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"Physical Precedent" Under Court of Appeals Rule 33(a)

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In what sense is a majority decision on a panel of the Georgia Court of Appeals binding or authoritative?

Court of Appeals Rule 33(a) states that a judgment concurred in by all judges of a panel is a binding precedent, but "if there is a special concurrence without a statement of agreement with all that is said in the opinion or a concurrence in the judgment only, the opinion is a physical precedent only." The effect and validity of this rule has been raised by the Georgia Supreme Court in granting review of Cotton States Mut. Ins. Co. v. Brightman, 256 Ga. App. 451 (2002), a decision involving a two-Judge majority opinion and the opinion of another Judge concurring specially. In granting review, the Supreme Court posed questions about the merits of the underlying dispute and this question:

In the absence of an opinion by this Court in this case, what binding effect would the opinion of the Court of Appeals have on the trial courts of this State with regard to those holdings in which only two judges on the Court of Appeals panel concurred? See Court of Appeals Rule 33 (a).

Once the Supreme Court posed that question, members of the Appellate Practice Section began to discuss the significance of this question and the possible effect of a decision altering the "physical precedent" doctrine of Rule 33(a). This article will summarize those discussions and independent research. It will conclude with arguments for and against the continuing validity of Rule 33(a).

IMPORTANT

SEE SECTION CALENDAR OF EVENTS IN THIS ISSUE

How the "Physical Precedent" Rule Works in Practice

To assess how the "physical precedent" concept of Rule 33(a) works in practice, we looked to see how the Court of Appeals uses physical precedent cases as authority. We looked at all citations identified by the words "physical precedent" in decisions of that Court in 1991, 1996, and 2001, and categorized them as follows:

1. The authority of the case is not otherwise considered
   1A. The case stands as sole authority for a legal proposition
   1B. The case is cited with other, binding cases for the proposition
2. The authority of the case is reconsidered
   2A. The case is found persuasive
   2B. The case is found unpersuasive

A few other instances in which a physical precedent was mentioned or distinguished in passing, without addressing its authority, were ignored. Here are the numeric results.

	1991	1996	2001
1A (sole authority)	8	21	44
1B (cumulative authority)	12	17	59
2A (found persuasive)	1	2	5
2B (found unpersuasive)	6	6	8
Total	27	46	116

These numbers show a fairly sharp increase in the citation of physical precedent cases, almost exclusively in the categories in which the authority of the case is not further questioned (1A and 1B). This would suggest that there is a shift in decisions of the

Court of Appeals to regard physical precedent cases as more like binding precedent cases.

The numbers are not, however, the entire story. A qualitative analysis suggests a more subtle use of physical precedent cases. Though counter-examples can be found, it appears that the Court of Appeals cites physical precedent cases as standalone authority for legal propositions (1A) mainly when the proposition is undisputed or peripheral and if it was not the point on which the original panel divided. When the proposition is more significant to the dispute between the current parties, the Court tends to seek additional binding authority for the same proposition or for related or contrasting propositions (1B). On the other hand, in about half of the cases in which the Court reconsidered the authority of the physical precedent case (2A and 2B), it focused on the same dispute that divided the earlier panel.

Thus, it appears that the Court of Appeals is citing physical precedent cases more often, and as authoritative more often, than in earlier years. Its use of those cases generally reflects an appreciation that the cases are more authoritative for some issue than for others, depending on how critical the issue was then and is now.

The History of the "Physical Precedent" Idea under Rule 33(a)

The term "physical precedent" originally referred to prior opinions where a particular "point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."[2] The typical "physical precedent" case involved an appellate ruling on some substantive issue that might have been decided differently if the case were in a different procedural posture or if other positions had been taken by the parties. When the latent issues arise in later cases, the prior cases would not represent true precedents and would carry “little, if any, persuasive force."[3]

In 1965, the term acquired an additional meaning when the Court of Appeals adopted the predecessor of Rule 33(a),[4] causing decisions with limited concurrences to be treated as non-precedential. This was a semantic change, because before 1965 the term referred to cases in which issues were not considered, but after 1965, it has come to mean those in which issues were considered and decided, though with less than full agreement. It was also a significant jurisprudential departure, for before that change, decisions by two judges of a division, with one judge concurring specially or in the judgment only, were fully precedential as, in fact, they remained even after 1965.[5]

