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West Virginia Supreme Court of Appeals

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THE MODUS OPERANDI OF THE SUPREME COURT OF APPEALS

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WITHIN the last few years, lawyers have manifested considerable interest regarding the manner in which appellate courts actually transact their business, make their decisions, and prepare opinions. Highly interesting and instructive articles on the subject have appeared in recent issues of the American Bar Association Journal. It, therefore, seems probable that a like consideration of the private routine of our own supreme court of appeals may not be out of place. Such a discussion should, at least, dispel certain current misapprehensions, which seem to prevail in some quarters, as to the routine pursued by that court.

But there is surprisingly little to say. Most, and the most important part, of the court's work is done in an open forum. The statutory regulations, and the rules of the court, under which it operates, are, of course, perfectly familiar to the bar. But, supplementing these, there are certain minor usages or practices of the court, covering details of procedure not embraced in any rule or formal law, which have long been consistently adhered to.

By statute, an application for an appeal or writ of error takes the form of a petition assigning errors, accompanied by the record and a note of argument. The filing of these papers perfects the application, but the rules of court permit what is called an "oral presentation" of the petition. This must be done at the "motion hour" of the court, which is the first order of business every Tuesday morning while the court is in term. The court insists, however, that this "presentation" be simply a presenta-

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tion, not an argument. Counsel are expected to confine themselves to a succinct statement of the character of the case, the controlling elements in the record, and the actual errors insisted upon, and to do this in ten minutes. No argument is contemplated, and, of course, no reading of law or from the record is permitted; and overrunning the allotted time is always restrained.

By practice, also, not by statute, nor by any rule of court, a second and a third application for an appeal or writ of error will be entertained. The statute provides that "In a case wherein the court shall deem the judgment, decree or order complained of plainly right, and reject it on that ground, no other petition therein shall afterwards be entertained."¹ Ordinarily, the court will not reject such petition on the ground that the action of the lower court is "plainly right" until a third petition for appeal or writ of error has been presented and refused, except on request of counsel for petitioner, in order to expedite finality of the lower court's action for the purpose of taking the case to the Supreme Court of the United States, or other like reason. The court has no objection, of course, to second or even third petitions, provided they are not mere repetitions, or protests against the former action of the court. In such a second or third application a new brief must always be filed, and the brief and oral presentation should present something new in the case, or more fully amplify a phase of the case not theretofore adequately covered.

If the petition is for the docketing of a certified case, the same rules and practices, in general, prevail, except that counsel on each side should file briefs.² A misapprehension, however, seems somewhat prevalent as to the significance of the docketing, or refusing to docket, a certified case. The statute provides that "if the court be of the opinion that the rulings of the lower court ought to be reviewed, the case or cause shall be docketed for hearing."³ The supreme court of appeals construes this provision as giving it some discretion as to the propriety of bringing up, hearing and passing upon the questions in litigation, at a preliminary stage of the case. Therefore, refusal to docket is not always tantamount to approval of the action of the lower court.⁴ This position seems to be imperative, lest the trial court be rendered a mere conduit to the court of appeals, and the latter

¹ W. VA. REV. CODE (1931) c. 58, art. 5, § 9.

² Rule II, § 1.

³ W. VA. REV. CODE (1931) c. 58, art. 5, § 2.

⁴ *Sweeney v. Security Trust Co.*, 116 W. Va. 344, 180 S. E. 887 (1935).

be flooded with cases which can more appropriately and more safely be determined only upon fuller development.

