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OPENING THE WINDOWS OF THE APPELLATE COURTHOUSE

State should consider greater use of e-filing, publication of high court practices

By JEFFREY R. BABBIN

Connecticut's appellate system has strived for greater simplicity, openness, transparency and justice. It has succeeded on some measures, but obstacles to fully realizing this goal remain in place. In this article, I take stock of where we are at the end of 2010 and mention a few items on my appellate wish list for 2011.

Where We Are

Lawyers following the Connecticut Supreme Court and Appellate Court appreciate the work of the appellate system in providing more access to information and better and more predictable procedures. Seemingly minor changes, like allowing motions for extension of time to be e-mailed to the appellate clerk, and receiving the order on the motion by e-mail, have been major conveniences, saving on time, money, and stress.

The appellate system has also been more open to public input on rules, allowing public attendance at the Advisory Committee on Appellate Rules and posting its agendas and minutes on the Internet (but not yet the packets of information that committee members receive and discuss at each meeting). Members of the appellate judiciary and clerk's office have also been gracious in providing valuable insights to the appellate bar and exchanging ideas at meetings of the Connecticut Bar Association's Appellate Advocacy Committee, which this author co-chairs.

The appellate system also now conveniently publishes on its web site the docket of argument-ready cases and the "assignment for days" showing the upcoming schedule of cases to be argued in the Supreme and Appellate courts (and an archive of past schedules).

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For cases to be argued in the Supreme Court, there is now a link at the Supreme Court web site to a legal blog that posts the briefs, and the appellate rules require all filers of Supreme Court briefs to electronically upload them to make them available for posting (although, absent an enforcement mechanism, not all litigants comply despite notice of the requirement in Supreme Court docketing letters).

Rules changes in recent years also have made it easier for Supreme Court arguments to be broadcast on the Connecticut Network (CT-N). With limited exceptions, oral arguments are now eligible to be broadcast, filmed or audio-taped. Unfortunately, the availability of broadcasts are affected by the state budget and the limited resources of CT-N, and few arguments (other than in some notable, well-publicized cases) are broadcast or filmed. CT-N does, though, make those that are videotaped available for later viewing without charge on its web site.

Perhaps the most significant change of recent vintage was the Supreme Court's decision, in the fall of 2009, to adopt a new internal policy of sitting en banc in every case, i.*e.,* a full bench of seven justices, less any recused justices. Not only does this make appellate justice more uniform, but it eliminates any concern about how the panel was chosen for particular cases. There is now one Supreme Court, and not a different one for every case.

One important and helpful practice is not new, which is the accessibility and helpfulness of appellate case managers in working through problems by phone.

Where We Can Go

For each step forward, there is room for further progress. In many states, and in the federal appeals courts, all motions and even briefs can be filed electronically and deemed received upon electronic receipt even if some smaller number of bound briefs must still be submitted for the chamber's use.

In Connecticut, preparing and filing 25 bound copies of every brief and thick appendix for Supreme Court cases uses up paper, money, and time. Also, in many

Jeffrey R. Babbin is a partner in Wiggin and Dana's Appellate and Complex Legal Issues Practice Group. He co-chairs the Connecticut Bar Association's Appellate Advocacy Committee.

states and the federal appeals courts, the appellate docket sheet listing filings in the case are publicly available online, but the Connecticut appellate system has yet to develop that capability, even though the Superior Court has long had that convenience. Some jurisdictions also post appellate oral argument transcripts, which are not routinely available in Connecticut unless each interested person separately orders and pays for one.

Transparency would also be enhanced by publishing the regular practices of the Court, either in the Practice Book's appellate rules or in written guidelines available to all practitioners, including those not experienced in appellate matters. For example, until recently, the appellate system's internal process for deciding which Appellate Court cases are transferred before argument and decision to the Supreme Court was shrouded in mystery, not available in a public document or to be learned even by a phone call to the appellate clerk's office.

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It was thought by the appellate bar to be handled as a "backroom" transaction. Under Chief Justice Chase Rogers, the transfer process has become more systematic, with a handful of senior judges appointed to review and make transfer decisions based on specific criteria. Now, the appellate pre-argument conference judges mediating each new appellate case make recommendations on transfer by categorizing each case based on the uniform criteria.

While these are welcome developments to make the practice more uniform, they remain unpublished either in the appellate rules or on the judicial web site. Instead, the current practice has been made public by former Supreme Court Justice David M. Borden (now a judge trial referee), who plays a significant rule as a gatekeeper in the transfer process and published a *Connecticut Bar Journal* article in 2010 with a helpful discussion of the new protocol. Taking this new openness to the next level by, at the very least, publishing the new internal procedures and transfer criteria on the judicial website would be a positive step.

Finally, no article on appellate justice would be complete without referring to Connecticut's peculiar jurisprudence on "articulation"—the subject of much discussion and controversy among the appellate bar. Although no rule mandates this line of caselaw, numerous appellate decisions each year refuse to decide issues that have been briefed and argued by the parties because of a perception that the trial court did not adequately explain its decision in a case and the appellant failed to ask the trial court to "articulate" its reasoning once an appeal was filed.

This rule of appellate forfeiture has developed even though the rules of practice direct the trial court to explain the outcome of a case; but the caselaw has instead developed to impose a sanction on the appellant and its counsel for the perceived failings of the trial judge. While much more can be written about this procedure than space here permits, appellate practices (like articulation) that are developed through ad hoc, case-by-case decisions and not uniformly applied are difficult for practitioners and judge alike to understand and apply.

This is best illustrated by a recent denial of habeas relief for ineffective assistance of counsel after appellate counsel had failed to seek an articulation of an ambiguous trial court opinion, leading to the forfeiture of appellate review of an issue. The holding of the Superior Court habeas decision was that reasonable appellate counsel could not have anticipated the need for articulation, so counsel's failure was not ineffective assistance. See *Young v. Warden*, No. CV05-4000457, 2008 Conn. Super. LEXIS 1260, at *10-19 (J.D. of Tolland May 15, 2008), *affirmed on other grounds*, 120 Conn. App. 359, 370-75 (2010).

It is important that the appellate courts endeavor to avoid unnecessary traps and surprises for counsel and their clients, and so let us call for 2011 to be a year for reflection on new ways to further improve the state's admirable appellate system and eliminate the remaining rough edges that can impede what the appellate courts do best—hear the parties' arguments, review the record, and determine as best as possible the appropriate legal principles to apply to that record. Simple procedures, openness, transparency, and uniformity remain the guideposts on the path toward that goal. ■