

On the Effective Use of Resources in Pennsylvania

by Stephen J. McEwen, Jr.

The Pennsylvania Superior Court is a statewide intermediate appellate forum comprised of fifteen commissioned judges and, during 1998, eight senior judges (judges who had reached the mandatory retirement age of seventy years). It was one of thirty-five state intermediate appellate courts recently reviewed and found to be the fifth most expeditious court based on cases resolved in 1993.¹ Seventy-five percent of the cases were resolved within 370 days after the filing of the notice of appeal. In 1997, the record of the court would have been considerably better, as the appeal time was reduced from 370 days to 281 days, a time frame surpassing the guidelines of the American Bar Association's (ABA) Judicial Division, which recommends that seventy-five percent of the cases be resolved within 290 days.

It is somewhat difficult to be modest about such performance, because the taming of a roaring inventory in timely fashion is an accomplishment that engenders considerable pride. While it is difficult to identify the factors and procedures that have enabled the court to attain this enviable record, one reason is certain, undisputed, and obvious, namely, the firm dedication and intense effort of the judges of this court to excel.

Yet the drive to excel is surely a shared characteristic to be found in appellate courts everywhere. Thus, one must search for more tangible features of our operations to account for our timeliness. Three features of our court that come to mind are: (1) the assignment of four "elbow clerks" to each judge, two of whom may pursue the career of a government attorney, (2) a central legal staff, and (3) the yeoman service of senior judges.

Legal staff assigned to individual judges. The assistance of four "elbow clerks" assigned to each judge is, in the view of the members of this court, instrumental in enabling the judges to provide an average of 250 written decisions per year. It was in 1980 that the volume of appeals prompted the Legislature and Governor of Pennsylvania to expand the membership of this court from seven to fifteen commissioned judges. The three elbow clerks who served those fifteen judges and a few senior judges stemmed the tide for a bit, but the number of appeals continued to soar, as did the annual production of written decisions of each judge: 121 in 1982, 190 in 1987, 209 in 1992, and 248 in 1997. As a result, during this period, the

allotment of three clerks was increased to four.

The effort to compress the maximum productivity from resources is continuous, as is demonstrated by a personnel measure adopted in 1983 that authorized each judge to designate one clerk, after three years' service, a Judicial Clerk III. That personnel change removed a relatively low earning cap and permitted that clerk to pursue the path and higher compensation of a state government attorney. That permanent clerk can serve as supervisor of the staff of clerks, as well as a mentor for the new clerks who periodically arrive, and affords a certain continuity in the operations of each chamber's staff. The benefits to the court of a career elbow clerk have been such that each judge was authorized in 1996 to designate a second of the four clerks as a career clerk, so that each chambers now has two career clerks and two other clerks who, for the most part, serve but a year or two.

The observation is sometimes made that the administrative responsibility posed by the presence of four clerks significantly reduces the time a judge is able to devote to decision making. A further occasional observation is that the scrutiny and revision of the work of four clerks render the judge an editor and not an author. Those observations are most often the suggestions of a judge in another state court in which fewer than 200 cases per year are assigned to him or her for written decision, not to mention the scrutiny of an additional 500 cases to determine whether to join or to write in concurrence or dissent.

Surely there is immeasurable fulfillment to be found in a chambers where a judge, with the aid of but a single clerk, or two, carves a niche in jurisprudential halls by crafting all of his or her own opinions. So idyllic a chambers triggers recollection of the America of Norman Rockwell - and the observation that even if the America of Rockwell ever was, it now isn't. The fact is that only those appellate courts able to control their volume and inventory, namely, allocatur courts or courts that exercise discretion and accept appeals upon petition, are able to control their jurisprudential destiny.

