75th anniversary
McNees Wallace & Nurick LLC
Harrisburg, PA • Lancaster, PA • State College, PA • Hazleton, PA • Columbus, OH • Washington, DC
APPELLATE Advocate
SPRING 2010

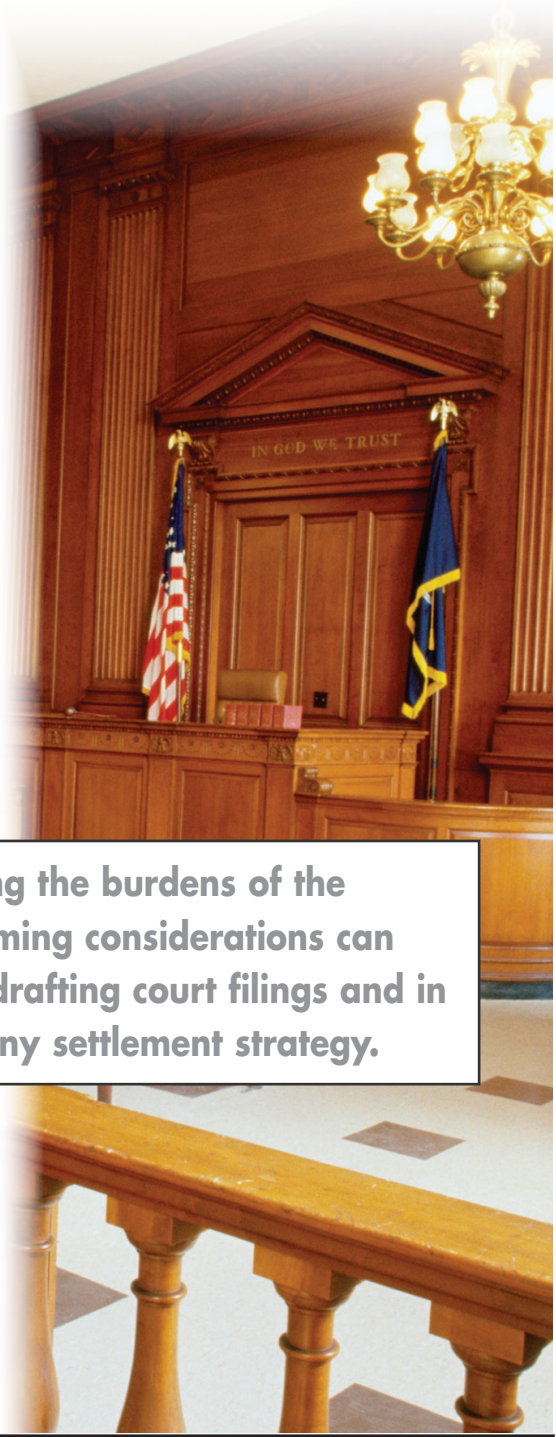
WHAT'S NEW IN THE PENNSYLVANIA APPELLATE COURTS?

By Helen Gemmill

Two years ago, we updated our readers regarding the many new and departing judges in the Pennsylvania appellate courts. With the November 2009 election, there have been even more changes. So, here's what's new in our Pennsylvania appellate courts, along with an update on the courts' workload.

Judges Joining The Bench And Leaving The Bench

The Pennsylvania Supreme Court now has a full complement of justices on the bench. The newest addition is Justice Joan Orie Melvin, who was elected last year. Justice Orie Melvin had previously served as a trial court judge in Allegheny County and was a judge for 10 years on the Superior Court. She replaced Justice Jane Cutler Greenspan, who had served an 18-month interim appointment and who had agreed not to run for election.



Understanding the burdens of the courts and timing considerations can be useful in drafting court filings and in developing any settlement strategy.

The Pennsylvania Superior Court, the intermediate appeal court that reviews most of the civil and criminal appeals from the county common pleas courts, has also seen changes in personnel. Four new judges were elected in November 2009: Anne Lazarus from Philadelphia, Sallie Mundy from Tioga County, Judith Olson from Pittsburgh and Paula Ott from Chester County. The Superior Court now has 14 commissioned judges and one vacancy

continued on page 2

WHAT'S NEW IN THE PENNSYLVANIA APPELLATE COURTS? continued from page 1

(resulting from the election of Justice Joan Orie Melvin to the Supreme Court). There are also seven senior judges who assist the Court with the case load. Interestingly, most of the commissioned judges on this Court are women (10 of 14), and half of the commissioned judges (7 of 14) have served on the Superior Court for less than three years.

