

Chairing An Outstanding Appellate Practice At Cozen O'Connor

The Editor interviews *The Honorable Sandra Schultz Newman*, Partner of Cozen O'Connor.

Editor: Why did you decide to leave the bench and return to direct trial work and advocacy?

Newman: I have progressed through many phases in my legal career. When I was an assistant district attorney in the early '70s, I fought hard to prosecute those who had violated the law. In my nineteen years in private practice, I helped people resolve what were often devastating disputes through fair and equitable agreements so that they could move on with their lives, and I litigated cases that could not be settled. During my two years on the Pennsylvania Commonwealth Court and my past eleven years on the Supreme Court of Pennsylvania, I have concentrated my energies on making sure that citizens have access to a sound and well-interpreted constitutional answer to questions of law. It has been a great privilege to serve on both the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court, with my colleagues and staff, whom I greatly admire and who have helped me fulfill my duties. Moreover, to serve as the only woman ever elected to the Pennsylvania Supreme Court has been an honor for me, beyond measure. Now, as I continue to look at the next phase of my career, I want to turn my attention to fulfilling my other professional and academic goals and interests. That is why I have decided to accept the offer and opportunity to serve as the Chair of the Appellate Practice, for all its offices, of Cozen O'Connor. This is a new and exciting venture for me, in which I will bring an interesting perspective and depth of experience to the firm's clients and attorneys. It will be yet another phase in my career when I can facilitate further access to our superb system of justice and further the development of jurisprudence.

Editor: As you reflect on your time on the bench, what are the administrative accomplishments you are most proud of?

Newman: As the first woman elected to the bench of the oldest court in the nation (67 years older than the U.S. Supreme Court), I have always been grateful for the opportunity to serve on this Court, and am mindful of the historical role assigned to any professional woman who is "first" in any post or endeavor. For these reasons, I have done my best to apply my knowledge and skills as a jurist, and also to the court projects that have been part of my portfolio of commitments. I am especially proud to have mentored many young lawyers and particularly a number of women, for which I was recognized by the Pennsylvania Bar Association's Women in the Profession Committee with their Anne X. Alpern award. This award is given to a female lawyer or judge who demonstrates excellence in the legal profession and who makes a significant professional impact on women in the law. My role as Liaison to the First Judicial District, and my efforts to modernize and restructure



The Hon. Sandra Schultz Newman

the Family Court, have been some of the many commitments of which I am proud, and to which I remain deeply committed. My obligation to build a thoughtful and thorough security strategy for the courts of the Commonwealth in my position as the Chair of the Judicial Council's Committee on Judicial Safety and Preparedness, especially in these increasingly tumultuous times, is another area of significant commitment in which I have been and remain deeply invested. I am proud of what I have accomplished to date in these endeavors, and I hope to support these important efforts even after I have stepped down from my official role on the bench.

Editor: When you reflect back on you time on the bench, what are some of the case decisions and opinions that remain top of mind for you? And why?

Newman: This is the most difficult question because there are too many opinions that stand out as challenging to me and which I am proud to have authored. I will just list two that stand out at this time:

(1) *Kuznik v. Westmoreland County Bd. of Cm'rs.*, 902 A.2d 476 (Pa. 2006).

The Commonwealth Court held that Westmoreland County and state election officials violated the Pennsylvania Constitution and the Election Code by agreeing to purchase electronic voting machines for use in the May 2006 primary election without first submitting the issue to a referendum vote before the electors in that County. The Commonwealth Court ordered paper balloting for elections for federal office and lever voting machines for state offices. We reversed the order of the Commonwealth Court and held that in light of the requirement of the Help America Vote Act (HAVA) to replace lever machines with an electronic voting system for voting in federal elections, the Secretary of the Commonwealth correctly determined that a referendum was not needed prior to purchasing the units for use in the May 2006 primary, and those units must be used for both federal and local offices.

We held that paper balloting ordered for federal elections did not comply with the HAVA requirement with respect to access for disabled voters. We further held that the dual system of voting mandated by the Commonwealth Court violated provisions of the state Constitution and the Election Code establishing a uni-

itary voting system.

Significantly, we held that the state statutory referendum requirement was preempted by HAVA on the theory of conflict preemption.

