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Chief Justice Cappy - It's all about Case Management

R. Stanton Wettick Jr.

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Chief Justice Cappy—It’s All About Case Management

*Hon. R. Stanton Wettick, Jr.**

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I. WHAT THIS ARTICLE IS NOT ABOUT

When Interim Dean Gormley asked me to contribute an article to a special memorial issue of *Duquesne Law Review* dedicated to Chief Justice Ralph J. Cappy, he said that he did not want another article describing memories of Ralph.

This means that I cannot talk about my wedding at which Ralph officiated. It was to be a short ceremony. However, to this day, all my wife remembers is a ten-minute ad-libbed introduction in which Ralph talked (and talked) about our being partners in doubles squash for over ten years and what this shows about character, reliability, and keeping going when the going gets tough. My wife has yet to understand how her wedding got connected to some sport that Ralph and I played.

Also, I cannot talk about a program at the Bench-Bar Conference addressing a scene in a Paul Newman movie where the judge,

* Judge, Allegheny County Court of Common Pleas.

at the pretrial conference, spends fifteen minutes talking to opposing counsel about family, golf, and last Saturday night at the club, while ignoring the presence of Paul Newman. My comment was: "This won't happen in my courtroom—there is no chit-chat—immediately get to the point or I'll move on." Ralph's response: "I made sure that this never happened in my courtroom because I went out of my way to make every lawyer feel comfortable. It's important that you spend time doing this." My response: "Are you saying that this is why you are now on the Pennsylvania Supreme Court while I'm still hearing landlord-tenant cases?" Ralph: "I thought I said it in a nicer way."

Also, I cannot talk about *Smith v. Coyne*,¹ which addressed the constitutionality of legislation providing that a tenant's appeal from a judgment of a magisterial district judge awarding possession will act as a supersedeas to prevent a tenant's eviction while the appeal is pending, only if the tenant deposits with the Prothonotary all back rent that the magisterial district judge determined to be due. I ruled that this legislation, as applied to low-income tenants, violated the Pennsylvania Constitution because it unreasonably burdened the tenant's right to a jury trial of the landlord's claim for possession. The Pennsylvania Supreme Court unanimously rejected my ruling.

The majority stated that there is no absolute right to a jury trial and the court should honor legislation that gives more weight to the landlord's property rights than to the tenant's right to a jury trial.

Justice Cappy wanted no part of an opinion stating that the right to a jury trial is dependent on a balancing test. At the same time, he liked the result. Consequently, he needed another vehicle; he found it in *Haines v. Levin*,² where the Court ruled that the execution of a judgment for possession while an appeal is pending does not interfere with the tenant's rights to have the landlord's claim for possession decided by a jury. The likelihood that the tenant will forego presenting his or her case to a jury once removed from the premises is not the measure of the constitutionality of the rule. A jury trial is ultimately available to the tenant to fix the parties' rights.

Shortly after I received the opinion, my office created a formal-looking certificate titled "The Dumbauld Memorial Award for Out-

1. 722 A.2d 1022 (Pa. 1999).

2. 51 Pa. 412 (1866).

standing Legal Scholarship.”³ It identified Pennsylvania Supreme Court Justice Ralph J. Cappy as its first recipient.

The certificate was accompanied by a cover letter from the Award’s Committee stating that it was to be an annual award but that it had taken nine years to find an opinion worthy of the award. “Unlike your colleagues, you truly understand that Pennsylvania is a common law jurisdiction that must give proper respect to bodies of case law developed during the Civil War era.”

Ralph’s response was that he could not understand how I could have made my ruling without even discussing a Pennsylvania Supreme Court case that appeared to be directly on point.

II. THE ARTICLE BEGINS

A. *Justice Delayed Is Justice Denied*

If you asked Ralph what was his single most important contribution to Pennsylvania’s system of justice for civil cases, I believe that he would have said the creation of a culture—and systems to support the culture—that civil cases will promptly be resolved.

Ralph measured any case management system by the time taken for disposition. Ralph did not believe that significant judicial resources should be spent attempting to settle cases before they are ready for trial. Cases that will settle before they are ready to be tried will settle without judicial intervention. The remaining cases will settle on or near the date on which the case will actually be tried. Consequently, judicial resources must be allocated in a fashion that guarantees that cases will be tried on the dates scheduled for trial.

