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Explaining the High Court's Work Product and Efficiency

A recent opinion piece by Howard Bashman, "Adding Judicial Efficiency to the Appellate Conversation," published June 11 in *The Legal,* citing no statistics, claims that the Supreme Court of Pennsylvania is inefficient and does not work hard. The author claims that "sizeable delays" are "plaguing" the court's work; allocaturs and appeals proceed "at ... a glacial pace" and suffer "chronic backlogs"; allocaturs "are routinely taking over a year to be decided"; the court lacks a "culture of judicial efficiency"; and the court "at some point ... will need to bear down and do the hard work necessary" to address the issues he raises. The assertion that the court does not work hard is profoundly mistaken: I know this for a fact and the court's work product proves it.

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A recent opinion piece by Howard Bashman, "Adding Judicial Efficiency to the Appellate Conversation," published June 11 in *The Legal*, citing no statistics, claims that the Supreme Court of Pennsylvania is inefficient and does not work hard. The author claims that "sizeable delays" are "plaguing" the court's work; allocaturs and appeals proceed "at ... a glacial pace" and suffer "chronic backlogs"; allocaturs "are routinely taking over a year to be decided"; the court lacks a "culture of judicial efficiency"; and the court "at some point ... will need to bear down and do the hard work necessary" to address the issues he raises. The assertion that the court does not work hard is profoundly mistaken: I know this for a fact and the court's work product proves it. Moreover, the exclusive focus on the time of argument to disposition loses sight of the value of considered decisions, and the court's other responsibilities. Following my initial disappointment, it occurred to me that, in addition to explaining why the author's multiple criticisms are misguided, there might be some educational benefit in describing the reality of the court's business and function.

The claim that the court does not already work hard is not based upon the author's firsthand experience associated with the court or its rules committees and boards, which are staffed by volunteer lawyers whose invaluable assistance helps the court discharge some of its equally-important duties beyond deciding cases. The criticism arises from an anecdotal comparison of the court to Pennsylvania intermediate state and federal appellate courts. The comparison is inapt. The direct review courts typically sit in panels of three; the cases most often result in nonprecedential decisions involving error review; and the courts all benefit from the services of experienced senior judges. The Superior Court is allotted 15 judges, supplemented by senior judges (five at present); the Commonwealth Court has nine judges, supplemented by senior judges (four at present); the U.S. Court of Appeals for the Third Circuit is allotted 14 judges, and currently has 24 commissioned and senior judges available, a number supplemented with judges from other circuits sitting by designation. None of these tribunals are courts of last resort. The state intermediate courts have no capital appeal caseload, and the Third Circuit has a very limited one.

The Supreme Court of Pennsylvania is a court of last resort that sits only en banc, and presides over a mixture of direct and discretionary appeals. Every justice votes on every matter, including: direct appeals, capital appeals (direct and collateral), allocaturs, discretionary appeals, Children's Fast Track matters, gaming appeals, grand jury appeals,

legislative redistricting appeals, King's Bench petitions, certified questions from federal courts, election appeals, emergency petitions, petitions for review, judicial disciplinary matters, attorney disciplinary matters, recommendations from eight rules committees and six court-related boards, miscellaneous petitions, ancillary matters and pro se matters. Our complement of seven justices is not supplemented with senior justices, and the court was deprived of a justice for over a year.

The criticism by comparison to the U.S. Supreme Court is no less inapt, as that court of nine members has no mandatory capital direct review responsibility, and has far more control over its docket. Indeed, our court is unlike any of the courts to which the author refers. Our task involves a balancing of finite resources to decide a large caseload of appeals over which we have no discretionary control, including capital cases, as well as discretionary appeals accepted precisely because of their statewide importance. We cannot turn away discretionary appeals of statewide importance and say: "Sorry, we're too busy."

In any event, the court's work ethic and efficiency is objectively measurable. As the author notes, the U.S. Supreme Court issues merits rulings in 70 to 80 cases per term. In calendar year 2012, our six-justice court filed 93 full opinions and five precedential per curiam opinions or orders, disposing of a total of 126 separate appeals, arising on seven different dockets, and resolved another 120 direct appeals (capital and noncapital) by per curiam order. The court resolved 18 capital appeals by opinion, and decided 10 more by per curiam order. One of the 93 opinions involved the decennial legislative reapportionment, a matter that had to be decided quickly because it affected the 2012 primary election. The appeals were briefed, argued and decided within two weeks of the filing of the petitions for review. The 87-page opinion issued the next week; it addressed and resolved 12 separate appeals.

