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# WHY THE NORTH CAROLINA COURT OF APPEALS SHOULD HAVE A PROCEDURE FOR SITTING EN BANC

JOHN V. ORTH\*

*Courts that sit in panels often have a procedure for sitting as a group, or en banc, to resolve difficult or potentially divisive issues, and to reconcile inconsistent rulings among panels. The twelve-judge North Carolina Court of Appeals sits in three-judge panels and has no rules providing a procedure for hearing cases en banc. In this Article, Professor Orth explains the historical roots of the current North Carolina rule, provides examples of the difficulties that arise as a result, and suggests a new rule of North Carolina appellate procedure that would solve the problem.*

The North Carolina Court of Appeals, which presently consists of twelve judges, sits in panels of three judges each.<sup>1</sup> Each panel is bound by precedents established by higher courts and by prior decisions of other panels of the court of appeals. Therein lies the problem. While it is easy to say, as the North Carolina Supreme Court has, that “[w]here 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,”<sup>2</sup> the rule is sometimes hard to apply in practice. Whether the issue involved in one case is the “same issue” as that

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1. See N.C. GEN. STAT. § 7A-16 (1995) (“The Court of Appeals is created effective January 1, 1967. . . . Effective January 1, 1977, the number of judges is increased to 12. . . . The Court of Appeals shall sit in panels of three judges each. . . .”).

2. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). It is worth noting that in support of this proposition the North Carolina Supreme Court cited a case from the Eleventh Circuit of the United States Court of Appeals, *Monroe County v. United States Department of Labor*, 690 F.2d 1359 (11th Cir. 1982), which, referring to the operating procedure of the federal court of appeals, recognized “the firm rule of the Fifth Circuit (and subsequently the Eleventh Circuit) that a three-judge panel may not disregard precedent set by a prior panel absent an intervening Supreme Court decision or *en banc* circuit decision,” *id.* at 1363 (emphasis added). See *Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 (citing *Monroe County*).

decided in a different case may be difficult to determine. One panel of the court of appeals may become convinced that an earlier panel misunderstood or misapplied (or simply missed) a relevant precedent. It may even be difficult to determine whether an acknowledged precedent has been "overturned" by a higher court or merely distinguished.<sup>3</sup> In addition, since the overruling may have been implied rather than express, the effect of the subsequent decision may have to be examined; a judgment of some subtlety might be required, and reasonable judges (even panels of reasonable judges) might disagree. One answer, of course, would be to let the state supreme court resolve all such questions, and obviously only that court can finally determine state law.

But multi-member courts that sit in panels normally have another alternative: to refer the matter for resolution to the whole court sitting en banc, that is, all the judges sitting together. Needless appeals to a higher court are thereby avoided, and appeals that do go forward have the benefit of a fully developed record. A procedure for sitting en banc also preserves the dignity of the court—preventing it from speaking with many voices.

This Article will argue that the North Carolina Court of Appeals should have a procedure for sitting en banc. First, it will illustrate the problems arising in the present situation, without such a procedure. It will then examine the institutional arrangements necessary for the development of an en banc procedure. This will require examination of the state constitution as well as legislation concerning the court of appeals. Finally, it will recommend a rule of appellate procedure providing for the court of appeals, in exceptional cases, to sit en banc.

### I. PROBLEMS IN THE ABSENCE OF AN EN BANC PROCEDURE

Without an en banc procedure, all succeeding panels of the court of appeals are constrained to follow a precedent set by a prior panel. In a real sense, the court of appeals as presently operated is not a single court at all, but only a collection of panels. Although further thought or practical experience may convince a later panel of the unsoundness or impracticability of a rule, it must continue to be applied until overruled by the supreme court. For example, compensatory damages may not be awarded in contempt

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3. Cf. *Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 36 ("[T]he Court will examine the effect of the subsequent decision, rather than whether the term 'overrule' was actually employed.").

proceedings in North Carolina because three judges of the court of appeals once ruled against them<sup>4</sup> and the supreme court has not had occasion to examine the issue. Although a later panel acknowledged the persuasiveness of the arguments for changing the rule and although the rule is not applied in a majority of other states, the court of appeals is now irrevocably committed on the issue.<sup>5</sup> The same is true concerning the rule that one hiring an independent contractor is not liable in tort to the independent contractor's employee. Because a panel of the court of appeals once ruled against such liability<sup>6</sup> and the supreme court has not expressly changed the rule, a later panel of the court of appeals can do nothing but impotently note that "courts in other states have resolved this issue contrary to the position taken by this Court";<sup>7</sup> it cannot revisit the issue. Further examples could be adduced, but the point of them all would be the same: not whether any particular rule is right or wrong, but whether all the panels of the court of appeals are doomed forevermore to follow a rule once established by a single panel, saved, if at all, only by the intervention of the supreme court.

