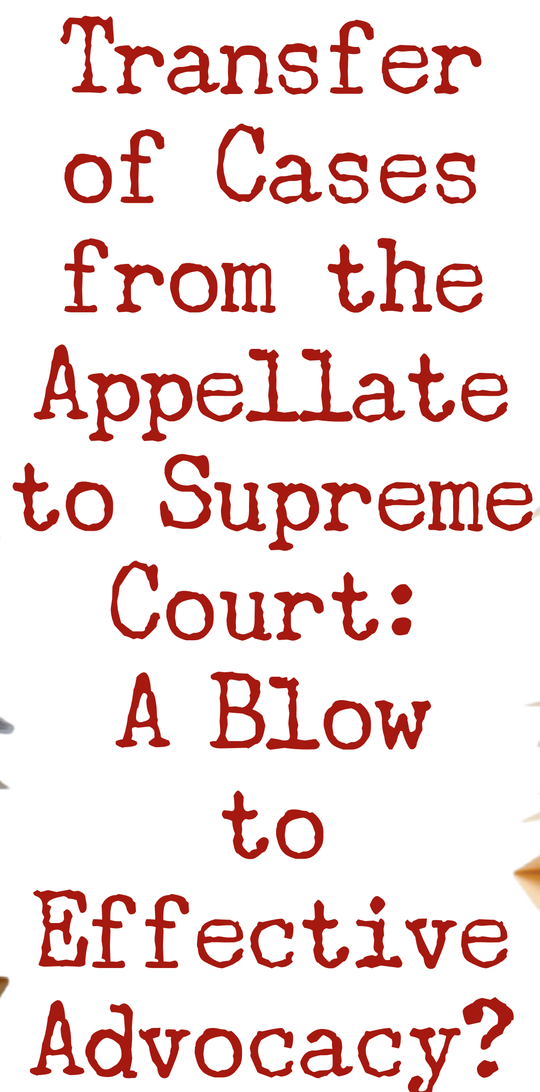
Transfer of Cases from the Appellate to Supreme Court: A Blow to Effective Advocacy?



By Thomas J. Donlon

Under Conn. Gen. Stat. § 51-199(c), the Supreme Court has the power to *sua sponte* transfer cases pending before the Connecticut Appellate Court to its own docket.[1] As applied by the Supreme Court, transfer under this Section can occur at various times during the appeal process: at the outset, after the appellant has filed his or her brief, or even after both sides have filed their briefs. As a result, lawyers may prepare a brief for submission to the appellate court and end up arguing the case before the Supreme Court. The differences in purpose and personnel between the two courts, however, may make a brief written for the appellate court less effective in the Supreme Court. This potential impact on the advocate's principal tool of persuasion militates in favor of the exercise of the Supreme Court's transfer authority prior to the preparation of briefs rather than during or after.

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Section 51-199 was enacted to implement the 1982 constitutional amendment creating the appellate court.[2] The appellate court was intended to reduce the case backlog in the Supreme Court and free the justices from routine appeals in order to give "detailed and deep analysis to those cases which are of importance to the general public."[3] The language in subsection (c) provides a means of getting truly important issues directly to the Supreme Court for final resolution. In practice, subsection (c) also has given the Supreme Court flexibility to adjust its caseload, which can improve the overall efficiency of the judicial system.

While the transfer mechanism in Section 52-199(c) is not unique,[4] our Supreme Court's regular application of this authority to routine cases is unusual.[5] Transfer of cases to the Supreme Court is so common in Connecticut[6] that most attorneys who regularly practice in the appellate arena have faced it. An attorney, however, never knows when in the process this may occur. An appellee may have begun work on a brief, only to learn part way through that the case has been transferred. Worse, both sides may not learn of a transfer until after all of the briefs have been submitted, or even until after the case is ready for argument. Exercised in such a manner, the practice of transfer diminishes the ability of the advocate to craft a message to the court actually hearing the case, with potentially negative implications for the client and the court.