There seems also to be some question as to whether the court prefers that applications for appeals, and the final submission of cases, should be made orally, as well as by brief. No statute controls on this point, and the rules of court make the matter optional with counsel. It can be stated, however, that the court considers itself aided in a high degree by having briefs at all times supplemented by oral presentation or argument. And, assuming that the oral argument is at all well done, it cannot be otherwise than highly advantageous to the litigant, who thus is afforded a double opportunity for the presentation of his case. Oral discussion, from its very nature, has certain advantages over the printed brief. It is less formal, more flexible and, generally, more graphic and impressive. However, such argument must not degenerate into mere oration or invective, but should be frank, clear and explicit, and should, if required by any member of the court, be directed to such points as may be raised by a judge. Questions by the court are not intended to be inquisitory or embarrassing, but always arise from a genuine effort on the part of the questioner to clarify some difficulty in the case which has arisen in his own mind. And, finally, the speaker should observe voluntarily the limitation of time which the rules prescribe. Is there any reason why an attorney can not observe his own watch as conveniently as the clock can be watched by the president of the court? And, when counsel's time expires, the argument should cease. It is doubtful if an attorney, who has not been able to arrange his discourse so as to present it within the time prescribed, can add much by persisting, after time is called, in further struggling with his subject.

Some members of the bar, particularly those who have never been accustomed to the assistance of law clerks, are known to suspect that in the court of appeals, too much of the investigation and decision of cases is left to the law clerks. The fact is that a law clerk in the office of a judge performs precisely the same functions which are exercised by a like clerk in the ordinary well organized law office. He performs the detail work with which a judge cannot well be encumbered, such as verifying quotations from the record, and citations of law, making research in the library, "Shepardizing" cases cited or used, proof-reading of opinions, and numberless other like legal, semi-legal, and semi-

clerical duties. One particular function generally cast upon him is that of familiarizing himself with, and digesting, the record in each case, which, on application for writ of error or appeal, is referred to the office of the judge in which he works, and presenting a resume thereof to the court in writ conference. But in no case, at any time, does the law clerk, either to a judge privately, or to the court in conference, presume to suggest his personal opinion on a controverted question of law or fact, or as to the disposition of a case.

The mere making up of the argument docket for a term is no trifling problem. The court is given "complete control of the time and manner of the hearing and submission to such court for decision of all causes pending therein, establishing such order of priority in the hearing of cases as it may deem just and expedient", and directs the court to "make, enter of record and cause to be published reasonable rules and regulations in reference to the hearing and submission of all such causes."⁵ Accordingly, it is provided that "Sixty days before the first day of each regular term or any special term at which an argument docket may be ordered, the clerk shall prepare a list of the cases then ready and matured and distribute the printed list of counsel of record in each case."⁶ But experience has demonstrated that in the arranging of dates for the argument and submission of cases and the order of the cases for each day, many facts require consideration. The convenience of counsel interested requires that cases from each court or circuit be grouped together, and that conflict with local terms of court be avoided as far as practicable; and that no more cases be set for argument at one time than can be disposed of in two days, at most, which, generally, limits the number to approximately ten. The order in which a case appears on the day's docket is determined by the date of its maturity. Certified cases and appeals from the workmen's compensation appeal board mature in thirty days from their docketing, require no printed record, and are distributed on the docket on days set for other cases from the county from which these cases come. When the clerk has thus arranged a tentative docket, it is submitted to the court for approval and is then published and distributed.

An anomalous procedure for the disposition of cases is found in the Code,⁷ which provides that, upon leave of the court, at

⁵ W. VA. REV. CODE (1931) c. 58, art. 5, § 19.

⁶ Rule V, § 1.

⁷ W. VA. REV. CODE (1931) c. 58, art. 5, § 25.

any time after the appeal or writ of error is granted, a motion may be made to affirm or reverse "with like effect as if the appeal, writ of error or other process had been regularly matured for final hearing." The hearing of such a motion, when allowed, is on thirty days' notice to the opposite party, and ordinarily, on the original record and typewritten briefs. Such leave, however, is construed to be wholly within the sound discretion of the court and is not granted except for special, distinct and peculiar reasons which appeal to the court as meritorious. Mere anxiety for an early disposition of the case, or the desire to avoid the expense of printing the record and briefs, being grounds which can be alleged in every case, will not alone suffice.

