always Appealing-- Whose Division Is It Anyway?

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Whose Division Is It Anyway?

By Jonathan Collins

"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

In the Star Trek franchise, Starfleet Academy tested its cadets with an exercise called the "Kobayashi Maru" — a training simulation intentionally designed to be impossible to win.1 If I were designing a Kobayashi Maru simulation for aspiring appellate attorneys, it might go something like this: imagine presenting oral argument at Division One of the Court of Appeals and one of the judges interrupts your well-prepared introduction to inform you Division Two has just decided the same legal issue and adopted your opponent's reasoning.

Well, you can save your virtual reality headsets for now, because that scenario played out for real earlier this year in Hous. Auth. of King Cnty. v. Knight,2 a Division One case involving eviction notice requirements under the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act. Less than two minutes into argument, Judge Dwyer somberly told the appellant: "I'm sure, to your dismay, you realize yesterday that Judge Maxa filed an opinion in Division Two which appeared to hook, line, and sinker, adopt the position of [the other side] in this case."3

Judge Dwyer was referring to Pendleton Place, LLC v. Asentista,4 a published decision in a CARES Act case Division Two issued the day before. To make

matters worse, the Division Two panel in Asentista relied on Sherwood Auburn LLC v. Pinzon — a Division One case that Judge Dwyer had authored 13 months earlier.5

It seems like a recipe for certain defeat — another Washington court vindicates your opponent's legal theory on the eve of oral argument while relying on authority written by the same judge staring down at you. But it turned out this wasn't like the "Kobayashi Maru" scenario at all; far from it, in fact.

In an amusing twist, during argument Judge Dwyer suggested that Division Two had overextended Pinzon, expressing regret his opinion hadn't been more explicit: "I'm often criticized for writing too much. I wonder — did I find an occasion to write too little, since we're back here arguing about these things?"6 When Division One released its opinion in Knight, Judge Dwyer wrote — on behalf of a unanimous panel — that "we respectfully disagree with Division II's reasoning and decision in Asentista" even though that panel "relied on our decision in Pinzon."7

This uncommon situation serves as an important reminder about the structure of the Court of Appeals. Indeed, one might wonder: was Division Two required to follow Division One, as it did in Asentista? And can Division One really diverge from Division Two merely by noting its "respectful disagreement"? In other words, when — and under what circumstances — can the three divisions disagree with one another?

The Supreme Court addressed this question in 2018 when it decided In re Arnold, which rejected "any kind of 'horizontal stare decisis' between or among the divisions of the Court of Appeals," stating that while "one division of the Court of Appeals should give respectful consideration to the decisions of other divisions," ultimately each division is "not bound by the decision of another division."8

While other Washington courts had already endorsed this view,9 the result in Arnold was not necessarily a foregone conclusion. For example, some appellate panels suggested that they could "abrogate" a prior Court of Appeals decision only when it is "both incorrect and harmful" — essentially treating Court of Appeals precedent as the Supreme Court treats its own precedent.10

But both the statute and court rules empower the Supreme Court — and the Supreme Court alone — to resolve conflicting Court of Appeals decisions.11 It logically follows that the divisions cannot bind each other, as those rules would be pointless if "one division were required to defer to the decisions of another division."12

Not to mention that "horizontal stare decisis" between the different divisions creates a "first to the post" problem where the first division to decide an issue in one case establishes the law for the entire state; if that division gets it wrong, the error perpetuates unless the Supreme Court takes review.13 In contrast, allowing the divisions to produce conflicting decisions serves a "positive function by alerting the high court to areas of law that are unsettled or otherwise in need of review."14

While the Arnold Court focused its analysis on conflicts between different divisions, all three divisions have explicitly stated the same reasoning applies to different panels within the same division: "we are not even bound by decisions by different panels within our own division."15 Arguably, the logical conclusion of this rule — somewhat ironically — is that there is no reason for an appellate panel to treat intradivisonal authority (decisions from the same division) as more persuasive than interdivisional authority (decisions from other divisions).

In other words, if each appellate panel is never bound by another — irrespective of which division the panel sits in — then, consistent with the reasoning in Arnold, all Court of Appeals decisions have only "persuasive" value for any particular panel.16 And, under GR 14.1(a), that includes unpublished decisions, which "may be accorded such persuasive value as the court deems appropriate." As a consequence, once a Court of Appeals panel has addressed binding Supreme Court authority, everything else — published and unpublished decisions from all three divisions — is non-binding, and the panel can more or less assign persuasive weight as it sees fit.

