PBA APPELLATE ADVOCACY COMMITTEE
SEPTEMBER 16, 2020

I. Introduction and Welcome

Karl Myers called the meeting to order and welcomed Committee members. Attendance was taken through members’ identification on Zoom. See below for the roll call.

II. Adoption of Minutes

Karl opened the floor to comments regarding the minutes of the previous meeting. There were no comments. Karl opened the floor for a motion to approve the minutes. Dara DeCourcy so moved, the motion was seconded, and the minutes were approved by unanimous voice vote without modification.

III. Financial Report

Jill Beck presented the financial report. There has been no change in available cash since the last report. Karl added that the Committee is required to submit a budget request for the upcoming year, although it is hard to forecast next year’s expenditures at this point due to continuing uncertainty regarding COVID. Accordingly, the Committee submitted a request for the same amount that was allotted this year, i.e., $1700. Although the Committee will probably not need that full amount, we wanted to request it in case it is possible to resume in-person meetings next year. Having the funds available will allow us to sponsor or co-sponsor such events. For instance, the Commonwealth Court is still celebrating its 50th anniversary, so there may be an opportunity to co-sponsor functions with the Commonwealth Court Historical Society, as well as the judicial conference we have proposed, if the Supreme Court acts on it. We are awaiting a decision on our request. Karl opened the floor to questions. There were none.

IV. Subcommittee Reports

A. Education and Conference Subcommittee

1. Recap of August 27 CLE

Jill Beck reported that the August 27 CLE was successful. The panelists included Justice Donohue, Judge Wojcik, and Judge Nichols. They presented a general overview of virtual advocacy as well as specific tips and tricks. There were a lot of questions, and it appeared that the attendees were interested in continued virtual advocacy in the future, although the sense from the panelists was that it was unlikely to continue indefinitely.

Dara DeCourcy agreed that the CLE was successful and noted that attendance was very strong. Karl Myers and Pam Kance agreed. Pam noted that access to a webcast of the CLE is available online. Karl thanked Dara and Jill for organizing the program on short notice and
putting together a very strong program. Karl noted that it reflects well on the Committee, and that PBA President Schwager is impressed with what we are doing.

2. Upcoming CLE

Karl Myers opened a discussion about the Committee’s potential upcoming CLE, which was originally intended to provide a retrospective about COVID-related litigation.

In fact, it turns out that COVID litigation is still continuing, as illustrated by Monday’s decision in federal court striking down COVID-related orders in Pennsylvania. Richard Klein noted that unless legislative action is taken, there will likely be numerous lawsuits that will eventually be litigated in the appellate courts.

Carl Solano reported that the Statutory Law Committee is already planning a program having to do with pandemic-related litigation, scheduled to occur later this year, possibly in connection with the Philadelphia Bar Association bench-bar conference. Karl requested that Pam provide him the contact information for the leaders of that committee to explore opportunities for partnership.

Virginia McMichael noted that there will likely be an increase in bankruptcy filings due to the pandemic.

Karl commented that we cannot wait until the pandemic is completely over to have the CLE. Our concept is to focus the CLE on governmental litigation. It is possible that attorneys who are involved in active litigation might be reluctant to participate as panelists. Karl noted that we may also want to consider having the panelists discuss election-related litigation. Perhaps they would be willing to do so after those election related issues are resolved.

B. Website

Dara DeCourcy presented the report for the website subcommittee. The website has been updated to include a description of the August CLE program as well as the materials for that program (although not in the exact form released by PBI). The website has also been updated to include the courts’ protocols under the “Resources” section. The “Meetings and Publications” section has been updated to include an article authored by Karl Myers entitled “Appeals in the time of COVID-19.” Karl thanked Dara for the report and for keeping the website updated.

C. Rules & Court Technology

Karl introduced Carl Solano as the new chair of the rules and court technology subcommittee, taking over from Scot Withers. Carl reported for the subcommittee.

First, there are two proposed rules, which were already circulated to the Committee, for which the comment period expires on October 2. One proposed rule clarifies that the courts’ websites indicate the number of copies to submit for various filings. The other proposed rule encourages any party intending to assert waiver in a case in which an allocatur petition has been filed to submit an answer to the allocatur petition stating that. The Supreme Court has already encouraged that practice in its opinions, but Justice Donohue proposed in an opinion last year
that the rules mandate filing an answer when waiver is an issue. However, the Rules Committee
is not proposing that the rules be amended to make this a mandatory practice. The Rules
Committee’s proposal includes an interesting discussion of waiver issues.

Second, the set of rule changes relating to petitions for review and other matters went into
effect early last month. This is the most significant set of amendments to the rules in several
decades. There are 99 pages of changes to the rules dealing with issues including how to seek
interlocutory review when the trial court has refused to certify an order for appeal. These are
rules that the Rules Committee has been working on for several years. Carl encouraged members
to familiarize themselves with the amendments and suggested they may be an appropriate topic
for a CLE.