Chief Justice Cappy would use the following illustration: If fifteen cases are scheduled for trial on June 1 and if five judges are available to try these cases, a party will know that its case will proceed to trial on this date if it does not settle. Consequently, it is possible that all fifteen cases will settle. In the past, this would have been seen as evidence of a misallocation of judicial resources. Instead, it is now seen as a system that is working. The availability of the five judges to try the cases listed for trial was the impetus for settlement. Furthermore, these five judges are now available for cases scheduled for trial on June 2.

3. Edward Dumbauld served on the United States District Court for the Western District of Pennsylvania between August 1961 and September 1997. He had a reputation for bringing historical perspectives to the law.

1. *Allegheny County*

When Chief Justice Cappy became the Administrative Judge of Allegheny County, the trial list included every case in the Civil Division. Cases would not move to the top of the list until approximately two and a half years after they had been placed at the bottom of the list. Ralph saw that if the trial list could be revised to include only cases in which the plaintiffs were seeking equitable relief or damages in excess of the arbitration limits, the Civil Division had sufficient resources to promptly dispose of these cases.

The major problem was with nearly 1,000 pending arbitration appeals. Ralph wanted to move these cases off the trial list but did not have additional judges to try the cases. Consequently, he created a Special Masters Program. The judges were members of the Academy of Trial Lawyers (a members-only association that was not dominated by either plaintiffs' or defendants' attorneys). As he anticipated, most of the members agreed to serve.

For the first year, each of the 175 volunteer attorneys was assigned four cases. They held compulsory case settlement conferences in each case. Where a case did not settle, with the consent of the parties (which was seldom withheld), they would serve as the judge in the jury or nonjury trial.

As was typical with Ralph, once he created a program, he selected others in whom he had confidence to make it work. For the Special Masters Program, he requested Attorney Seymour Sikov, a respected member of the Academy of Trial Lawyers, to assume responsibility for the operation of the program. This system, under Mr. Sikov's guidance, functioned with minimal oversight by Judge Cappy.

Arbitration appeals taken in future years were also assigned to the Special Masters Program until the Civil Division had eliminated its backlog.

The trial list also included real estate assessment appeals. Judge Cappy entered a court order assigning these cases to the Board of Viewers. Appeals from the Board were taken to the Common Pleas Court, which could make rulings based on the record before the Board of Viewers. A few years after he entered this order, Judge Cappy persuaded the General Assembly to expand the jurisdiction of the Board of Viewers in order to permit the Board of Viewers to do what it was already doing—hearing assessment appeals.

Judge Cappy also removed asbestos litigation from the trial list. He, together with counsel, created local rules that simplified the

pleadings. He assigned the asbestos docket to a single judge, so only one judge needed to become familiar with this litigation and the litigation would be governed by uniform rulings.

Today, a common complaint of the trial lawyers of Allegheny County is that the cases are coming up for trial too soon.

2. *Philadelphia*

After his election to the Pennsylvania Supreme Court, Justice Cappy was assigned by the other Justices of the Supreme Court to review the operations of the Philadelphia Common Pleas Court. At that time, there was a seven-year backlog.

The first step that Justice Cappy took was to stop the bleeding. If new filings were placed at the back of the backlogged cases, it would take years before any cases would be tried within a reasonable time after they were filed. Consequently, he created a "good bank/bad bank system."

The "good bank" consisted of new filings. A system was created under which these cases would proceed to trial within less than two years. Since resolution of the new filings was the top priority, judicial resources, as needed, would be assigned so that judges would always be available on the trial date established by the court to try those cases that did not settle.

There was a different system for the backlogged cases. Attorneys were enlisted to conduct settlement conferences. For the cases that did not settle, the trial dates would depend on what judicial resources were available. The judicial resources needed for resolving the new filings were not available for the backlogged cases.