In the Commonwealth Court, the intermediate appellate court that hears appeals involving state and local governments and regulatory agencies, has two new judges. Elected in November were Kevin Brobson from Harrisburg and Patricia McCullough from Pittsburgh. This Court also has a substantial number of women judges (4 of the 9 commissioned judges and 1 of the 5 senior judges).

The Courts' Workload

Clients are often surprised at the heavy volume of cases that the appellate courts handle and the length of time it takes for the courts to issue a decision. Understanding the burdens of the courts and timing considerations can be useful in drafting court filings and in developing any settlement strategy.

Most of the matters filed in the Supreme Court are petitions for allowance of appeal, which the Supreme Court reviews to decide whether it will even hear the case. In 2008 (the latest year for which full Supreme Court statistics are available), 2,151 petitions were filed, but the Supreme Court chose to allow only 110 cases to be heard. Moreover, of the appeals that are permitted to go forward each year, in most of those cases the Supreme Court upholds the intermediate appellate court's decision. Thus, the chance that a case will even be heard by the Supreme Court or that a lower court decision will be reversed is very slim.

The Superior Court is the workhorse of the appellate courts. The Superior Court has already published its 2009 statistics, reporting that 8,169 new appeals were filed last year. Approximately 40% of the new appeals in 2009 were civil cases and 60% were criminal cases The Superior Court resolved 8,321 appeals in 2009, but as of January 1, 2010, 6,661 appeals remained pending on its docket. On average, appeals were resolved in 301 days. The Superior Court issued 5,384 written opinions in 2009.

The Commonwealth Court saw 3,409 appeals filed in calendar year 2008 and 582 original jurisdiction cases (in which the Commonwealth Court acts as the trial court). The Commonwealth Court disposed of 3,856 cases in that same year. About 94% of this Court's cases were decided in less than 365 days, and 87% were decided in less than 290 days. The Commonwealth Court authored 1,205 opinions in 2008.

What Does This Information Mean For Your Appeal?

Appeals can be costly and time-consuming, so it is important to maximize the opportunities for success. Given the appellate courts' heavy workload, appellate judges may look more favorably upon arguments that are presented in concise, compelling briefs that quickly focus on the key issues. Knowing the backgrounds and preferences of the judges serving on the appellate courts can also help in tailoring arguments to catch the judge's attention and position the case for a prompt, favorable ruling. ■

Helen L. Gemmill practices in the firm's Real Estate and Appellate and Post-Trial Practice Groups.
hgemmill@mwn.com / 717.237.5273

SOME LESSONS FROM APPELLATE ARGUMENT

By Donald Kaufman

The presentation of argument on appeal is made first by written briefs. The contents of those briefs are governed by rules describing the ordering and content of each section, including a statement of facts based on the written record from the lower court, a concise statement of the issues to be addressed, and an argument section addressing each of these issues, with appropriate legal citations. The appellate court (whether state or federal) typically assigns a particular case to a panel of three judges. That panel then hears oral arguments on the numerous cases (sometimes 20 to 30) assigned to it, one after the other over the course of one or more consecutive days. Usually there are time limits for each attorney's presentation, and these may be strictly enforced. In the Third Circuit Court of Appeals, the attorney's lectern has a light system like a reverse drag race; a green light shows at the beginning of the 15-minute argument, a yellow light shows when there are two minutes left, and a red light shows when time is up.

THE APPELLATE COURT (WHETHER STATE OR FEDERAL) TYPICALLY ASSIGNS A PARTICULAR CASE TO A PANEL OF THREE JUDGES.

Oral argument is the first and only chance to speak directly to the appellate court, and the last chance to communicate with the court about your case. Unlike the written briefs, your argument need not follow any formal structure. Any of the Judges may ask questions or make observations at any time. The Judges might ask no questions, or one Judge may ask many questions, or all of the Judges may have questions and comments. The appellate attorney must be ready for any of these eventualities.

The appellate attorney should be well-prepared, should aim to focus on a few key points, should have an overarching reason why it is right and fair that his client prevail, should listen to the Judges and adjust the shape of the argument to their questions and concerns, and should speak to the Court in a respectful but conversational tone.

