



2000

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### Recommended Citation

Stephen J. McEwen, *TV or Not TV: The Telecast of Appellate Arguments in Pennsylvania*, 2 J. APP. PRAC. & PROCESS 405 (2000).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol2/iss2/12>

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## TV OR NOT TV: THE TELECAST OF APPELLATE ARGUMENTS IN PENNSYLVANIA

Stephen J. McEwen, Jr.\*

*Oyez! Oyez! God preserve the Commonwealth . . . and this Honorable Court—and, please God, save the judges from profile shots.*

Last year, the Pennsylvania Superior Court, a statewide intermediate appellate court, began televising oral argument of its most significant cases—those chosen for en banc consideration. When the proposal to telecast argument sessions of this appellate court was initially suggested, the reaction of the bar mirrored, with but slight variation, the reaction of the bench. Judges wondered whether such telecasts would cause the lawyers to showboat a bit, while the lawyers mused whether the judges would proceed to posture and pose. During 1999, fourteen hours of televised appellate arguments by more than sixty-five lawyers to the fifteen en banc judges of the court did not provide even a glimpse of showboating by the lawyers—or by the judges.

Because the development of televised appellate arguments in Pennsylvania evolved rather naturally from the particular part played by the court in the justice system, it well serves to briefly describe the history and the role of the court.

The Superior Court of Pennsylvania was created in 1895 to assist the Pennsylvania Supreme Court in handling a volume of appeals that was then, and has ever since been, ascending. When the occasional temporary efforts to reduce the inventory were not sufficiently productive, the legislature in 1980 expanded the

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superior court from seven to fifteen judges. All appeals until that time had been heard by all seven judges of the superior court. Once the court was expanded to fifteen judges in 1980, the court undertook two essential changes in its operation.

First, all appeals to the superior court would be considered and decided by a three-judge panel. Second, the court would sit en banc in nine-judge panels to hear arguments in those appeals that were determined by a majority of the fifteen members of the court to be of exceptional importance.

Only a select number of cases receive en banc treatment. The court proceeded to en banc argument in only twenty-six cases in 1999, seven as a result of the sua sponte determination of a majority of the court and nineteen by grant of a petition for en banc consideration filed by one of the parties to the appeal. Meanwhile, in recent years, the superior court has annually received 8,000 appeals, rendered 5,000 decisions, and heard argument in approximately one-half of that number, or 2,500 cases, while the parties in the other 2,500 appeals agreed to submit the appeal to the court for decision upon the briefs.

At a December 1998 court conference, the judges decided that the live telecast of its en banc arguments on the Pennsylvania Cable Network ("PCN") might well serve the cause of judicial independence by educating the public. The positive reaction of the judges was in large measure based upon their familiarity with the live telecast by PCN of the proceedings in the Pennsylvania Senate and the House since 1994, and upon the fact that PCN was not commercial television, or even a component of the Public Broadcasting System, but was what some have aptly described as Pennsylvania's C-Span.

PCN was very enthusiastic about the project and had no reservations about whether such telecasts were within the PCN mission, whether there would be sufficient viewer interest to justify the telecasts, or whether the telecasts were logistically feasible. PCN responded that because it seeks to inform the citizens of Pennsylvania about their state government, such telecasts would be quite purposeful. As a result, the PCN people took it from there. The need for court participation in the logistics was quite minimal.

The plan called for an en banc argument session in each of the three geographic districts of the statewide court. Spring 1999

saw the first televised en banc argument session held in the Capitol Courtroom in the State Capitol in Harrisburg, the building where PCN had been regularly televising the House and Senate proceedings. The summer en banc session took place in the Founders Courtroom in Philadelphia on Flag Day, while the fall session was held in the Pittsburgh courtroom in September. By reason of an unusual number of en banc cases, a fourth session was held in Philadelphia in December.

It was a fortuitous coincidence that found the historic first telecast conducted on Law Day 1999. The en banc docket that day contained six cases: three appeals by convicted defendants, one of which implicated the state's "three strikes" legislation; a case in which a civil trial verdict had been reversed by the trial judge; a case requiring application of inheritance issues to the domestic relations support statute; and a case requiring interpretation of the environmental provisions of a three-decades-old insurance policy.

