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Adding Judicial Efficiency to the Appellate Conversation

The month of June once again is here, and, as in years past, attention turns to thoughts of summer, to high school graduations, and to anticipation of the U.S. Supreme Court's issuance of the term's most important and contentious rulings.

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Upon Further Review

The month of June once again is here, and, as in years past, attention turns to thoughts of summer, to high school graduations, and to anticipation of the U.S. Supreme Court's issuance of the term's most important and contentious rulings. Despite all of the criticism that frequently is directed at the U.S. Supreme Court — some warranted, and the rest, perhaps not so much — rarely does one hear the complaint that the nation's highest court is taking too long to decide the cases pending before it.

Indeed, the U.S. Supreme Court stays remarkably current in its caseload. For example, by tradition, any case that is argued between October and the end of the following April will be decided before the court adjourns for its summer recess in late June or (on very rare occasion) early July. Thus, the longest that one must wait for a decision from the U.S. Supreme Court (measured as the time between oral argument and the opinion's issuance) is nine months, and often the wait for decision is much shorter than that.

Of course, the U.S. Supreme Court has nearly total control over the contents of its caseload, the court has nine justices who share the workload, and the court typically only hears and decides a grand total of 70 to 80 cases per term. I am sure that many other appellate courts would also seem extraordinarily efficient if they were only issuing rulings on the merits in 70 to 80 cases per year.

To many, the issue of judicial efficiency on appeal may seem to have much in common with the weather: People talk about it frequently, but no one ever does anything about it. But while the weather may largely be beyond day-to-day human control, the pace at which appellate courts decide the cases pending before them is certainly well within the control of humans, in particular, those men and women serving as appellate court judges.

To be sure, appellate lawyers who practice primarily in Pennsylvania do not have all that much to complain about when it comes to the issue of judicial efficiency. For example, with regard to federal court appeals, the U.S. Court of Appeals for the Third Circuit stays remarkably current with its caseload. At the Third Circuit, only relatively few cases remain pending for decision longer than one year after oral argument, and those cases that do take longer to decide typically are the ones that are most complex or in which more than one judge has decided to write an opinion.

Likewise, both of Pennsylvania's two intermediate state appellate courts — the Commonwealth Court and the Superior Court — stay very, very current with their caseloads. Decisions in even the most difficult appeals commonly issue within three to nine months from oral argument, and rarely does either of those courts take longer than a year from oral argument to issue a ruling in even the most complex appeals. The efficiency of the Superior Court is particularly deserving of praise, because that court correctly regards itself as one of the busiest intermediate appellate courts in the nation.

Regrettably, the one Pennsylvania-based appellate court that I have yet to mention happens to be the one local appellate court about which lawyers and litigants routinely have the most delay-related concerns and complaints — and that court is the Supreme Court of Pennsylvania. Whether it is requests for discretionary review by allowance of appeal that are routinely taking over a year to be decided or argued cases that are routinely taking from one to two (or sometimes even more) years after oral argument to be decided, Pennsylvania's highest court frequently does a disservice to itself, to the litigants, and to the people of Pennsylvania and those businesses that are based in or have a presence in Pennsylvania by proceeding toward the resolution of cases at what might charitably be described as a glacial pace.

There may seem to be little that I can do or that most of the readers of this column can do to encourage judicial efficiency on appeal beyond merely lending our encouragement. What needs to happen is that courts that lack a culture of judicial efficiency need to find ways to reward that goal. The federal appellate courts have found a way to encourage judicial efficiency through a method of self-shaming. Every so often, the administrators of the federal judiciary circulate a list within each judicial circuit identifying by name the judges who have been assigned opinions that have not been issued within the court's own self-imposed timetable for decision and listing the number of cases in which each judge is behind. Even though these judges possess life tenure, most federal appellate judges do not enjoy appearing on these lists, and they therefore try their best to ensure that only the most difficult of cases are taking the most time to decide.

Upping the ante a bit further, the state constitution of California contains a provision that denies pay to judges who fail to issue decisions in matters that have been under advisement for longer than 90 days. At the appellate level, this constitutional provision causes the Supreme Court of California and the state's intermediate appellate courts to issue decisions within 90 days after cases have been orally argued. California appellate courts have found a way around the harsh operation of the rule when necessary, by postponing oral argument until the courts have thoroughly analyzed each case and have reached a tentative decision on the outcome. Nevertheless, California state appellate courts are, by and large, deciding cases quite promptly.

Beyond self-shaming or mandating judicial efficiency through a constitutional amendment, Pennsylvania citizens have another remedy available, which they can exercise at the ballot box. When someone is running for a vacant seat on the state Supreme Court, the legal news media, attorneys and the public should ask the candidate what his or her views are on speeding up the time for rulings and whether he or she would advocate taking steps to ensure a more efficient state supreme court and what those steps might be. Similarly, when sitting justices stand for retention election, voters should ask the same questions. Moreover, every justice has established his or her own record reflecting how long from oral argument to final decision opinions have taken when that justice has written either the opinion of the court or a separate opinion, and in cases that have taken an exceptionally long time to produce a ruling, the justice should be called on to explain what role, if any, he or she played in that delay.

There are plenty of excuses that can be offered for why the Supreme Court of Pennsylvania has developed chronic backlogs in deciding whether to hear cases and in deciding on the merits the cases in which review has been granted. The court has been without a seventh justice for quite some time now, meaning that 86 percent of the authorized justices are required to do 100 percent of the work. In addition, the court has mandatory appellate jurisdiction over death penalty appeals, and those cases commonly present numerous issues and involve unparalleled factual and legal complexity. Finally, the justices on Pennsylvania's highest court also are in charge of running the judicial branch of state government, and those administrative tasks take time (when they cannot and are not being delegated to qualified administrative staff).

No one can contend that it will be easy for the Supreme Court of Pennsylvania to become current in its work, nor can the problem be solved overnight. However, the current delays that plague Pennsylvania's highest court cannot continue indefinitely; at some point, the justices on that court will need to bear down and do the hard work necessary to dig their court out of the unfortunate situation in which it now finds itself. I am confident that the current justices are up to this task if they decide it is worth accomplishing, and it is up to us — the consumers of justice in Pennsylvania — to let the court know that we support a return to an adequately efficient Supreme Court of Pennsylvania.

However, if the current justices are unable or unwilling to eliminate the sizeable delays now plaguing much of that court's work, then Pennsylvania's citizens can only blame themselves, because they hold the key to judicial efficiency at the ballot box and through the adoption of necessary legislation or constitutional amendments. •