As to the routine of the court in passing upon and disposing of cases, the public would doubtless be surprised at the extremely simple and informal procedure followed. There is nothing sacrosanct, esoteric, mysterious or intricate about this process. When a petition is presented for a writ of error or appeal, it is immediately assigned to the office of one of the judges. This assignment is made in strict rotation, each office receives every fifth case. From the absolutely necessary factors in the situation, not all of the judges, nor even any one judge, can possibly find time to make a minute and critical examination of the records presented with petitions for writs. The consequence is that writs ordinarily are granted largely upon the briefs filed. It is assumed that counsel, in his brief and oral presentation, has embodied the controlling elements of his case, and that his note of argument presents the case adequately and truthfully.

The court sits each Monday during term in what is called a "writ conference" for the purposes of considering such petitions. In this conference, after a brief resume of the case has been presented by the law clerk, each judge, in turn, beginning with the junior, discusses the case and expresses his views thereon. If a majority are in agreement, the writ is allowed or rejected accordingly. If there is a substantial diversity of opinion, further effort to agree is made. In any case, however, the vote of three or more judges awards or refuses a writ. Ordinarily, the judge or judges, if any, not concurring, make no record of their adverse conclusion; but, where his position is considered by a judge sufficiently vital, he may elect to have the order show his disagreement with the action taken.

The granting of writs by one or more individual judges, although authorized by statute, has fallen into what Grover Cleve-

land called "innocuous desuetude." The five judges of the court reside in Charleston. The court is in term for most of the year, and generally, even in vacation, more than one judge is available in his chambers. When a petition is to be presented in vacation, the invariable custom is to assemble all the judges who are available, and then unless an extreme emergency exists, to defer passing upon the petition until the whole court can meet in writ conference.

The handling of a case on final submission is much the same as that followed upon petition for a writ. At the closing of the argument day, all cases are immediately assigned by the president of the court in absolute rotation, except where a judge is disqualified to act in a case. The judge receiving the case reads in detail, and fully familiarizes himself with, the record and briefs; and, when he has completed his study of the case, brings it into conference. On each Friday during term, the court sits in "decision conference", to which each of the judges is expected to bring one case and ordinarily no more. A list of the cases to be considered is furnished each judge earlier in the week, upon which he studies maturely at least the briefs in the cases assigned to the other judges. This study generally leads to a reading of the critical parts of the record, and in short cases, often of the whole thereof.

In the decision conference, each judge presents his own case, beginning in inverse order of seniority. In so doing, he gives in complete detail the pleadings, the issues, the evidence and the apt citations of authority, but does not intimate his own opinion on any question involved. Next the case is discussed by the other four judges in turn, beginning with the junior, each judge concluding with a tentative, but only tentative, statement of his opinion on the question to be decided. When the other four judges have finished, the judge who brought the case into conference completes the discussion by stating the conclusion at which he has arrived on the issues involved. If the judges are in agreement on all points necessary to be decided, the case is then considered disposed of. But if a diversity of opinion survives on any point, a general round-table discussion follows, accompanied by such reexamination of the record and reconsideration of cases and statutes, as will aid in resolving the questions on which there is a disagreement. When all judges have been fully heard, a vote is taken, beginning with the junior judge, unless he has brought

in the case, a concurrence of any three or more resulting in a decision.

If the judge to whom the case was assigned, and who brought it into conference, is with the majority, he writes the opinion, as a matter of course. If he finds himself a dissenter, he "trades" the case to one of the judges who is in the majority for another in which he is of the majority. If, during the preparation of the opinion, the writer encounters difficulties not foreseen in the decision conference, the case is brought in again for further consideration. This sometimes results in a modification, or even a complete change, in the decision of the court. When the opinion is completed, copies are immediately distributed to the other four judges for study and criticism. The preparation of an opinion is a constant tacking between Scylla and Charybdis: it must be long enough to dispose of the points which counsel consider important, but short enough not to encumber the books unduly.