So, how will an appellate panel weigh all of the various Court of Appeals authority available in a particular case?

Under a maximalist interpretation of Arnold, every appellate panel would begin each case essentially from scratch — relying only on Supreme Court authority and ignoring everything else as non-precedential. But I don't think this approach

is what the Supreme Court had in mind; instead, the Court encouraged appellate panels to “strive not to be in conflict with each other” and give “respectful consideration” to prior Court of Appeals decisions out of a concern for consistency.17 Still, it is not entirely clear what this means in practice — the Court seems to say that prior Court of Appeals decisions aren’t binding but that appellate panels should nevertheless avoid conflicting decisions without good reason.

Since Arnold, this dynamic has sometimes played out in interesting ways. In one case, Division One declined to follow a published decision from Division Three and instead followed its own unpublished decision on the same issue.18 In another case, Division Two declined to follow an unpublished decision from Division One and instead followed its own published authority; the Supreme Court then reversed, essentially aligning with the unpublished Division One decision that Division Two had rejected.19

Rather than consider what the courts say, it is more insightful to look at what they actually do. While an exhaustive empirical analysis is beyond the scope of this article, my review of post-Arnold Court of Appeals decisions reveals that much of the common wisdom remains true:

First, true “disagreement” with another appellate panel is rare. Most of the time, the non-binding nature of prior Court of Appeals decisions isn’t relevant because appellate panels tend to distinguish inapplicable authority on other grounds. In other words, an appellate panel is far more likely to hold that another decision is inapplicable due to different factual or procedural circumstances and thus there is no true conflict that would require invoking the independence acknowledged in Arnold. Cases where unavoidable disagreements over legal reasoning arise — such that the result might be different if the prior decision was binding — are rare.

Second, appellate panels tend to prefer intradivision authority. By my count, appellate panels have declined to follow interdivision authority on the grounds that it is non-binding — citing Arnold — 13 times since 2018.20 In that same time period, however, an appellate panel has chosen to disregard intradivision authority only three times;21 and, arguably, only twice — in one case, intervening Supreme Court authority altered the relevant legal analysis such that the earlier,

"conflicting" authority may have no longer been valid law anyway.22 This suggests that even though authority from any division is equally non-binding — and thus equally "persuasive" — in any particular case, appellate panels are still more willing to disagree with panels from other divisions than from their own.

Third, do not assume a panel will treat interdivision authority as inherently less persuasive. While appellate panels tend to prefer intradivision authority, that preference emerges only in edge cases; the three divisions still agree most of the time and thus they do not approach interdivision authority skeptically or view it as inherently less persuasive. Indeed, in many decisions, appellate panels seem to treat cases from other divisions more or less the same as their own, citing to both without much discussion. In some cases, a panel mentions the non-binding nature of interdivision authority only because a litigant urged the panel to disregard it; such requests to ignore interdivision authority are often unsuccessful.23

Fourth, unpublished decisions are disfavored, but panels will still consider them. GR 14.1 allows appellate courts to rely on unpublished decisions as persuasive authority, but it also states that appellate courts "should not" discuss unpublished authority "unless necessary for a reasoned decision."24 Consistent with this rule, appellate panels generally do not discuss unpublished authority unless a party specifically asks them to consider it.25 Nevertheless, appellate panels sometimes find relevant unpublished decisions helpful.26 Moreover, appellate panels will fairly consider unpublished authority when asked; they usually explain why an unpublished decision is distinguishable on the merits rather than simply dismissing it as non-precedential.27 I would not recommend using unpublished authority as the center of your argument, but — if used sparingly — there is little downside to citing an unpublished decision with particularly relevant facts or legal analysis.

Fifth, inviting an appellate panel to diverge from a prior decision under *Arnold* should be done with caution and only as a last resort. In Arnold, the Supreme Court explained that an appellate panel from one division cannot bind another because both the statute and court rules establish that only the Supreme Court will resolve conflicts between and among the Court of Appeals.28 For that same reason, asking an appellate panel to ignore an

unfavorable decision under Arnold may result in a pyrrhic victory — the appellate panel might agree with you and ignore the other decision, but that disagreement inherently acknowledges a conflict warranting Supreme Court review under RAP 13.4(b)(2). Thus, your priority should always be to distinguish unfavorable authority and avoid the appearance of a conflict requiring the appellate panel to invoke Arnold.