Third, the Supreme Court issued an order on September 15 amending its policy on public
access to case records. It reminded practitioners that the Rules of Professional Conduct require
them to comply with the public access policy.

Karl Myers commented that the amendment to the public records policy provides that an
electronic certification of compliance with the public access policy, i.e., through the filing
system, is sufficient without a separate certification in the filing itself.

Judge Bowes asked Carl his thoughts on the amendments to Chapters 13, 15, and 16 of
the Rules, which she thinks help clarify practice. Carl agreed that they do help and noted that the
distinction between original and appellate petitions for review is still somewhat unclear. It may
be possible to further clarify the rules through additional amendment.

Norma Chase noted that on PACFile, the procedure for indicating the confidentiality
status of a document is not well labeled. Karl noted that enforcement of the certification
requirement is inconsistent in the Courts of Common Pleas.

Phil Yoon noted that the Superior Court is paying close attention to whether proper notice
of orders has been given under Rule of Civil Procedure 236, as indicated in its recent decision in
*Carr v. Michuck*. Accordingly, if a Rule 236 notice is not issued, the Court may deem the order
to not be appealable. It is therefore important to ensure that the notice is reflected on the docket.

**D. Appellate Practice Specialty Certification**

Althea Bennett was not present to report for the appellate practice specialty certification
subcommittee.

**V. Open Floor**

Karl Myers opened the floor to general comments.

Jill Beck explained that each committee of the PBA now has a diversity and inclusion
representative, and she is serving that role for the Committee. She reported that there are two
upcoming diversity programs through the PBA. The first one is on September 23 at 4:00. It is a
continuation of the conversation that took place a couple months ago on racism and reform. The
other is the diversity summit, which will be on October 7. Jill asked Pam to send flyers to the mailing list in case anybody is interested.

Bill Cluck noted that in-person hearings and trials are resuming in the Middle District of Pennsylvania. He has a Commonwealth Court hearing scheduled for mid-October. He asked whether it is possible to request that Commonwealth Court hold hearings in person, particularly when there will be multiple witnesses, due to the difficulty in communicating with witnesses virtually.

Judge Bowes noted that the appellate courts have instructions on their websites on how to use the WebEx platform for arguments and hearings. Her understanding is that the platform allows attorneys and clients to conduct a practice session that nobody else can view so that they can engage in confidential communication with each other. Bill noted that his client is in Perry County with no access to broadband.

Karl explained that for the Committee to take a position on the issue would likely require PBA approval. By that time, at least one or two months would have passed. Based on the previous CLE and other indications, courts seem to be on the verge of resuming in-person proceedings – if not immediately, then likely by January. Until then, the best approach is probably to apply for relief in an individual case.

Bill asked whether continued virtual arguments are because of the Governor’s order or because of the Supreme Court’s orders. Karl responded that although the Supreme Court has technically lifted the judicial emergency, it left to the discretion of each of the courts whether to proceed virtually or in person, and the Commonwealth Court has elected to continue with virtual arguments for now. Rob Byer noted that Commonwealth Court issued a notice to litigants with cases on the October list asking counsel to indicate whether they preferred in-person or virtual argument. Robert Graci noted that he was at the Pennsylvania Judicial Center two weeks ago. The facility is not closed, but an appointment is required to enter it. Phil Yoon explained that is necessary to ensure there are not too many people in the building.

Karl suggested that judges vary in their proceedings, and an application in a particular case is probably a better approach than the Committee taking a blanket position.

Phil noted that at the last meeting, he had reported that the Superior Court was considering conducting a webinar on virtual arguments. It is currently planning to have the webinar in early to late October. Information will be sent to the Committee. It will be free, not a CLE.

Robert Graci commended Judge Bowes for her article in the September/October Pennsylvania Lawyer. Dara DeCourcy noted that we should post it to the website.

Luz Denise, a new member, introduced herself and indicated her desire to do more appellate work. Karl welcomed her to the Committee.
VI. Adjournment.

Karl advised that the Committee will meet again on PBA Committee/Section Day, November 19, time to be announced.

The meeting was adjourned at 12:54 p.m.

Roll Call:

1. Jill Beck
2. Hon. Mary Jane Bowes
3. Robert Byer
4. Norma Chase
5. Bill Cluck
6. Dara DeCourcy
7. Dan Forrest
8. Robert Graci
9. Pam Kance
10. Richard Klein
11. Virginia McMichael
12. Jean Mosites
13. Karl Myers
14. Luz Denise Negron-Bennett
15. Lisa Rau
16. David Robbins
17. Jim Sargent
18. Dan Siegel
19. Carl Solano
20. Andrew Sperl
21. Saxton Stump
22. Pam Van Blunk
23. Tony Vetrano
24. Stacy Wallace
25. Thomas Wilkinson
26. Phil Yoon