A Message from our Co-Chair …

Make A Big Impact In Virtually No Time

by Charles W. Craven

The roster for our Post-Trial and Appellate Practice Committee lists more than 100 members. However, not every member contributes to the operations of the committee. Every member is, of course, very busy with professional and personal pursuits. There is not enough time, is the common rationale. But, the fact is that there is enough time for each member who is not currently active to make a big impact in virtually no time.

The average year provides each of us with 8,760 hours (24 x 365 = 8,760). Devoting an average of one hour per month to the operations of the committee would, in fact, consume a very small fraction of those hours, about 0.14% (12 ÷ 8,760 = 0.0013698).

Devoting at least 0.14% of one’s time to the advancement of our committee’s operations is, in fact, not asking too much. On the other hand, given the economies of scale, that relatively meager allocation of time can, in fact, yield significant impact. A contribution of 12 hours by 100 members would obviously provide 1,200 hours annually to the advancement of our committee’s operations.

What can one do to be an active member and to make a big impact in virtually no time? The opportunities are many:

· join and become active in one of our subcommittees (listed on page 3);
· write or simply submit an existing article, case comment, commentary, or practical tips piece for publication in our newsletter;
· attend committee meetings;
· attend committee-sponsored CLE seminars;
· become a speaker at a seminar;

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A Message from Co-Chair
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- propose ideas for seminar topics;
- propose ideas for committee operations;
- participate in “Lunch and Learn” programs;
- enlist new members.

With the contribution of a mere fraction of time, each and every member of our committee can be proud to be an active member of a dynamic organization devoted to the improvement of post-trial and appellate practice and to the interrelationships of the bench, the bar, and the public. Why not make at least the minimal contribution of a mere 0.14% of your time?

Charles W. Craven is a partner in the Philadelphia office of Marshall, Dennehy, Warner, Coleman & Goggin, where he specializes in state and federal post-trial appellate practice. Mr. Craven is also co-chair of the Post-Trial and Appellate Practice Committee.

Recent Appellate Practice Decisions

by Timothy L. Clawges, Esquire

The Superior Court has issued three noteworthy opinions for appellate practitioners. They are:

In Com. v. Antonio Otero, 2004 PaSuper. 390 (October 8, 2004), a panel of the Superior Court found issues waived for failure to timely file a Rule 1925(b) statement of matters complained of on appeal though appellant filed a timely motion for extension of time in which to file the statement, which was denied.

In Kensey v. Kensey, 2004 Pa.Super. 441 (November 23, 2004), a panel of the Superior Court found an immediate appeal cannot be taken from an order finding an antenuptial agreement when economic claims remain outstanding and no divorce decree entered.

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Mark Your Calendars

May 4-6, 2005  
PBA Annual Meeting,  
Pittsburgh Hilton

June 10, 2005  
Committee/Section Day,  
Harrisburg Holiday Inn

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Everyone wants to write a good brief, but there is no feedback from the audience, *i.e.* the court, to let you know when you have done so. There is of course the opinion, but not much can be gleaned from that, and most of us would rather write a bad brief and win than a good one and lose. So we are left with the appellate rules, seminars, guides to citation, and anecdotal evidence, regarding what works. What is usually left out of these forms of literary guidance is simple but is something about which we need to remind ourselves: good brief writing is just a form of good writing.

They don’t teach you how to be a good writer in law school, at least when I was there, except for the soporific mechanisms of citation format. They probably didn’t teach this in your undergraduate political science or history courses either. Books are written about how to write, but lawyers by and large don’t read them, and I’m no exception. I’ve never heard a judge cite one. I have been writing appellate briefs, mostly in criminal law, but also in workers’ compensation and social security disability cases for more than 20 years. I also write Master’s reports in divorce cases.

My beliefs about writing evolved from the experience of doing it, reading my opponents’ briefs, but mostly from just general reading. You can’t write unless you read. It doesn’t matter whether you read fiction or non-fiction, because there are common elements that mark the best of each:

- They tell an interesting story.
- You care about the people involved.
- There is some theme of plot or character that flows throughout.
- You hope for (or fear) certain endings.