It appears that the real "guiding spirit" of the Rule was not the traditional "physical precedent" concept, but rather the old "full bench rule." The "full bench rule" of the Supreme Court originated in an 1858 statute[6] providing that a full-bench decision had the force of statutory law and could not be overruled or changed except by legislation, which was soon modified to provide that such a decision could be overruled or modified by a subsequent "full-bench."[7] This made unanimous decisions binding on all courts and extremely difficult to overrule or modify, though a majority could authoritatively distinguish them or regard language within them as dicta. Where there were conflicts among prior full-bench opinions, the oldest case would trump. By contrast, an appellate judgment fragmented by only partial concurrence was a "weaker" precedent than a unanimous opinion, and perhaps even no impediment at all to a subsequent opinion inclined to strike off in a different direction.[8]

When the Court of Appeals was created, its powers, practice, and procedure were tethered to those of the Supreme Court "so far as they can be made to apply,"[9] including the full bench rule.[10] In 1945, separate legislation provided that a whole court majority of five judges could overrule three judge panel decisions, but a unanimous decision of all judges could only be "overruled or materially modified" by the concurrence of all judges.[11] As the Court of Appeals expanded in 1961, 1996 and 1999, the General Assembly essentially retained this basic scheme. The requirement of a unanimous opinion by the whole court to overrule or modify a prior unanimous opinion by the whole court continued in force.[12]

In the meanwhile, however, the Constitution of 1945 stripped the General Assembly of any power it had to establish rules for the Supreme Court and placed the power in the Supreme Court.[13] After realizing that there was no longer a statutory basis for the full bench rule, the Supreme Court continued the rule as a matter of its own policy[14] until 1975, when it declared that "when a majority of this court determines that stability must give way to justice . . . , then justice prevails. The ‘full bench rule’ has been repealed."[15]

Arguments Against the Continuing Validity of the "Physical Precedent" Rule

Rule 33(a) may have constitutional problems. Article VI, Section V, Paragraph III provides that "[t]he decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents" (emphasis added). "[A] decision by a division of three judges, or by a majority of them, is a decision by the Court of Appeals of this state."[16] Two judges make up a quorum.[17] "Where there is express authority to the effect that two judges shall constitute a quorum of a division, no reason appears for holding that more than two judges, who concur in their opinions, are essential for the rendition of a valid judgment."[18] It is at least unclear that the Court of Appeals could constitutionally require more than a majority concurrence to constitute a binding precedent.

Rule 33(a) has some negative effects. A "physical precedent" under Rule 33 (a) would seem an unlikely candidate for review by the Supreme Court because it has no officially binding effect on any court. Yet, the absence of unanimity itself strongly indicates either that a point of law is unsettled or that its application in a given case is problematical. Either way, it marks the very sort of case which more likely *ought* to be scrutinized further. It should not be ignored because technically it has no precedential effect.

The issues that divided the court remain unsettled and even further fester and compound, all to the detriment of the private parties, the lower bench, and the bar which may continue to have to struggle with them, and all to the even greater expenditure of legal and other resources. It is after all the role of an appellate court to resolve issues, especially the tough ones, for the guidance of the lower courts and the public. Our system is not served by ducking the issues, which is the practical effect of Rule 33(a), and it is certainly not served when this power is given to a single judge.

On the other hand, there is nothing inherently or intolerably unreliable about a fragmented concurrence, as shown by the practice of the Court of Appeals before 1965 and the great multitude of American jurisdictions. It is anomalous that an even sharper disagreement, e.g., a narrow 4-3 split of the Court of Appeals or a 2-1 division of an 11th Circuit panel is precedential, but a fragmented agreement should be any less so. It is also anomalous that a single judge's dissent would not deprive a case of precedential value, but that a single judge's special or limited concurrence would. No statute currently in effect requires this result.

Many of the criticisms of the old "full bench rule" apply with like force to Rule 33(a). The rule was "apparently . . . not recognized or followed in the courts of any nation on earth which is sufficiently civilized to have a judicial system."[19] There were a number of adverse consequences from the rule: it tended to perpetuate error and to take the law further down misdirected paths, even when evolving circumstances exposed the folly. It restrained improvement of the judicial "product." It deflected the appellate courts from considering the underlying (or preferable) merits into an arid quest for the oldest and closest "full bench" precedent.[20]

Arguments For the Continuing Validity of the "Physical Precedent" Rule

Whatever its history, the physical-precedent rule is a valuable tool for an overburdened court. It is a counterbalance to institutional and caseload pressures that inhibit deliberation among the judges of the Georgia Court of Appeals. In an ideal world, every appellate decision would be the product of careful deliberation, not only within the chambers of the judge assigned primary responsibility for the case, but also among the judges on the panel. Appellate decisions derive more of their legitimacy from being the product of multi-judge deliberation than they derive from being the work of judges who "outrank" trial judges.