The court appreciates the need to decide appeals quickly. But, the court also appreciates its duty to provide clear explications of law that will govern the entire commonwealth, not just the parties before the court. Principled compromise to achieve consensus is a necessity, and that process can take the form of multiple drafts of opinions, reconsideration and accommodation — all to achieve a clear majority disposition. Consensus is far more difficult when the court lacks its full complement. Immediately after the suspension of former Justice Joan Orie Melvin in May 2012, the court reassigned her open cases and also instituted a process to discuss deadlocked cases in conference. A fair number of deadlocked cases have been resolved in just this fashion. The process was worth the extra time it took: One year later, all appeals reassigned from Orie Melvin have either been decided, are in circulation awaiting court vote, or are being held internally pending resolution of related issues in other cases.

The disruption occasioned by the suspension of Orie Melvin was exacerbated by her newness to the court. Justices with prior appellate judicial experience have frequently remarked upon their surprise at the breadth and depth of the workload here. The learning curve on this court is correspondingly long and steep. For example, focusing just on published opinions, in her two-year-and-five-month active tenure on the court, Orie Melvin, who had experience on the Superior Court, filed 15 majority opinions. By comparison, Justice Thomas G. Saylor and I, the two most senior justices, each filed 18 majority opinions in 2012 alone; one of those opinions resolved the 12 separate reapportionment challenges.

Whether shorthanded or not, the court routinely identifies and advances cases requiring expedited disposition, including, but not limited to, Children's Fast Track matters and cases that affect impending elections. For example, in 2012, in addition to the redistricting decision: (1) the court issued a precedential per curiam decision in a King's Bench appeal, within two weeks of the initial pleading, which sought a writ of mandamus to hold special elections for the House of Representatives; (2) the court issued a precedential per curiam decision resolving the initial challenge to the voter ID law, five days after that case was argued; (3) in a unanimous opinion by Justice Max Baer, the court decided a Children's Fast Track appeal 37 days after it was argued; and (4) in a unanimous opinion by Justice Debra Todd, the court decided an appeal involving judicial discipline 17 days after it was argued. This year, to cite just one more example, a unanimous opinion by Baer, filed nine days after oral argument, resolved a case involving a constitutional challenge to an act of the General Assembly pursuant to which certain counties abolished the elected office of jury commissioner.

All appeals are important, and the court appreciates that litigants and lawyers expect to see their cases decided quickly. But, surely many knowledgeable lawyers, litigants and citizens also recognize the imperative for courts of last resort to decide cases clearly, correctly, by majority whenever possible, and with an appreciation of the implications of the decisions. The court works hard to balance cases requiring immediate or accelerated disposition against cases where the decisional process can be more orderly and deliberative; in all cases, we strive to get it right, and to achieve consensus, while tending to many other duties.

The author's opinion of the court's work ethic is borne of an assumption that the only consideration in measuring the court's "culture" or its "efficiency" or its "work ethic" is the speed of its decision of appeals and allocaturs, followed by an assumption that timeliness is objectively measurable by comparing a state court of last resort to other courts with different compositions, duties and jurisdictional priorities. The Supreme Court of Pennsylvania is duty-bound to see the bigger picture.

In any event, the assertions concerning timeliness of disposition are mistaken. Respecting allocaturs, these matters do not "routinely tak[e] over a year to be decided" and the court has not "developed chronic backlogs in deciding whether to hear cases." Each year, the court receives over 2,000 allocatur petitions. With the court at full complement, justices draft an average of over 300 reports per year, in cases involving all areas of law, and each justice must review and vote on all reports generated by other justices. In the past year, each justice has received approximately 50 additional assignments given that we have operated with only six justices. The statistics on dispositions are reported each year and are posted on the court's website, and the pace of dispositions is objectively measurable.

The court disposed of nearly 2,100 allocatur petitions on the merits in calendar year 2012, within the following approximate timeframes, calculated by the Supreme Court Prothonotary's Office from the date of assignment to a justice to the date of disposition:

• Eastern District of Pennsylvania: 134 days median; 163 days mean.

• Middle District of Pennsylvania: 132 days median; 154 days mean.

• Western District of Pennsylvania: 134 days median; 153 days mean.

The assertions of a glacial pace and chronic backlogs in allocatur dispositions are fictional.