The management of the Common Pleas Court of Philadelphia was more complicated than the management of the Common Pleas Court of Allegheny County because Philadelphia was viewed by plaintiffs' attorneys as a very desirable forum. Consequently, the Philadelphia docket included more mass tort litigation, individual lawsuits brought by dozens or even hundreds of plaintiffs raising similar claims against the same defendants, and other related litigation requiring extensive judicial involvement.

These cases had the potential for destroying the "good bank" if they were included in the "good bank" litigation. Thus, Justice Cappy developed a separate Complex Litigation Center for these cases.

This overhaul of the Philadelphia Common Pleas Court required the assistance of then-Mayor Rendell. The system that Justice

Cappy was creating required significant space outside of City Hall. The Mayor, however, viewed the Common Pleas Court as an inefficient and bloated system, gobbling up tax dollars that should be used elsewhere. There were tradeoffs. The Court obtained additional space. In return, the Rules of Civil Procedure were amended to allow a competent adult (rather than the Sheriff) to serve original process in actions commenced in the Philadelphia Common Pleas Court, a significant number of jobs were eliminated, and cars with chauffeurs were a thing of the past.

Today, the "bad bank" is also a thing of the past and almost all cases are tried within one to two years of filing.

B. Other Examples of Chief Justice Cappy's Leadership

1. Breast Implant Litigation

Immediately following a television program titled *Breast Implants: Dangerous Devices*, Pennsylvania law firms began filing large numbers of cases in the Common Pleas Courts against silicone implant manufacturers and medical providers.

There were approximately 700 pending lawsuits in the fall of 1992 when lawyers representing plaintiffs, hospitals, physicians, and implant manufacturers approached Justice Cappy to inform him of this litigation. Counsel requested that the Pennsylvania Supreme Court coordinate the litigation so that every issue in this complex litigation would not be litigated in thirty or more Common Pleas Courts.

Justice Cappy immediately recognized that this litigation had some characteristics of the asbestos litigation in that a woman experiencing less serious injuries (e.g., pain and swelling from the body's reaction to silicone) would—under traditional principles of tort law—be required to seek recovery for more serious injuries that she could—but might never—experience in the future (cancer, lupus, autoimmune diseases). Through a November 23, 1992 court order, the Pennsylvania Supreme Court appointed an *Ad Hoc* Committee on Silicone Litigation, consisting of two appellate court and two Common Pleas Court judges, which was charged with proposing recommendations for silicone implant litigation.

Following receipt of the recommendations of the Committee, on March 17, 1993—less than five months from counsel's meeting with Justice Cappy—the Supreme Court entered a court order appointing three Common Pleas Court judges to sit as a three-judge Coordinating Panel to manage and coordinate all lawsuits

filed in all courts of the Commonwealth for personal injuries alleged to have been sustained from the use of silicone implants. It designated the Allegheny County Court of Common Pleas as the Coordinating Court and provided that judges assigned to the Coordinating Panel were assigned to sit as judges on the Allegheny County Court of Common Pleas when coordinating this litigation. The order further provided that all new litigation involving silicone breast implants was to be filed in the local judicial district, as required by the Pennsylvania Rules of Civil Procedure, but that the Coordinating Court would manage these cases. The order also authorized the Coordinating Court to enter case management orders affecting practice and procedure, as long as the orders did not enlarge or abridge the substantive rights of litigants.

The Supreme Court order creating the Coordinating Court with authority to manage all implant cases and with authority to develop procedures tailored to this litigation worked as anticipated. Approximately twenty case management orders were issued. Resolution of this litigation required rulings on numerous complicated issues of substantive law and procedure, including *Frye* motions. The litigation was not fully resolved for almost ten years. However, at the end of the day, only four Common Pleas Court judges (each of whom continued to fulfill their responsibilities to their Common Pleas Courts) were involved with this litigation.

2. *Medical Malpractice—Certificates of Merit*

In early November 2002, Governor Rendell announced that he had created a Task Force for Medical Malpractice Liability Reform. The announcement stated that one of the important issues the Task Force would be addressing was legislation requiring attorneys to obtain expert reports supporting claims against a physician before bringing a lawsuit against the physician.