But the world in which the Georgia Court of Appeals operates is far from ideal. Despite the court's 1999 expansion, it can once again credibly claim to be the most overburdened appellate court in the nation.[21] Because the several appellate systems are too diverse to permit exact statistical comparisons, the situation is best adduced with an example: the single county containing Cleveland, Ohio is served by a District Court of Appeals with twelve judges – the same number serving on Georgia's statewide Court of Appeals.

Workload pressures demand adjustments. The adjustments that the Georgia Court of Appeals has undergone are not necessarily antithetical to qual-

ity. But those adjustments have meant less deliberation among the judges and more reliance upon the single judge assigned primary responsibility for each case. The Georgia Court of Appeals is possibly the only appellate court in the nation in which the judges do not routinely discuss their cases in person. Instead, they exchange written memos. The memos-only approach inhibits give-and-take among the judges.[22]

Another adjustment is the court's cadre of staff attorneys. The judges of the Court of Appeals are each assigned three staff attorneys, and four more staff attorneys rotate among the twelve judges. The staff attorneys are career professionals with excellent credentials; their average tenure on the appellate courts may exceed the judges'.

The consequence of these adjustments is a an appellate court where most deliberations in most cases occur within the assigned judge's chambers – where only one vote counts.

For most cases, such streamlined deliberations are probably sufficient. In many routine cases, there is an obvious correct result. The primary mission of an intermediate appellate court is not to make new law, but to decided routine cases.[23]

But even where the correct result is obvious, there can be important disagreements among the judges. A judge may perceive a proposed majority opinion to contain a misstatement of law[24] or to hold forth on matters not necessary to the decision.[25] The caseload of the Court of Appeals and the structures in place to accommodate that caseload combine to inhibit other members of the panel from weighing in with such concerns.

The physical-precedent rule – and the rule that enlists four additional judges when there a dissent[26] – provide an important counterbalance to those inhibitions. Those rules give the other two judges on the panel leverage.

Without the physical-precedent rule, it would be all to easy to simply roll over a single judge with reservations. As it is, when the outcome is agreed to but one judge has reservations about the proposed opinion, the panel has three options: they can deliberate further, achieve unanimity, and issue a precedential opinion; if the case is extraordinary, they can invite the other nine judges to participate;[27] or they can issue a physical-precedent opinion. Since, by definition, the physical-precedent rule applies to issues that do not affect the outcome of the case and since the court's mission as an intermediate appellate court is to decide cases in volume, physical precedent is often the best option.

It is true that the physical precedent rule can be problematic. It may sometimes be used precipitously. Sometimes judges concur specially without saying why.

Physical precedent cases do create dilemmas for the Supreme Court. When certiorari is sought from such a case, the Supreme Court must determine whether the intermediate court's disagreement represents an impasse after deliberation – and therefore a reason to grant the writ – or a decision not to decide – and therefore a reason to deny the writ.

But the physical-precedent rule enables the Court of Appeals to correctly decide particular cases without binding future courts to reasoning that was not essential to the result and that did not command the assent all the judges. The Supreme Court should not interfere with Court of Appeals Rule 33 (a)

See endnotes on pages 8-9.

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Notices will be distributed closer to the meeting time via email or mail

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*Membership lunches (w/speaker(s)
Separate leadership meetings (State Bar HQ)

Friday, February 14 - Leadership Meeting, Bar Headquarters
*Friday, March 14- Host Firm To Be Announced
*Friday, April 18 - Section Leadership Meeting,
State Bar Headquarters//***Time to be announced***
*Friday, May 1 - Bar Headquarters for Membership
State Bar Annual Meeting, Amelia Island, Fl, June 12-14, 2003

Section members are encouraged to submit items they believe would be of general interest to Section members. Please submit comments on this issue or contributions to future issues to ewasmuth@sgrlaw.com

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IMPORTANT Note To Members

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A note from the State Bar of Georgia

The State Bar of Georgia has just redesigned its Web site. The site has just been redesigned and refocused to provide quick and easy access to everything members and the public need to know about the State Bar. Members can check their CLE online, make changes to their membership information, order publications, search the online membership directory and obtain up-to-the-minute updates on Bar events and meetings. The Bar welcomes your comments and suggestions regarding our new look. Please e-mail us at webmaster@gabar.org.

[1]Jim Bonner contributed the sections on the history of the rule and arguments against its continuing validity. Chris McFadden contributed the section on arguments for the continuing validity of the rule. Charles Cork contributed the rest of the article.