Respecting appeals, as noted, the court filed 93 full opinions and five per curiam opinions or precedential orders in 2012, disposing of 126 appeals, and resolved another 120 appeals (capital and noncapital) by per curiam order. Noncapital direct appeals are screened for suitability for oral argument through the court's dispositional review process. (See Supreme Court Internal Operating Procedures (IOPs) § 5A.) The court's Prothonotary's Office calculated the disposition rates for noncapital direct appeals, which, after dispositional review and full court vote, were deemed suitable for resolution by per curiam order without argument as follows:

• Eastern District (35 cases): 90 days median; 114 days mean.

• Middle District (44 cases): 100 days median; 107 days mean.

• Western District (nine cases): 75 days median; 91 days mean.

Turning to the most consequential cases resolved in 2012 — i.e., those proceeding to argument, supplemented by nonargued cases resulting in precedential decisions — my staff reviewed the noncapital cases individually and determined that 60 opinions or orders, disposing of a total of 88 appeals, were filed less than a year after argument or submission. Excluded from that calculation were appeals where a dispositive per curiam order (usually an affirmance or an improvident grant dismissal) was issued shortly after session, as well as election appeals that did not lead to precedential decisions. Forty-seven of these 60 opinions, deciding 71 appeals, issued in 270 days or less. The court's Prothonotary's Office calculated the overall disposition rates for these noncapital appeals as follows:

• Eastern District: 311 days median; 382 days mean.

• Middle District: 225 days median; 317 days mean.

• Western District: 325 days median; 328 days mean.

Meanwhile, the court disposed of those election direct appeals that did not result in precedential decisions — 15 cases across the three districts — in a median time of nine days and a mean time of 10 days. To be sure, there are appeals that took longer to decide, some much longer, but those appeals typically involve cases where there were multiple responsive opinions, where there was a reassignment of the appeal, where there was a multiplicity of issues, the court worked hard to achieve consensus, or the case was held pending resolution of a related issue in our court or in the U.S. Supreme Court.

On the capital docket, the court decided three direct appeals, all in less than a year. Capital appeals arising under the Post-Conviction Relief Act (PCRA) are far more time-consuming and difficult, frequently produce multiple responsive opinions or reassignment, and many produce remands, inflating time-to-disposition rates. In addition, given the changing nature of capital jurisprudence dictated by the U.S. Supreme Court, appeals are frequently held pending other developments. For example, *Commonwealth v. DeJesus*, 546-547 CAP, posed PCRA cross-appeals with the primary issue involving an *Atkins* claim of mental retardation. *DeJesus* was decided by unanimous opinion nearly two-and-a-half years after submission. However, a case central to resolution of the appeals, our court's decision in *Commonwealth v. Sanchez*, 597 CAP, was pending before the U.S. Supreme Court on certiorari, leaving the precedent uncertain. *DeJesus* was filed 10 weeks after the certiorari denial in *Sanchez*.

In any event, the majority of our capital appeals were decided in less than a year. In addition to the three direct appeals, the court issued 13 opinions in capital PCRA matters, resolving 15 separate appeals, and a precedential per curiam

order in another appeal. Nine of the dispositions issued in less than a year, including six by full majority opinion and another one by precedential per curiam order.

The author claims that the court "lacks a culture of judicial efficiency." To prove this assertion, which obviously is not premised upon firsthand knowledge, the author contrasts the court with federal circuit courts, stating that administrators of the federal judiciary "every so often" produce a list within each circuit identifying by name judges with overdue opinion assignments. Our court monitors the progress of opinion assignments far more closely — and directly — than that. At the court's six regular argument sessions each year, I distribute individual inventories listing each justice's opinion assignments and the date of assignment. The inventories also identify cases that have been withdrawn for revision, identify every hold of an opinion, noting the date and reason for the hold, and update the court's overall appeals inventory, broken down by justice. The holds are further divided into those still within the court's target IOP deadlines and those exceeding the deadlines. This is a time-intensive but salutary practice that I instituted early in my tenure as chief justice. In addition to these inventories, every justice has access to our internal case management system and can track open assignments and holds on any docket at any time.