While I acknowledge the challenge of converting, say, a workers’ compensation subrogation claim, a tax case, a summary license suspension, or a child support appeal into an interesting story with fascinating characters you make “come alive” for an enthusiastic and eager appellate audience, I maintain that you need to recognize and accept the challenge of doing so. You can almost always find some shred of human interest, some link between what you are doing and a larger social or legal concern, to permit you to address the court in a way that makes it feel there is an important issue at stake in your case.

Usually, the party that gets to define the issue has an advantage. Your job is to define it so as to engage the reader.

In short, you need to grab the attention of a jaded reader. How you do this is going to depend on whatever juice you can wring out of the dry or dead facts of your case. This is case-specific. There are certain things to be avoided. They are the boredom-inducing, eyes-glazing-over hallmarks of much traditional legal writing, such as: using classifications instead of real names (appellant/appellee; petitioner/respondent) unless use of real names would run afoul of some rule; use of jargon, including the usual suspects, “subsequent” for after; “prior” for before; “necessary prerequisite” (a redundancy); and “irregardless” which is simply not a word.

Usually, short sentences are better. They are easier for you to write and for the reader to understand. They also lend themselves to oral argument. Brevity is a virtue. If the sentence you just wrote does not advance the argument, delete it. A few metaphors may be needed, to connect your facts to something people care about, but don’t overdo it. Pathos is, “a quality arousing feelings of pity, sympathy, tenderness or sorrow”, Webster’s II New College Dictionary. Most of our clients could use a little pathos. There is a risk of writing to elicit such tender feelings from the court. Excessive pathos is called bathos.

I’ve said brief writing is like other writings, but there are differences. Irony is probably not productive, and sarcasm never is. Humor is most likely out as well. You can’t flatter the audience, other than using the usual honorifics. You can’t insult the audience. You can’t sound arrogant, but you can sound educated. In most briefs, I allow myself at least one line where I use a word, quote or phrase to let the court know that there is a larger world out there to which this case is connected. It may not win the case, and may not even raise a great legal point, but in some way it communicates the seriousness of my client’s purpose. Courts like serious issues, and I imagine, want to believe that their work also has a serious purpose. You can help them become engaged in your case by applying general concepts of good writing.

Recent Appellate Practice Decisions
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In *King v. Stefanelli*, 2004 Pa.Super. 438 (November 22, 2004), a panel of the Superior Court found issues waived for failure to comply with rules of appellate procedure. It says claims raised as “sub issues” in the argument portion of the brief but not presented in the statement of questions are waived. It also found an issue waived for failure to include an argument.
Panelists:
Hon. Ronald D. Castille, Supreme Court of Pennsylvania
Hon. J. Michael Eakin, Supreme Court of Pennsylvania
President Judge Joseph A. Del Sole, Superior Court of Pennsylvania
Hon. Correale F. Stevens, Superior Court of Pennsylvania
Hon. Maureen Lally-Green, Superior Court of Pennsylvania
President Judge James Gardner Colins, Commonwealth Court of Pennsylvania
Hon. Robert A. Graci and Charles W. Craven, Esq.
Co-Chairs, Post-Trial and Appellate Practice Committee


**Tips from the Bench on Avoiding the Pitfalls of Post-Trial and Appellate Practice**

9:30 a.m.-9:40 a.m. Introductory Remarks
Presented by: Hon. Robert A. Graci and Charles W. Craven, Esq., Co-Chairs, Post-Trial and Appellate Practice Committee

9:40 a.m.-10:00 a.m. The Rules of Governing Post-Trial and Appellate Procedure: from the nuts and bolts to recent pronouncements of the appellate courts on appellate practice.
Presented by: President Judge Joseph A. Del Sole, Superior Court of Pennsylvania

10:00 a.m.-10:20 a.m. The Record: how to make a good record; how to easily appear clueless or lose your appealable issue; making sure that the record from the lower court is complete; what should and should not be included in the reproduced record.
Presented by: Hon. Correale F. Stevens, Superior Court of Pennsylvania