[2]Webster v. Fall, 266 U.S. 507, 511 (1925), quoted in Albany Federal Savings and Loan Association v. Henderson, 198 Ga. 116, 134, 31 SE2d 20 (1944). See also Gordy Tire Co. v. Dayton Rubber Co., 216 Ga. 83, 89, 114 SE2d 529 (1960).

[3]Musgrove v. Georgia Railroad and Banking Co., 204 Ga. 139, 158, 49 SE2d 26 (1948). See, e.g., Spell v. State, 120 Ga.App. 398, 170 SE2d 701 (1969); Garland v. State, 110 Ga.App. 756, 140 SE2d 46 (1964).

[4]See Rule 29(c) of the Rules of the Court of Appeals, 111 Ga.App. 883, 895 (1965)

[5]See, e.g., the subsequent citations to State Highway Department v. Cobb Construction Co., 111 Ga.App. 822, 143 SE2d 500 (1965) (one judge concurring specially); Baldwin Processing Co. v. Georgia Power Co., 112 Ga. App. 92, 143 SE2d 761 (1965) (one judge concurring only in judgment), two of the last cases decided prior to the 1965 rule.

[6]Georgia Laws 1858, p. 74.

[7]§210 of the Code of 1863.

[8]See King v. State, 169 Ga. 15, 149 SE 650 (1929).

[9]Georgia Laws 1906, p. 24.

[10]See Calhoun v. Cawley, 104 Ga. 335, 30 SE 773 (1898); Corley v. City of Atlanta, 181 Ga. 381, 182 SE 177 (1935); State Highway Dept. v. Wilson, 98 Ga.App. 619, 106 SE2d 544 (1958); State Highway Dept. v. Blalock, 89 Ga.App. 630, 106 SE2d 552 (1958). See also Sylvania Electric Products v. Electrical Wholesalers, 198 Ga. 870, 876-78, 33 SE2d 5 (1945) (Duckworth, J., dissenting), adopted as the unanimous opinion of the Court in Rivers v. Cole Corp., 209 Ga. 406, 73 SE2d 196 (1952).

[11]Georgia Laws 1945, p. 232. This is now codified as OCGA 15-3-1 et seq.

[12]OCGA § 15-3-1(d); Georgia Laws 1961, p. 140; Georgia Laws 1996, p. 405; Georgia Laws 1999, p. 10.

[13]Article VI, Section II, Para. VII. Strangely, the Constitution of 1945 conferred no similar self-regulatory power upon the Court of Appeals.

[14]Ward v. Big Apple Supermarkets, 223 Ga. 756, 764, 158 SE2d 396 (1967). See also Atlanta Coca-Cola Co. v. Gates, 225 Ga. 824, 827 at 842-43 (1969) (Felton, J., dissenting).

[15]Hall v. Hopper, 234 Ga. 625, 632, 216 SE2d 839 (1975).

[16]Joseph v. State, 148 Ga. 166, 96 SE 229 (1918) (emphasis added).

[17]OCGA § 15-3-1(b).

[18]Fountain v. State, 149 Ga. 519, 522-23, 101 SE294 (1919). See also Green County v. Wright, 127 Ga. 150, 56 SE 288 (1906) ("If a quorum of the justices participate in the decision, the judgment is not void because of the failure of one of the justices to take part in the decision").

[19]D.M. Field and Lloyd Sutter, "The Price of Milk and the Supreme Court of Georgia," 19 Mercer L.Rev. 366, 368 (1968).

[20]For a brief glimpse of how constructive and enlightening such a quest could be, see Johnson v. Motor Contract Co., 186 Ga. 466, 469-70, 198 SE 59 (1938).

[21] See Court Statistics Project, State Court Caseload Statistics, 2001 (National Center for State Courts 2001) <http://www.ncsconline.org/D_Research/csp/2001_Files/2001_SCCS.html>.

[22] Justice Robert Benham, Remarks at a luncheon sponsored by the Appellate Practice Section, State Bar of Georgia (October 11, 2002). Justice Benham served on the Court of Appeals from 1984 through 1989.

[23] See Court Statistics Project, State Court Caseload Statistics, 1990 51 (National Center for State Courts 2001).

[24] Greene County v. North Shore Resort, L.L.C., 238 Ga.App. 236, 245, 517 S.E.2d 553, 560 (1999) (Pope, P.J., concurring specially).

[25] Smith v. Vencare, Inc., 238 Ga.App. 621, 632, 519 S.E.2d 735, 745 (1999) (Smith, J., concurring specially).

[26] O.C.G.A. § 15-3-1 (c) (1).

[27] O.C.G.A. § 15-3-1 (c) (2).