GUEST COMMENTARY

What Federal Judges Can Teach Pennsylvania

BY J. DANIEL HULL

Although my law practice is based in Pittsburgh, I often practice in other jurisdictions. Over the last three years, beginning with media reports about problems in the Pennsylvania Supreme Court, I have received from non-Pennsylvania lawyers a range of comments and questions about practicing law in Pennsylvania:

- Did one state Supreme Court judge really try to run over another with a car outside a Philadelphia hotel?
- Is trial-fixing common in your state?
- Are male judges chasing female staff around the chambers, and sexually extorting female litigants in divorce cases?
- Are Pennsylvania judges for sale?
- Is it true that your jurists are not overly self-conscious about the quality of their legal scholarship?
- Are status conferences, dispositive and discovery motions and other important proceedings conducted off-the-record?
- Is your state system so far gone and ingrained with subtle corruption, favor-trading, and politics that no one involved can apprehend how bad it is?
- Does it help to be in federal court?

The hard part is that the comments have come from lawyers whom I respect both as people and as practitioners and some of the "perceptions" are grounded in reality.

For a variety of reasons — the Rolf Larsen proceedings, the 1996 trial-fixing case in Pittsburgh, and "sexual" scandals involving judges throughout the state — the public focus on Pennsylvania's court system has indeed increased.

In September 1995, state representative Jeffrey E. Piccola, (R-Dauphin), the chair of Pennsylvania's House Judiciary Committee, went so far as to liken this state's highest court to "a street gang — with little or no rules." Piccola made the comparison after conducting hearings in August 1995 on the King's Bench Authority — a unique and very old power of Pennsylvania's Supreme Court to reach into lower courts and assume control of cases.

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In part, the perceptions concerning the state court system results from the fact that Pennsylvania's state judges are popularly elected rather than appointed.

This has been a Commonwealth tradition since 1850. While many of these jurists are excellent scholars and decision-makers, state judges are, in the final analysis, chosen purely on the basis of politics rather than on the basis of whether they possess the qualifications to

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Dan Hull practices in Pennsylvania, Maryland and Washington, D.C and is the president of J.D. Hull & Associates, P.C. He is a former legislative assistant to two members of Congress in Washington, D.C. The firm focuses on commercial litigation, environmental law and lobbying. This article is a revised version of one by Hull that appeared in the Pittsburgh Legal Journal.

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serve on the bench.

In November 1994, a former Commonwealth Court judge, urging adoption of a more merit-based selection system, pointed out in testimony before Pennsylvania's House Judiciary Committee that Pennsylvania is one of eight states that still chooses all of its appellate judges by partisan elections.

While the press, some lawyers and a growing chorus of citizens are characterizing this system as medieval, lawyers and their clients have a lot invested in it.

Many lawyers regularly appear before judges to whom they have given election campaign money. Many judges, in turn, apparently and oddly believe they have no obligation to disclose such payments to opposing counsel or their clients.

From a distance, most of us would admit that electing judges at least looks bad, and probably compromises the principle of even-handed justice for everyone. But we are all stuck with this situation until the state legislature comes up with a way to take politics out of becoming and serving as a judge without compromising the accountability to citizens that popular elections afford.

Some groups, like the Philadelphia-based Pennsylvanians for Modern Courts, are urging state-wide merit selection for appellate judges. There also have been proposals to require selection of all judges including those at the Common Pleas Court level along the lines of the merit-based system traditionally used for nomination and approval of our federal judges.

In general, the method for selecting federal judges in this country has worked pretty well. While not completely apolitical, the federal selection apparatus generally has come up with honest, hard-working and able (and sometimes extraordinarily so) lawyers to appoint to the federal bench. The exceptions have been glaring and relatively few in number.

Until the state legislature meaningfully reforms Pennsylvania's state judicial system, can we look to Pennsylvania's federal judges for guidance and example? The answer should be yes.

For more than 200 years, federal courts, including those that sit in Pennsylvania, have occupied a special and important place in the nation's history and jurisprudence. As most lawyers know, under the federal constitution, federal judges, from the trial level up to the U.S. Supreme Court, are in charge of two main types of cases. The first group is "federal question" cases. These disputes generally involve a federal law, a federal agency or a question of federal constitutional law.

The second group is diversity cases, disputes "between citizens of different states." Congress granted diversity jurisdiction to the federal courts to counter the Constitutional Convention's concern that state courts would be biased against out-of-state litigants.

In other words, the drafters of the constitution feared that if, for example, a Virginia resident sued a Pennsylvanian in a Pennsylvania court, the latter would have a "home-court" advantage. Assignment of such a case to a federal judge — who theoretically would be less provincial than his or her state counterpart — was designed to address the possibility of prejudice against "outsiders" by a state court.

Apart from federal question and diversity cases, an important third reason for the existence of federal trial courts prevails. It has to do with setting an example.

In the book *Law and Lawyers in the United States* (Harvard University Press 1964), Erwin N. Griswold, then a law school dean and professor, summed up this idea well. When the nation's constitution was drafted, in addition to having federal judges decide disputes that were "federal" or brought by "outsiders," "there was also some desire," Griswold wrote, "that the Federal government take a hand in assuring the steady dispensation of justice."

In other words, Griswold said, federal courts — whether they sit in Pennsylvania, California or Puerto Rico — should set an example. Federal judges should bend over backwards to be free from politics, pettiness or prejudice of any kind.

Unfortunately, recent attention upon very human, sometimes colorful but ultimately unattractive traits in this state's non-federal judiciary has reduced and soiled the image of our state courts — in the eyes of many in and outside Pennsylvania — to an ugly and embarrassing cartoon in which citizens, businesses, lawyers and judges themselves can have little pride or confidence.

This is particularly unhealthy for those parts of the Commonwealth where economic declines and resistance to change keep feeding our collective inferiority complex about our business communities, the courts, local government institutions and the professions (including law) that serve these entities.

Arguably, a Pennsylvania resident who is appointed to the federal bench should cultivate and maintain a little isolation and distance in exchange for the post. He or she is no longer just another citizen of Pennsylvania. Although federal judges are human, the federal courts they administer and the things they do in them should be "better."

Should we expect more from our federal judges? Absolutely. And especially from those sitting in Pennsylvania. As this state struggles to reform the perceived "street gang" quality of its own judiciary, the men and women of the federal bench can and should set an example for our state court judges. ■