In conclusion, it's important to understand that Court of Appeals decisions are not binding on appellate panels, even those within the same division. In practice, however, this structure does not substantially alter best appellate practices because appellate panels strive to avoid conflict with the other divisions and rarely diverge from their own. You should not assume an appellate panel will simply ignore interdivision authority as "non-binding," and you should carefully consider whether you want to invite a decision expressly announcing an inter-panel conflict that might warrant further review.

Jonathan Collins has been an associate at Smith Goodfriend since 2019. He previously clerked for Judge Linda Lau in Division One and Chief Justice Mary Fairhurst of the Washington State Supreme Court. Jon can be reached at jon@washingtonappeals.com.

1 Kobayashi Maru, Wikipedia (2024), https://en.wikipedia.org/wiki/Kobayashi_Maru.

2 __ Wn. App. 2d __, 543 P.3d 891 (2024).

3 Wash. Court of Appeals oral argument, Hous. Auth. of King Cnty. v. Knight, No. 85031-8-I (Jan. 10, 2024), at 2 min., 11 sec. to 2 min. 29 sec., https://tvw.org/video/division-1-court-of-appeals-2024011245/?eventID=2024011245.

4 __ Wn. App. 2d __, 541 P.3d 397 (2024).

5 See Asentista, 541 P.3d at 402, ¶¶29-34, citing Sherwood Auburn LLC v. Pinzon, 24 Wn. App. 2d 664, 521 P.3d 212 (2022), rev. denied, 1 Wn.3d 1005 (2023).

6 Supra, n.3 at 14 min., 20 sec. to 14 min. 30 sec.

7 Knight, 543 P.3d at 902, ¶¶48-49.

8 In re Arnold, 190 Wn.2d 136, 147-54, ¶¶28 & 28, 410 P.3d 1133 (2018).

9 Grisby v. Herzog, 190 Wn. App. 786, 806-11, ¶¶36-43, 362 P.3d 763 (2015).

10 State v. Stalker, 152 Wn. App. 805, 811-12, ¶7, 219 P.3d 722 (2009), rev. denied, 168 Wn.2d 1043 (2010).

11 RCW 2.06.030(e); RAP 13.4(b)(2).

12 Arnold, 190 Wn.2d at 150, ¶30.

13 Mark DeForrest, In the Groove or in a Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 Gonz. L. Rev. 455, 504-05 (2013).

14 Id. at 505.

15 State v. Smith, 17 Wn. App. 2d 146, 152, ¶19, 484 P.3d 550, rev. denied, 198 Wn.2d 1005 (2021); Marriage of Snider and Stroud, 6 Wn. App. 2d 310, 315, ¶12, 430 P.3d 726 (2018); State v. Miller, No. 38969-3-III, 2024 WL 1319169, ¶¶18-19 (March 28, 2024).

16 See Arnold, 190 Wn.2d at 150-51, ¶33.

17 Arnold, 190 Wn.2d at 150-54, ¶¶33, 38 (quoted source omitted).

18 State v. J.H.-M., __ Wn. App. 2d __, ¶9, 538 P.3d 644 (2023).

19 Wolf v. State, 24 Wn. App. 2d 290, 308, n.9, 519 P.3d 608 (2022), rev'd, 2 Wn.3d 93, 534 P.3d 822 (2023).

20 See, e.g., Kiemle & Hagood Co. v. Daniels, 26 Wn. App. 2d 199, 218, ¶41, 528 P.3d 834 (2023).

21 Marriage of Kaufman, 17 Wn. App. 2d 497, 516, n.6, 485 P.3d 991 (2021); Miller, supra n.15; State v. Smith, 17 Wn. App. 2d 146, 152, ¶19, 484 P.3d 550 (2021).

22 See Smith, 17 Wn. App. 2d at 152-53, ¶20.

23 See Cahill v. Swedish Heath Servs., No. 82590-9-I, 2022 WL 16915855, *6, n.10 (Nov. 14, 2022) (unpublished) (rejecting respondent's request to disregard interdivision authority under Arnold).

24 GR 14.1(a), (c).

25 Ian Cairns, Always Appealing: Did the Sky Fall? A Retrospective on Allowing the Citation of Unpublished Decisions, King County Bar Bulletin (Jan. 2021), https://www.washingtonappeals.com/always-appealing-column.php.

26 See, supra n.22.

27 See, e.g., Bragg v. State, 28 Wn. App. 2d 497, 506-07, ¶¶18-21, 536 P.3d 1176 (2023) (comparing unpublished decision from Division Two to published decision from Division Three and applying the latter).

28 Arnold, 190 Wn.2d at 149-50, ¶¶28-31.