Furthermore, the court produced a comprehensive revision of its IOPs this past January (effective January 2). Among other points, the IOPs establish self-imposed target deadlines for the circulation of allocatur reports and opinions. With respect to opinions, the IOPs for the first time calibrate the court's target circulation guidelines depending upon the type of appeal involved. An opinion in a 12-issue capital PCRA appeal will take longer to draft than an opinion addressing a single-issue discretionary appeal; the new IOPs reflect this reality. The IOPs also explain the court's procedures and deadlines for voting, for holds, for circulation of responsive opinions, for reassignment, etc. The IOPs revise the court's "hold" practice, to minimize serial holds, and to encourage justices in a responsive posture to collaborate and avoid the need for multiple responsive opinions, thereby reducing delay. All of these target deadlines recognize that exceptional circumstances may cause delay. Being short a justice, and left to dispose of the unavailable justice's inventory and to take up her share of new inventory, are obvious such circumstances, IOP§ 12, but they are hardly the only ones.

The court's procedures respecting allocaturs likewise are public. (See IOP § 6.) Under the court's current self-imposed target deadlines, allocatur reports are to be circulated internally to the other justices within 90 days of assignment, with proposed disposition dates not more than 60 days thereafter. Holds are permitted, but are limited in terms of purpose and time. Children's Fast Track allocaturs are subject to an accelerated timeframe. I fully expect our allocatur dispositional rates to remain close to the IOP target ranges. To ensure that we remain current, in conjunction with the effective date of the revised IOPs earlier this year, I distributed individualized allocatur inventories to each justice, identifying overdue allocatur assignments and encouraging justices to become or remain current.

The author's uninformed opinion of the court's "efficiency" and "culture" is erroneous. Finally, it is important to remember that, while the author's personal practice and experience may be limited to a few allocaturs and the occasional appeal, these dockets represent a fraction of the court's business. Last year, the court resolved 297 petitions for review, 277 original jurisdiction matters and 68 King's Bench matters. These cases include varied and complex direct appeals in gaming cases, appeals in grand jury matters, and emergency motions. The court supervises the practice of law, including attorney disciplinary matters: Over 200 such cases were reviewed in 2012. The court carefully evaluates and implements rule recommendations from 14 boards and committees; annually, we receive approximately 45 proposals to adopt or amend statewide rules.

Furthermore, in its supervisory capacity, the court is responsible for 60 judicial districts with more than 2,000 employees and elected officials. The court proactively addresses important issues affecting the Unified Judicial System. For example, the court recently drafted a statewide manual to provide guidance for constables, and established an Elder Law Task Force, chaired by Todd, to focus on legal issues affecting older Pennsylvanians. The court's Office of Children and Families in the Courts, led by Baer, continues its emphasis on helping at-risk children find safe and permanent homes, leading to 12,200 less children in foster care, and an estimated net savings of $200 million in federal, state and local tax dollars over the last two years alone. The court regularly collaborates with other branches of government on statewide commissions (such as the Pennsylvania Commission on Sentencing and the Interbranch Commission for Gender, Racial and Ethnic Fairness) established to improve the administration of justice. The court actively encourages and facilitates pro bono work by attorneys, and it takes a lead in securing access to justice funding for indigent Pennsylvanians. The court has recently been recognized for its creative efforts to secure funding for these services with nontax dollars, and has encouraged attorneys to enter employment with legal services agencies through educational loan repayment programs — again, with nontax dollars. And, under the leadership of Justice J. Michael Eakin, the court has taken advantage of technological advances to streamline the filing, circulation and monitoring of court cases; to improve access to court dockets, records and forms; and to facilitate payment of court fees for the benefit of the state treasury and the judiciary's own budget.

In a letter to his friend and fellow novelist Nathaniel Hawthorne in June 1851, Herman Melville closed by noting: "But what plays the mischief with the truth is that men will insist upon the universal application of a temporary feeling or opinion." Bashman apparently has a feeling arising from a misapprehension of the business of the court and its currency, and then makes the mistake of extrapolating from his prejudgment erroneous universal conclusions. The

opinion piece was useful to the extent it was a reminder that practitioners may be unaware of the breadth of the court's responsibilities; I have attempted to fill that void. What is less helpful is the expression of a mistaken and subjective opinion that the court does not work hard and lacks a culture of efficiency and accountability. I realize that this sort of sloppiness has become common in an age of standardless "blogging," where viewpoint displaces facts. But, I am disheartened to see such a piece in a respected journal like *The Legal*.

The court has continued working hard in difficult circumstances arising from the long-term absence of a seventh justice. The court is by no means a perfect institution, it is constantly looking for ways to improve, and it is receptive to suggestions for improvement. Indeed, we are fortunate enough to be structured to receive suggestions on a routine basis from many citizens and lawyers who volunteer their time to help the court discharge its duties across many spheres. In contrast, the author's assertions do nothing to promote progress in the administration of justice in Pennsylvania.

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