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# Is The Supreme Court Supreme Enough?

## Chief justice says efficiency efforts haven't sapped intellectual energy

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The Connecticut Supreme Court, with the final word on the state Constitution, is the one laboratory for "pure science" in these constitutional rights. It can clarify murky areas of the law with the authority of precedent. But according to some of the state's top appellate court watchers — and practitioners — today's court has become more narrowly focused on deciding its quota of cases on time, without the soaring intellectual ambition of a decade ago.

Connecticut's lawyers — and judges — were skeptical of the choice of Yale Law Professor Ellen A. Peters to join the bench in 1978 because she was an academic, an intellectual. Rising to Chief Justice in the 1990s, she became the sparkplug for an unprecedentedly "hot" bench. It was handling a caseload of up to 200 decisions a year, and taking up groundbreaking issues, like the 1995 case of *Moore v. Ganim*, exploring what rights government owes the poor. There's some nostalgia in the bar for the kind of heights Peters inspired.

With the departure of Joette Katz in January to head the Department of Children and Families, the court lost not only its most liberal justice, but also a remarkably diligent worker and a lively intellect. Chief Justice Chase Rogers' 2009 decision to have all case heard en banc by seven members, rather than in smaller panels, has required a smaller caseload of about 135 decisions, but allows the court to speak with full-throated authority.

"We're very pleased with the en banc policy," Rogers said in an interview last week. "The goal was to have as many justices of the Supreme Court as could be available, minus any recusals, obviously. The public has more confidence in that rather than a panel of five, where it was the luck of the draw which five you would get."

Under a new court rule, Rogers and others won't have to recuse themselves if a family member's firm authors an amicus curiae brief. In 2008, for the landmark same-sex marriage case of *Kerrigan v. Commissioner of Public Health,* Rogers recused herself because her husband's firm, Robinson & Cole, penned an amicus curiae brief — one of dozens. Recusals are still in order if a family member argues or briefs the case, she noted last week.

She took issue with the notion that the Supreme Court is losing some of its intellectual energy.

"We have hard issues every year that we're dealing with," she said. "Cases that appear to be straightforward are not as straightforward when we actually start looking into the law. I've been here five years now. I can't say there's been an easy year, legally, in any of these years. I would not agree that hard cases don't come along every year. They do. I can tell you we struggle mightily to get it right every year."

Running a Supreme Court is a matter of picking and choosing, and Rogers said she feels the court is doing a better job of selecting which appeals to the Appellate Court it will take up directly. Some critics feel the high court has taken too many insignificant cases, which could have been better left for the Appellate Court's efficient three-judge panels to process.

Appellate cases have been reviewed by seasoned senior judges, including David Borden, Ellen Peters and Antoinette DuPont, to decide which appellate cases deserve direct review. Rogers says she's happy with this selection process.

Law Tribune File Photo

**Chief Justice Chase Rogers said the Supreme Court is taking several steps to try to reduce delays between the filing of briefs and the scheduling of oral arguments.**

"We've been having an ongoing dialogue about whether there were cases we should take or not take," the chief justice said. "We have a good handle on that now. I'm far more confident that this last year, the vast majority of cases were cases we should have taken, as opposed to four or five years ago. We were hearing a lot more cases four or five years ago."

### Technology Improvements

Rogers went directly from Appellate Court judge to chief justice in 2007. Her appointment followed a period of turmoil for the Judicial Branch, which struggled with its public image and in its relations with the legislative branch. Rogers took the helm with a promise to demystify the least-

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understood branch, and re-establish public confidence.

In the past five years, she created scores of committees to improve the Judicial Branch. She ushered in a new era, in which press cameras are no longer banned from civil and criminal courts. Most recently, she's decided to use her executive position as head of the Judicial Branch to consider streaming video of Appellate and Supreme Court arguments.

"I've been thinking about this in the past week, based on discussions I've been having with people in other states," Rogers said. "I'm going to explore, again, whether there are alternative ways to do a streaming video of the appellate court arguments in a way that CT-N [the state's public affairs network] doesn't have the money to do. I want to explore whether there would be some other ways to do it that wouldn't be as costly as prior proposals have been."

Jeffrey Babbin, a Wiggin and Dana appellate lawyer who co-chairs the Connecticut Bar Association's appellate law section applauded the idea.

"Streaming video? That would be terrific," he said. "You really don't have the benefit of seeing what's going on in cases that you might be interested in if you can't take the time to get to Hartford and watch it. That's terrific for practitioners, and would give people a better appreciation of the appellate process."

In the past two months, technology has already improved the life of the appellate practitioner, Babbin said. "Now," he said, "the Supreme and Appellate courts now have their docket sheets online. Just being able to access the aspects of a case — deadlines, motions, the status of the case — is great. All that actually makes my day-to-day life a lot easier."

However, in the ongoing struggle to have the Supreme Court do everything right, a new problem has been developing for reasons unclear to even a top appellate lawyer like Babbin.

"One thing that has been distressing," he said, "is the increasing delays in getting oral argument, after the briefing of the appeal. One thing that has improve, the court has been working hard to get decisions out more quickly after argument, and I commend that. But there's been this retrograde trend towards long delays to get an argument date, which feels like we've gone back in time to an earlier era, when that was a problem."

Rogers acknowledge that Babbin has a point. As reasons, she cited the move to en banc hearings for all cases and the labor-intensive efforts required to prepare printed copies of the records of lower court proceedings.

"The appellate clerk's office has been working diligently to reduce the backlog in the preparation of the record and will continue to do so until the backlog is gone," Rogers said. "In addition, the Court is considering eliminating the printed record on appeal…Finally, we plan to expand e-filing for Supreme and Appellate court cases to allow attorneys to file more documents online, contingent upon adequate funding."

## Articulation Forfeiture

But in the good news department, Rogers hinted that progress is being made to resolve an issue that has long vexed appellate lawyers. If a trial judge has not explained his or her reasoning sufficiently, and the trial lawyer hasn't asked for an articulation, appellate courts have sometimes refused to consider the issue. The courts' rationale is, the litigant's failure to ask for an articulation amounts to a waiver of that issue.

One remedy being considered is to allow appellate judges to request the articulation, and thus save the legal issue – and the client's claim. Not over-promising, Rogers said, "We're cognizant of the problem, and we're having an ongoing discussion with the bar about it." ■