Those appellate courts to which appeals are taken as a matter of right are challenged by an unrelenting increase in the number of those appeals and the need to provide written decisions in resolving them. Thus, personnel is a critical factor. If the legislature does not enlarge the membership of those

Footnotes

1. See Dorothy Toth Beasley, et al., *Time on Appeal in State Intermediate Appellate Courts*, JUDGES' J., Summer 1998, at 12, 14 (ranking Pennsylvania's intermediate appellate

court fifth among thirty intermediate appellate courts studied with both civil and criminal jurisdiction).

appellate courts (and it would require a separate article to address the sound jurisprudential reasons for refraining from such expansion, not to mention taxpayer concerns), then the current complement of judges inevitably requires more parajudicial assistance, specifically, a larger staff of elbow clerks and a larger central legal staff.

Pooled legal staff. The Central Legal Staff (CLS) is comprised of sixteen attorneys with responsibilities in two broad categories: individual appeals and educational projects. An adequate summary of the duties of CLS would require an extended article, but a certain reflection may be gleaned from this overview:

- Individual appeal work: docketing statement review, motions, conflict clearance, CLS writing program, and case management.
- Educational projects: new clerk seminars, continuing legal education classes, and legal research/position papers.

Because the Central Legal Staff processes essentially all of the miscellaneous matters requiring resolution by the court, the four elbow clerks are free to devote essentially all of their time to assisting their judge with the preparation of opinions and memoranda of decision.

Though wary that it is too obvious to merit mention, may I suggest that the selection of the CLS Director is a critical determination. The duties of the position require an exceptional research ability, as well as a skill at supervision of lawyers. Requirements also include the need to display assurance, as well as deference, in the required frequent contact with judges, and, as well, ideally, an instinct for searching in other jurisdictions, and even beyond, for methods to enhance the work product and process. Thus, while a fine intellect is a basic prerequisite, so is a need for particular personal skills.

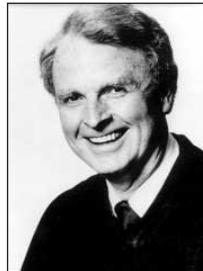
Roles of Senior Judges. Observers of the Pennsylvania Superior Court, including judges from other states, instantly focus upon the figure of almost 250 written decisions per judge, complemented, of course, by a further 500 studied decisions for joinder or concurrence or dissent. So fixed is the focus on the individual performance that the observers tend to overlook the total number of appeals decided by this court, most recently 4,981 in 1996 and 4,968 in 1997. Basic arithmetic demonstrates that our complement of fifteen commissioned judges could not have produced so many written decisions, because 250 cases per commissioned judge equates only to 3,750 written decisions. It is, therefore, evident that only

the continuing service of full-time senior judges has enabled this court to rise to the requirement of written decisions in almost 5,000 cases.

Mandatory retirement age for a judge in Pennsylvania is seventy years. A judge who has been elected to the Superior Court and completed at least ten years' service is eligible to become a senior judge. All eligible Superior Court judges since 1980 have continued to serve, and have done so on a full-time basis, maintaining a full chambers staff. The compensation of senior judges is a fixed per diem amount, but the per diem payments cease when the total payments in a year, added to the pension that year, reach the compensation level of a commissioned judge. Hence, senior judges sometimes serve without compensation for varying periods of time.

The efficacy of the senior judges' efforts is demonstrated by the fact that, during a recent year, senior judges constituted twenty-five percent of the membership of the court, but they were responsible for twenty-eight percent of its decisions. And, of course, the commissioned judges welcome and are grateful for both the efforts of and opportunity for continuing association with such venerable jurists.

And so the Pennsylvania Superior Court opines.



Judge Stephen J. McEwen, Jr. is the President Judge of the Pennsylvania Superior Court, the intermediate appellate court in Pennsylvania. He has served on that court since 1981 and has been its presiding judge since 1996. A graduate of St. Joseph's College (A.B.), the University of Pennsylvania Law School (LL.B.), and the University of Virginia Law School Graduate Program for Judges (LL.M.), Judge McEwen was a trial lawyer, professor of trial advocacy at Villanova University Law School, twice elected District Attorney of Delaware County, and General Counsel for the Pennsylvania District Attorneys Association.