An "opinion conference" is held each Monday afternoon during term to which are brought all opinions which have been distributed for a sufficient time to enable each judge to familiarize himself therewith. In this conference, the members of the court frankly, but courteously, call attention of the author to anything in the opinion which is considered not in conformity with the decision of the court, or to any inaccurate language, or expression which might be misconstrued. On the whole, however, the opinion is allowed substantially to stand as being peculiarly the work of the individual judge, not of the court. But the syllabus submitted by the author of the opinion is subjected to much more ruthless scrutiny since it is to be prepared by the court as a whole.⁸ Points of the syllabus are sometimes wholly eliminated or new points are added, and, more often than not, each point is in some degree modified and refined. If a dissenting judge, after consideration of the opinion and its syllabus still finds it impossible to concur therein, a dissenting opinion is prepared. Generally, the opinion is not handed down until the dissenting opinion is ready to accompany it, although sometimes it is considered better to let the decision come at once with the right reserved to file the dissenting opinion later.

Each Tuesday morning, the opinions which are ready are handed down, and orders entered in accordance therewith. There still remains to the defeated litigant the statutory right to file a

⁸ W. VA. CONST. art. VIII, § 5.

petition for a rehearing. It must not be assumed that the court, or the individual judge preparing the opinion, resents such a petition. On the contrary, it is desirable that all decisions and opinions should be scrutinized carefully by counsel, and if, by inadvertence, inaccuracies as to facts appear therein, or controlling statutes or decisions have been overlooked, the court should at once be given the benefit of such discovery. But petitions for rehearing which merely inveigh against the decision, or reiterate counsel's original contentions, are not helpful.

One feature of the court's work, perhaps, not fully appreciated is that it has been many years since this court adjourned any term without having decided and disposed of every case, motion or other proceeding matured for decision. Adjournment day always finds the Supreme Court of Appeals of West Virginia with a clear docket.

The court, however, cannot boast the same degree of efficiency in procuring the publication of its decisions. In actual operation, the reports do not generally appear until a year or more after the last opinion therein contained has been made ready for publication. The difficulty, or at least a large part of it, seems to arise from "too many masters". By the constitution of the state,⁹ the attorney general is made "*ex-officio*, Reporter of the Court of Appeals." The Code provides that the director of purchases of the state "shall have charge and supervision of the printing and binding of the reports of the decisions of the supreme court of appeals",¹⁰ but further stipulates that "The printing and binding of the reports shall be done under the direction of and in the manner prescribed by the reporter, subject to the control of the court." Where lies the authority and the responsibility? The same section further says that "Each volume shall, if practicable, contain the reports of at least eighty cases decided by the court, and shall contain not more than nine hundred pages, exclusive of the index and the table of cases reported and cited", and that "Proof sheets shall be furnished by the printer to the reporter and to each judge of the court, and such corrections and modifications shall be made by the printer as the reporter or any of the judges shall direct." These cross-currents do not make for speed. Diligent effort is being made, however, to devise some

⁹ *Id.* at art. VII, § 1.

¹⁰ W. VA. CODE ANN. (Michie, 1937) c. 25A, art. 3, § 5.

practical method by which, despite the intricacies of the statute, prompt publication of the reports may be achieved.

From what has been said, it will be seen that during every week when the court is in term, each Monday and Friday is devoted to conferences, and that on each Tuesday the court sits, either to receive motions and hand down opinions, or to hear argument of cases, or both. There are thus left but three days, plus possibly a remnant of Tuesday, for the consideration of cases submitted, usually five, and applications for appeals or writs of error, usually twice that number. It is, therefore humanly impossible that each judge should carefully read and investigate each case in full. The necessity for some division of the work is absolute in order that the court may function at all. No better plan than that now followed has been discovered or suggested.