Be prepared. Particularly in appellate argument, the attorney should know the facts and holdings of each case that attorney has cited in his or her brief, as well as about the cases cited by the other parties. The attorney should be especially familiar with the key cases. It can be useful to bring to the lectern brief notes about each of the cases should the Judges inquire about a particular case. The attorney should expect the Judges to be well-prepared. That said, it is not unusual in oral argument for there to be no discussion of the facts of the cited cases, but when it occurs the attorney should be ready. When a Judge focuses on a particular cited case, the appellate attorney needs to be able to discuss its details. One advance clue may be the Court's notification of argument that tells the attorney who the Judges on the panel will be. The attorney should review the case law pertinent to the argument to see if any of the Judges had participated in any of those cases. For example, an appellate judge asked me during argument, "What about the dissent in the [ ] case?" Fortunately, I was able to respond, "You wrote that dissent, Your Honor…"

Key points and a theme. Oral argument is quick and unrecorded. The Judges may hear 20 to 30 arguments in a single day. There is a fleeting opportunity to make an impression. They have already read the briefs, and do not want you to read to them again. The plan for argument is a bit like a plan for battle; the plan often evaporates as soon as the argument (or battle) begins. For all of these reasons, it is best to have no more than three or four key points that you wish to convey during the argument. These should relate to a larger theme, and all point the Court toward finding in your favor because the outcome is both correct and fair.

continued on back page

Listen and adjust. The appellate attorney needs to respond to the Judge's questions both as a matter of deference to the Court and because the questions may tell the attorney what issues matter to the Court. While questions may be welcome because they tell the attorney where the Court is focused, a line of questioning may take valuable time and steer the argument in an unexpected direction. The trick is to use the questions as an opportunity to address the Court's concerns while weaving that line of thought back into the core of the argument. This is easier said than done. Sometimes, particularly where one has alternate arguments, the attorney may wish both to respond and to re-focus the argument on another point. For example, I represented the Appellant in a case where we had two completely separate reasons why we argued our appeal should be granted; one involved a negligence claim which turned on the economic loss rule, while the other involved a contract claim which turned on the proper application of third-party beneficiary law. Fortunately, we were the fourth case to be heard that morning, and I had the opportunity to observe the Judges question other attorneys. I observed that the presiding Judge began to ask questions almost immediately, and focused on the weak point in the attorney's argument. If the attorney wished to contest that point, he could use up his time in doing so. I had a co-Appellant whose attorney also was presenting argument, and the Court had split our argument time so that I went second and had seven minutes. I came to the lectern, introduced myself, and immediately the presiding Judge said to me, "How are you going to get around the economic loss rule?" This was the weaker of my two arguments, and I did not want to spend my precious time discussing it at any length. I responded, "With great difficulty Your Honor." The Judge smiled. My implied concession allowed me then to turn to the stronger argument regarding third-party beneficiary law, which was where I wanted to focus.

Converse with the Court. It is a good idea to bring some notes to the lectern, but the notes should never become a crutch. Do not write out an argument and read it (or memorize it); this probably annoys the Court, and does not permit you to listen and be flexible. So long as you know your case and your case law, the absence of notes permits and requires you to think and speak, rather than to recite. I like to bring to the lectern a single page of notes that has on it, bullet-points style, the three or four key points to be made, and no other detail. Usually, I write at the top of the page the word "SLOW," which reminds me not to speak too fast. I also may bring a brief summary of each of the cases cited, in the event that the Court inquires about a particular case, and I need to refresh my recollection. I think that if one brings a complete outline of the argument, or worse, the entire argument written out, the temptation to use it rather than just thinking on your feet makes the argument stilted. Instead, work hard to prepare, and then rely on your wits, and you will be able to speak to the Court in a manner which shows your grasp of the material and your confidence in your position.

Oral argument is challenging and, when it goes well, exhilarating. ■

Donald B. Kaufman practices in the firm's Appellate and Post Trial, Asset Planning and Federal Taxation, Food Industry and Litigation groups.
dkaufman@mwn.com/ 717.237.5373

McNees Appellate & Post-Trial Practice Group

Debra P. Fourlas, Co-Chair
717.237.5201/dfourlas@mwn.com

Kandice J. Giurintano, Co-Chair
717.237.5452/kgiurintano@mwn.com

Devin J. Chwastyk
717.237.5482/dchwastyk@mwn.com

James P. DeAngelo
717.237.5470/jdeangelo@mwn.com

Tony D. Dick
614.719.2843 / tdick@mwncmh.com

Harvey Freedenberg
717.237.5267/hfreedenberg@mwn.com

Helen L. Gemmill
717.237.5273/hgemmill@mwn.com

Donald B. Kaufman
717.237.5373/dkaufman@mwn.com