10:20 a.m.-10:35 a.m. The Variances, Nuances, and Importance of the Appellate Courts’ Standards and Scopes of Review.
Presented by: President Judge James Gardner Colins, Commonwealth Court of Pennsylvania

10:30 a.m.-10:45 a.m. Break

10:45 a.m.-11:25 a.m. Post-Trial and Appellate Written Advocacy: including how to argue persuasively in post-trial motions and appeals, and Post-Trial and Appellate Oral Advocacy, including the courts’ protocols and procedures, the “do’s and don’ts” of effective oral advocacy, and good manners.
Presented by: Hon. J. Michael Eakin, Supreme Court of Pennsylvania
Hon. Maureen Lally-Green, Superior Court of Pennsylvania

11:25 a.m.-11:45 a.m. The Role of the Lawyer in the Development of the Law.
Presented by: Hon. Ronald D. Castille, Supreme Court of Pennsylvania
APPELLATE BRIEF WRITING: THE BASICS AND BEYOND

Co-sponsored by PBI and the PBA’s Post-Trial and Appellate Practice Committee, this three-credit CLE seminar will provide practical suggestions on the development of effective appellate briefs. The course will focus on the roles, requirements, and objectives of the Brief for the Appellant, the Brief for the Appellee, the Reply Brief for the Appellant, and the Brief for the Amicus Curiae. Consideration will be given to the selection and framing of issues, the influence of the standard and scope of review, citations to the record and to cases, accuracy, brevity, conciseness, and other qualities of effective appellate briefs.

Lunch service will begin at 11:45 a.m. The seminar program will run from 12:30 p.m. to 3:45 p.m.

PITTSBURGH
TUESDAY, MARCH 8, 2005

General Points: Hon. Maureen Lally-Green, Superior Court of Pennsylvania
Brief for Appellant: Kemal Mericli, Esq.
Brief for Appellee: John Knorr, Esq.
Reply Brief: Bryan Neft, Esq.
Amicus Brief: Norma Chase, Esq.
Commentators: Hon. Joan Orie Melvin, Superior Court of Pennsylvania
              Hon. Mary Jane Bowes, Superior Court of Pennsylvania

MECHANICSBURG
WEDNESDAY, MARCH 9, 2005

General Points: Hon. Robert Simpson, Jr., Commonwealth Court of Pennsylvania
Brief for Appellant: Alan Warshaw, Esq.
Brief for Appellee: David R. Fine, Esq.
Reply Brief: James Cawley, Esq.
Amicus Brief: Doris Leisch, Esq.

PHILADELPHIA
WEDNESDAY, MARCH 16, 2005

General Points: Nancy Winkelman, Esq.
Brief for Appellant: James Sargent, Esq.
Brief for Appellee: Kim Kocher, Esq.
Amicus Brief: Commissioner Robert Krebs, Workers’ Compensation Appeal Board
Commentators: Hon. Susan Gantman, Superior Court of Pennsylvania
              Hon. Renee Cohn Jubelirer, Commonwealth Court of Pennsylvania
Your PBA Listserv

What is a listserv?
A listserv is an electronic mailing list that allows subscribers to exchange information with each other simultaneously. Joining a listserv is like having a live conversation with a group, only all communication is by e-mail. When you subscribe to a listserv, you are able to e-mail all listserv members via just one e-mail address.

To subscribe to the Post-Trial and Appellate Practice Committee listserv, complete the form on the front page of the PBA Web site (www.pabar.org). Once subscribed to the listserv you will get the following confirmation message:

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To send a message to members of the listserv, address your e-mail to posttrial@list.pabar.org.

To reply only to the sender, hit “Reply,” and type your personal reply to the sender. This response will only go to the sender, not to the entire listserv membership. You can manually add other recipients outside of the sender or the membership.

To reply to the entire listserv membership, hit “Reply to All,” and type your response in the message body. This response will go to the sender and also to the entire listserv membership.

IMPORTANT: When you reply to the message, make sure that the listserv name is included either in the “to” or “cc” fields. If you see the listserv name with “bounce” included in the name, remove that address. The “bounce” address is a black hole. You may have to manually add the listserv address to one of the address fields in order for your reply to make it to the members of that list.

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