks or snarky rejoinders. Justice Scalia's dissent in [\*Obergefell v. Hodges\*, 135 S.Ct. 2584, 2629-30 \(2015\)](#), which held that the right to marry is guaranteed to same-sex couples, is sometimes referred to as an example of too personal an attack on a colleague (Justice Kennedy) who authored the majority opinion. Justice Scalia criticized Justice Kennedy's majority ruling writing as "profoundly incoherent," "egotistic" "pretentious," and a "hubris-inspired" judicial Putsch. On the other hand, the directness and transparency of Justice Scalia's prose can be acknowledged.

Judge Saxe remembers initial strains in the relationship between certain judges who engaged in multi-draft duels at the Appellate Division, First Department during his tenure there (1998-2017). The strain was often palpable during the weeks before a final vote was taken and sometimes lasted beyond that time. At that time, the Appellate Division, First Department had a communal lunchroom that served to mellow the friction between the aggrieved jurists. [See, Saxe, "Strained Relationships Fade When Judges Break Bread" *NYLJ*, Aug. 22, 2019, pg. 7.] The importance of breaking bread together should not be underestimated in promoting collegiality.

Collegiality doesn't equate with agreement among judges but rather with an understanding that judges do their work respecting each other in an atmosphere of civility. [See generally, *Posner Reflections on Judging* at 107]; see also Acosta, "Iron Sharpens Iron" *supra*; Saxe, "Strained Relationships" *supra*. Judges should work to dispel the view

## The Importance of Dissents in an Intermediate Appellate Court

that dissents lead to a breakdown in collegiality. All judges on our appellate courts should strive to welcome differing viewpoints and agree to disagree without delving into a lack of civility or intolerance.

Dissenting opinions of an intermediate appellate court, such as the Appellate Division, are vitally important to the orderly development of the law because they provide an opportunity, where the jurisdiction of the Court of Appeals permits, (see [CPLR 5601\(a\)](#)) for legal conflicts to be brought before the Court of Appeals for final resolution, thereby serving the development of legal precedent. In fact, we believe that in a Court of last resort like the Court of Appeals, and unlike the Appellate Division, an intermediate Appellate Court dissents, should be the exception.

We believe that dissents are welcomed by the Bar as they call attention to the intellectual stirrings, vitality and ability among appellate judges that enliven the practice of law and its development, something that is vitally important to our practice of law.

Y, David Scharf is co-managing partner of Morrison Cohen. David B. Saxe, a partner at Morrison Cohen, served as an Associate Justice of the Appellate Division, First Department for 19 years. The views expressed herein are solely those of the authors.

**Load-Date:** August 29, 2025

---

End of Document