Chief Justice Cappy believed that legislation governing certificates of merit might be procedural; thus, any legislation could be challenged on constitutional grounds. He also believed that it was important that this subject be governed by the Rules of Civil Procedure for three reasons. First, he did not want a format in which significant judicial resources were expended at the outset of the litigation to address the adequacy of expert reports. Second, the Rules of Civil Procedure—unlike legislation—can be refined or altered promptly by the Pennsylvania Supreme Court if they are creating unintended consequences. Third, it was his understanding that the other members of the Pennsylvania Supreme Court

believed that certificates of merits should be required and that any rule should cover all professional liability claims.

An inquiry was made to the Task Force as to whether this was a matter that could only be addressed by the General Assembly. The response was, if the Court acts first, there will be no need for the legislation.

Chief Justice Cappy immediately appointed a three-member *Ad Hoc* Committee to prepare proposed rules. The Committee was given a month to prepare its recommendations. A rule was adopted on January 27, 2003, effective immediately.

3. *Rules of Civil Procedure Governing Medical Malpractice*

A June 2003 Governor's Plan for Medical Malpractice Liability Reform included a request to the Pennsylvania Supreme Court to take certain actions. At the memorial service for Chief Justice Cappy, Governor Rendell described how pleased and surprised he was by the Court's very prompt response. He said that, shortly after the Plan was issued, he contacted Chief Justice Cappy to emphasize his desire for prompt responses to its recommendations. He said that he knew it took time for the Court to act but hoped that it could be done within a year. Chief Justice Cappy responded by saying that this will happen within six to nine months. Governor Rendell described his reaction: "Ralph is a nice guy who wants to help out but a six-to-nine month time period is not realistic."

While Chief Justice Cappy promised a prompt response, he never agreed to respond positively to each of the recommendations. Thus, he created an *Ad Hoc* Committee consisting of four attorneys and one Common Pleas Court judge to fully review the requests set forth in the Governor's Plan and to prepare a final report.

The Committee's final report recommended that the Supreme Court take positive action with respect to most of the recommendations and included proposed Rules of Civil Procedure for the Court to consider. These rules were adopted by the Pennsylvania Supreme Court within less than nine months following Chief Justice Cappy's conversation with Governor Rendell.

C. Chief Justice Cappy's Office

1. Fotaine ("Fo") Kalakos

Ms. Kalakos held the title of Administrative Assistant. Without Fo, Ralph would not have known what he did yesterday, what he was doing today, and what he was supposed to be doing tomorrow. She had a sophisticated understanding of the matters in which Ralph was involved. She knew whom he should talk to immediately, whom he should talk to today, whom he should talk to at some time, and whom he should never talk to.

If Ralph had attempted to keep track of each of the balls he had in the air, he would have had no time to do anything else. Fo had this difficult task, which she performed admirably.

Finally, Fo never gave the impression that she was a gatekeeper. She was always patient and treated everyone with the utmost respect.

2. Betty Minnotte

Any case-related matter that came into Ralph's office started at Betty's desk and ended up at her desk.

When Ralph, Betty, and I were in the same room, Ralph and I referred to her as *Madam Justice*. However, Ralph, in fact, was a hands-on judge. He was always concerned with how to arrive at a result because he saw his opinions as also addressing the next case involving the same body of law. Betty's job was to produce an opinion that followed Ralph's thinking.

What I most admired about Ralph's opinions was not the result or how he got there but the full and precise discussion of the issues and the manner in which case law was used. This was the work of *Madam Justice Minnotte*.

III. EPILOGUE

A legal intern in my office told me that she wanted to be just like Chief Justice Cappy. I gave her the following advice: (1) You will need to develop a whole new set of social skills. For most of us, divine intervention would be required to acquire skills that are even close to Ralph's; (2) You will have to stop thinking like a lawyer—you'll need to focus on what you want to accomplish and not where you are; (3) You are never off duty; there is always something that you need to be doing. Since you are a golfer, you'll need to learn to golf while talking on at least one cell phone; (4) You'll

need to be surrounded by persons as talented and dedicated as Fo and Betty; and (5) You should hope to have the good fortune of having a spouse (husband in your case) who is at the center of your life and whom you support as much as he supports you.