(2) *Commonwealth v. Sattazahn*, 763 A.2d 359 (Pa. 2000). The trial of David Allen Sattazahn resulted in his conviction for first-degree murder in the 1987 slaying of restaurant manager Richard Boyer. In the penalty phase of the trial, the jury deliberated without reaching a decision between a life sentence or the death penalty. The trial judge dismissed the jury as hung and entered a mandatory life sentence. On appeal, the Superior Court reversed based on a jury instruction, but the Commonwealth retried Sattazahn, again seeking the death penalty, which the jury ultimately imposed after his conviction upon retrial.

On appeal of his death sentence, Sattazahn argued that the Pennsylvania Constitution prohibits the Commonwealth from seeking the death penalty on retrial where a life sentence is imposed in the first trial. The Court first considered U.S. Supreme Court precedents holding that a sentencing court can impose any legally authorized sentence, regardless of whether it is greater than the sentence imposed following the first trial. The Court then discussed a prior federal case in which the jury had imposed a life sentence, thereby "acquitting" the defendant of the death penalty, and distinguished that case from the present one, in which "[t]he hung jury did not act as an acquittal on the merits." *Id.* at 367. In holding that the double jeopardy, due process, equal protection, and right to appeal provisions of the Pennsylvania Constitution do not preclude the Commonwealth from seeking a harsher sentence at retrial, the Court ultimately declined to adopt a standard more lenient than that which the U.S. Supreme Court had established. The vote was 4-3; Justice Saylor wrote a DO in which former Chief Justice Flaherty and Justice Nigro joined.

Editor: Since our publication is written to address the needs and interests of general counsel, can you give those general counsel some advice? What should they be considering as they plan their trial court strategies in anticipation of the appeals issues being decided today? Are there certain factors they should be considering?

Newman: There is a lot at stake in court cases today – from "bet the company" risks to potential adverse verdicts that could influence future business dealings. As a result, we have seen more and more cases make their way through the trial courts and on to appeal. This creates an additional burden for general counsel. It means you not only need to plan your trial strategy but early on anticipate your appellate strategy. As we all know, trial and appeal strategies are very different. In trials, you argue the facts of the case and depose witnesses, etc. In appeals, you need to plan a scholarly approach to challenge procedures of law issues that arose during trial. Therefore, general counsel may decide that their case remain with the same attorney for the trial and possible appeal, or may, in cer-

tain cases, identify separate counsel to sit in on the trial and ready an appeals strategy.

Editor: What makes a good appellate attorney, and how does that differ from a good trial attorney?

Newman: A good appellate attorney and a good trial attorney have one thing in common — they both know their audience. The big difference, however, is in the nature of the audience. The oratorical flair and the sense of the dramatic that work so well for a trial attorney are not welcome in an appellate argument, or in an appellate brief for that matter. Appellate courts expect that briefs and oral argument will be respectful in tone, accurate with regard to the law, and focused on the issues at bar.

A good trial attorney focuses on the facts and the development of the record. A good appellate attorney focuses on the law, and the application of the law to the facts developed below. Here are some specific strategies for general counsel:

1. Always be open to reasonable and creative strategies to settle your case before you ever get to court. When it is in the best interest of your client to settle, do so.

2. While settlement is always an option, prepare your case as if you are going to go trial.

3. Make maximum use of all of the discovery tools available (including discovery of e-mails, text messages, etc.) so that you can truly be prepared for trial.

4. Make maximum use of the motion in limine to preclude opposing counsel from presenting inadmissible and/or prejudicial evidence.

5. Above all else, preserve issues for appeal by making timely objections on the record. Nothing is as frustrating for an appellate court jurist as seeing a great issue lost due to waiver.

6. Don't be afraid to raise constitutional issues.

7. Be prepared when you go to argue in an Appellate Court. Be sure to check all cases and legislation before going to Court so you know if there is anything to update. For example, legislation may be passed the day before argument that changes and this could change your position in arguing.

Editor: What are some other ways in which you hope to shape Cozen O'Connor's appellate practice?

Newman: I will be communicating with general counsel to enhance our national trial and appellate counsel relationships. We will work closely as a team to plan strategies, not just in specific cases but in overall interest of each client's entire operation and risks.

As well, I will continue mentoring younger trial attorneys in the firm. The firm has great depth in this area – across so many offices – and we are cultivating the next wave of appellate lawyers.

Further, I will work with women in the profession, which has always been my passion. Also, my goal is to continue enhancing cultivation of firm-wide quality of life and professional programs to support women thriving in our culture.

Please email the interviewee at snewman@cozen.com with questions about this interview.