Disagreements with precedents set by a prior panel are only one of the inconveniences caused by the absence of an en banc procedure. Far more serious is the possibility, already realized in one or two instances, of two inconsistent lines of cases developing on a single issue. In *Stegall v. Stegall*,<sup>8</sup> the issue was whether the subsequent reconciliation of a separated married couple rescinds the executory provisions of a prior separation agreement. Holding that it does rescind such an agreement, the particular panel of the court of appeals refused to follow decisions to the contrary by earlier panels because it determined that they were inconsistent with the decision of a still earlier panel.<sup>9</sup> Similarly, in *Brooks v. Ansco &*

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4. See *Hartsell v. Hartsell*, 99 N.C. App. 380, 390, 393 S.E.2d 570, 577, *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

5. See *Atassi v. Atassi*, 122 N.C. App. 356, 360, 470 S.E.2d 59, 62 (1996) ("We acknowledge the persuasiveness of plaintiff's arguments for changing this rule, a rule in which North Carolina is a minority jurisdiction . . . However, this Court is without authority to dispense with rules adopted by our Supreme Court or another panel of this Court.").

6. See *Woodson v. Rowland*, 92 N.C. App. 38, 46-47, 373 S.E.2d 674, 678-79 (1988), *aff'd in part and rev'd in part*, 329 N.C. 330, 407 S.E.2d 222 (1991).

7. *Cook v. Morrison*, 105 N.C. App. 509, 518, 413 S.E.2d 922, 927 (1992).

8. 100 N.C. App. 398, 397 S.E.2d 306 (1990).

9. See *id.* at 402-10, 397 S.E.2d at 308-13 (disregarding *Small v. Small*, 93 N.C. App. 614, 621, 379 S.E.2d 273, 277 (1989), and *In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990), but applying *Carlton v. Carlton*, 74 N.C. App. 690, 329 S.E.2d 682 (1985)).

*Associates*,<sup>10</sup> where the issue was the scope of review of a final decision by an administrative agency, a divided panel of the court of appeals actually embodied the holdings of two divergent lines of cases, the majority applying one (de novo review if the agency's decision is based on an error of law, but whole record review if the agency's decision is not supported by substantial evidence)<sup>11</sup> and the concurring judge the other (review limited to whether the trial court committed an error of law).<sup>12</sup>

Even the viability of North Carolina Supreme Court precedents may be jeopardized by the absence of an en banc procedure. It is conceivable that successive panels of the court of appeals may develop a rule at variance with a prior supreme court precedent. If that were to happen, a later panel would be forced to choose between the earlier rule laid down by the supreme court and the more recent rule developed by the panels of the court of appeals. Although it would seem that the higher court's rule should be preferred unless the panels had purported to interpret or distinguish the earlier case, the decision could require considerable subtlety. In *Bromhal v. Stott*,<sup>13</sup> the issue was whether a trial court could enforce a provision of a married couple's separation agreement providing for the award of attorney's fees to a successful plaintiff in an action to enforce the agreement. Although the majority on the panel upheld the award of attorney's fees and relied on the decisions of prior panels,<sup>14</sup> a dissenting judge cited a supreme court decision clearly rejecting such awards in the absence of statutory authorization.<sup>15</sup> Ironically, the supreme court subsequently upheld the panel and distinguished its prior holding.<sup>16</sup>

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10. 114 N.C. App. 711, 443 S.E.2d 89 (1994).

11. *See id.* at 716, 443 S.E.2d at 92 (citing *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988)).

12. *See id.* at 718, 443 S.E.2d at 93 (John, J., concurring) (citing *In re Kozy*, 91 N.C. App. 342, 344, 371 S.E.2d 778, 779-80 (1988)).

13. 116 N.C. App. 250, 447 S.E.2d 481 (1994), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995).

14. *See id.* at 254, 447 S.E.2d at 484 (citing *Edwards v. Edwards*, 102 N.C. App. 706, 712-13, 403 S.E.2d 530, 533 (1991); *Carter v. Foster*, 103 N.C. App. 110, 115, 404 S.E.2d 484, 488 (1991)).

15. *See id.* at 256, 447 S.E.2d at 485 (Greene, J., concurring in part and dissenting in part) (citing *Stillwell Enters. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980)).

16. *See Bromhal*, 341 N.C. at 706, 462 S.E.2d at 222.

## II. STRUCTURE OF COURT OF APPEALS

The North Carolina Court of Appeals was established by statute effective January 1, 1967.<sup>17</sup> The statute constituting the court was enacted pursuant to amendments to the North Carolina Constitution adopted in 1965.<sup>18</sup> Now Article IV, Section 7 of the 1971 Constitution, the principal provision is as follows:

*Court of Appeals.* The structure, organization, and composition of the Court of Appeals shall be determined by the General Assembly. The Court shall have not less than five members, and may be authorized to sit in divisions, or other than en banc. Sessions of the Court shall be held at such times and places as the General Assembly may prescribe.<sup>19</sup>

At present, the court of appeals consists of twelve judges, with the statute authorizing the court to sit "in panels of three judges each."<sup>20</sup>