PCN and the court shared the view that the understanding, and thereby the interest, of the viewers would be enhanced were a commentary to precede the actual presentation of the arguments. It was essential, however, that the argument session itself be conducted without any change in format and in the manner of 104 years of tradition. Thus, it was not possible to pause after each case to enable the commentators to provide a summary of the facts and issues in the case to follow. Rather, the commentary on all six appeals was telecast before the argument session itself began. That commentary also included a capsule of the role of the superior court in the justice system, as well as a few moments of biography of each of the nine judges who would hear the cases.

The initial commentary team included the then-current president of the Pennsylvania Bar Association—in fact, the first woman president in the history of that association—Leslie Anne Miller; the judicial independence guru and prominent Philadelphia trial and appellate advocate Edward W. Madeira, Jr.; and G. Thomas Miller, the father of Leslie Miller, who had been a pillar of the Pennsylvania trial bar and its association for several decades, as well as a trial judge for several years. Thus, the broadcast had three commentators who could not only provide an astute summary of the appeals to be argued, but

whose own identity provided pleasant chimes of both tradition and the times, namely, a daughter following her father into the profession of the law. For later sessions, each commentary team has consisted of two lawyers of prominence at the trial and appellate levels.

Six appeals were presented at the second en banc session, held in Philadelphia. One criminal case concerned the conditions precedent to an appeal from the discretionary aspects of a sentence, and the other the sufficiency of a citizen's report for an investigatory stop by police. The civil cases included further scrutiny of the vexing issue of parental relocation in a child custody case, as well as the extent to which the issues of damages and of liability must be intertwined when a new trial is awarded. The other two civil cases required interpretation of insurance policies, one relating to underinsurance and the other to stacking.

The third en banc session, held in Pittsburgh, considered appeals in six civil cases and three criminal cases, while the fourth in Philadelphia considered five civil cases and three criminal cases.

PCN is considering a proposal to have the commentators for each session return for a post-argument commentary upon the decisions of the panel once all the decisions of that session are filed. That commentary would not be a separate program, but would only be shown as a segment of the session in the event that PCN reruns any session. The educational value of the tapes would be thereby enhanced, since the en banc session, when used by students (high schools and colleges, not just law schools), would be composed of three parts: the pre-argument commentary, the session itself, and the post-decision commentary.

The superior court has elected to restrict the live telecast of the presentation of argument to those cases that have been selected for en banc consideration, which total approximately 20 cases per year.

The other approximately 5,000 cases considered and decided by three-member panels of the court are, advisedly, not telecast. First, it would not be logistically possible because many argument sessions are conducted simultaneously in Harrisburg, in Philadelphia, and in Pittsburgh. Moreover, the scheduling

variables attendant the argument sessions, which in 1999 numbered fifty-four, preclude accommodation of the precise, advanced scheduling intrinsic to television presentations. Most importantly, the live PCN telecast of Senate and House proceedings in the Capitol have been, and wisely remain, the primary, if not urgent, pursuit of PCN and its worthy goals of educating the citizenry upon the state government and informing the citizens of bills that are under consideration for enactment.

In any event, the judges of the superior court have concluded that the goal of educating the public upon the appellate segment of the judicial system would be more fully achieved if the telecast of Superior Court proceedings were restricted to en banc sessions. The court reserves its en banc scrutiny to the most troubling, vexing issues from which new law or changes in the law arise. Thus, less than one percent of the appeals receive en banc review. Frequently, those same troubling, vexing questions perturb the citizenry as well, and trigger such awareness, even controversy, that the public has a particularly keen interest in the subjects of the en banc arguments. The thought also occurs that the routine telecast of all superior court appeals would soon provide the same appeal for viewers as test patterns and static. One is, therefore, compelled to conclude that the telecast of superior court proceedings is wisely restricted only to en banc sessions.

While the judges of the court have opined that the telecast does not intrude upon or impair the dignity of the proceedings or distract the participants, their view is corroborated by the absence of even one public expression of objection to the broadcast of these appellate arguments. When one considers that the court's daily constituency is judges and lawyers, the lack of objection becomes singularly incredible. Rather, all of the reaction has been positive, even enthusiastic.

Thus it is that the Pennsylvania Cable Network telecasts to the citizens of Pennsylvania the en banc argument sessions of the Superior Court of Pennsylvania—a practice that appears to provide meaningful education of the public about the role of the appellate judiciary in their justice system, without any negative effect upon the appellate proceedings.