Although not expressly required to do so by the state constitution, the supreme court always conducts its judicial business en banc, that is, with all the justices sitting together. By contrast, the state constitution expressly permits the General Assembly to authorize the court of appeals to sit "other than en banc."<sup>21</sup> In context, the express constitutional permission to authorize sittings "other than en banc" seems designed to rebut a possible inference that the judges of the court of appeals necessarily would, like the supreme court, always sit en banc. In other words, the constitutional text seems to take en banc sittings of the court of appeals for granted, while permitting sittings in smaller units if authorized by legislation. The sentence in the constitution concerning en banc sittings begins by providing that the court "shall have not less than five members."<sup>22</sup> It is, therefore, obvious that the present arrangement of three-member panels was not contemplated at the outset. Furthermore, the constitutional drafters' choice to set the minimum complement of judges for the court of appeals at five, an odd number, indicates that the court was originally designed so that it could function effectively en banc.

While the state constitution seems to permit the court of appeals

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17. See N.C. GEN. STAT. § 7A-16 (1995).

18. See Act of June 9, 1965, ch. 877, 1965 N.C. Sess. Laws 1173. Voting returns are available in *North Carolina Manual 1967*, at 328.

19. N.C. CONST. art. IV, § 7.

20. N.C. GEN. STAT. § 7A-16.

21. N.C. CONST. art. IV, § 7.

22. *Id.*

to sit en banc, the legislation concerning the court's organization has always provided that "[t]he court of appeals shall sit in panels of three judges each,"<sup>23</sup> and the court's uniform practice has been to conduct its judicial business only in three-member panels. It may be argued that the legislation authorizing panels does not imply a prohibition of en banc proceedings, but only directs the ordinary course of business: when the court sits in panels, as it normally does, the panels shall consist of three judges. It may also be argued that the uniform practice of the court to operate through three-member panels does not indicate that the court may not operate otherwise. The court of appeals is a relatively new judicial institution; it observed its thirtieth anniversary on January 1, 1997.<sup>24</sup> The problems for which an en banc procedure is suited—to correct rules established by one panel in the light of subsequent experience and to resolve differences among panels—developed only over time. Not until 1977 did the court of appeals reach its present complement of twelve judges,<sup>25</sup> permitting the regular staffing of four panels.

### III. PROPOSED RULE OF APPELLATE PROCEDURE

The supreme court has exclusive authority under the state constitution to make "rules of procedure and practice for the Appellate Division,"<sup>26</sup> that is, for the supreme court itself and for the court of appeals.<sup>27</sup> Establishment of an en banc procedure for the court of appeals could be accomplished by the adoption of a rule of appellate procedure. An analogy is provided by the Federal Rules of Appellate Procedure, which provide for en banc proceedings in the United States Courts of Appeals.<sup>28</sup> While the details would need

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23. N.C. GEN. STAT. § 7A-16.

24. See *supra* note 1. For a history of the first 20 years of the court of appeals, see David M. Britt, *History of the Court of Appeals of North Carolina*, 84 N.C. App. 714 (1987).

25. See N.C. GEN. STAT. § 7A-16. From January 1, 1965 to January 1, 1967, the court consisted of six judges; from January 1, 1967 to January 1, 1977, the court consisted of nine judges. See *id.*

26. N.C. CONST. art. IV, § 13, cl. 2. The North Carolina Rules of Appellate Procedure appear in 287 N.C. 671 (1975). They occasionally are amended by rules appearing in later volumes of the North Carolina Reports.

27. See N.C. CONST. art. IV, § 5 ("The Appellate Division of the General Court of Justice shall consist of the Supreme Court and the Court of Appeals.").

28. See FED. R. APP. P. 35. The Federal Rules specifically address the appropriateness of en banc proceedings:

Determination of Causes by the Court in [sic] Banc

(a) When Hearing or Rehearing In Banc Will Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal

to be tailored to suit the particular situation, the general outline of a North Carolina rule would seem to be clear: By the vote of a majority of the active judges of the court of appeals, a hearing or rehearing en banc would be ordered. A party could suggest the appropriateness of a hearing or rehearing en banc. En banc proceedings would be appropriate to resolve differences among panels and to reconsider rules established by one panel that later panels, in the light of experience, have come to consider inadvisable. Above all, en banc proceedings would be rare. They should neither be favored nor routinely ordered; they are appropriate only in exceptional cases.

Properly limited, an en banc procedure for the court of appeals would increase the effectiveness of that court by eliminating conflicts between panels and by permitting the judges' collective wisdom to be brought to bear on important issues. The establishment of an en banc procedure would make the court of appeals a single court, in other than an administrative sense, for the first time. It would also improve the quality of the records in those cases that do eventually go to the supreme court for final resolution. Of most importance, it would enhance the quality of justice for the people of North Carolina.

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or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing In Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for Suggestion of a Party for Hearing or Rehearing In Banc; Suggestion Does Not Stay Mandate. If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