Different Courts—Different Purposes

The appellate and Supreme Courts have separate and distinct roles. The appellate court, like most intermediate courts of appeal, principally concerns itself with correction of errors. The Supreme Court, as a court of last resort, looks to the impact of a decision on a broad range of potential cases beyond the narrow circumstances of the present one. As one author explains, "with each level or rise of the appellate structure, the *review for correctness* function diminishes, and the *institutional functions* which concerns itself with the uniformity of judicial administration and the progressive development of the law, increases."[7]

In Connecticut, any losing party may appeal as of right to the appellate court.[8] In contrast, appeals to the Supreme Court require the Court itself to grant certification: "[u]pon final determination of any appeal by the Appellate Court, there shall be no right to further review except the Supreme Court shall have the power to certify cases for its review…."[9] Practice Book § 84-2 specifically points out that certification "is not a matter of right" but permitted "only where there are special and important reasons therefore." Thus, the number and type of cases heard in each court differs substantially. While the appellate court hears a large number of routine appeals, the Supreme Court can be more selective.

The appellate court has been quite successful in carrying out its designated function—to reduce the caseload and backlog of the Supreme Court—in fact, maybe too successful. At times, the Supreme Court faces a less than full docket, which the Court seeks to remedy by transfer of more cases from the appellate court, reducing some of the burden on that court. Little public attention, however, appears to have been given to the possible adverse impacts of this practice on the quality of advocacy and, more importantly, on the administration of justice.

Different Courts—Different Briefs

As the roles and views of the appellate and Supreme Courts differ; so too the style and focus of a brief written to each will differ. In the appellate court, argument frequently focuses on application of existing law to the specifics of the individual case. An existing Supreme Court precedent restricts the attorneys' full freedom of argument. As the appellate court cannot overturn such case law, the briefs most likely will center on how the decision below does or does not comport with the precedent. While an attorney may well believe the precedent flawed, particularly where he or she has won below the advocate may wish to focus on the trial court's rationale for applying or distinguishing the precedent rather than wasting space in a brief with limited number of pages arguing against the precedent, or surrendering an opportunity for two bites at the apple by seeking transfer. In drafting the brief before the appellate court, an attorney may elect to merely say enough to preserve the issue, while saving more extensive arguments supporting a change to the law for the Court with the power to do so.

The Supreme Court remains much freer to decide a question on what it believes is the wiser approach, reinterpreting or even overruling prior precedent.[10] An argument based on principle and reason, rather than strict adherence to prior case law may be more appropriate in that setting.[11] Further, the impact of a particular decision on an entire area of the law, beyond the present factual circumstances, is often important to the Supreme Court's determination. In addressing such broader considerations, the opinions of other state or federal courts may be as persuasive as prior decisions by lower Connecticut courts, or even the appellate court's own precedents. As a result, a brief intended for the Supreme Court can look quite different from that submitted to the appellate court in the same case.

The structure of the two courts can also impact how an advocate crafts a brief. The large number of judges and the fact that the appellate court sits in panels of three, makes it unlikely that the advocate will know that any particular judge will read the brief. However, under the Supreme Court policy, begun in September 2009, of sitting en banc in every case, trends in decisions and expressions in prior opinions make it reasonable to shape an argument, or an entire brief, to seek to attract the support of particular Supreme Court justice or justices.

A basic rule for any writer is to know your audience. This is especially true of the appellate attorney—you must know your court; the players, the functions, and the approaches most likely to convince them to support your position. The Supreme Court's present transfer practice, however, makes that difficult. Practitioners regularly prepare briefs expecting them to be read by judges of the appellate court, when, in fact, they end up being read by members of the Supreme Court. Under the present system, an attorney cannot know with certainty who will be his or her reader until after finishing some or all of the writing. While oral argument remains available, that limited opportunity to interact with the court cannot fully balance out tactical and strategic choices made months before in the brief writing phase. Advocates should know who their readers will be before the brief is filed, so that they can best construct their arguments accordingly. At the same time, justices of the Supreme Court deserve to read a brief

that focuses on their particular concerns and responsibilities.

A Proposed Solution

The appellate court now assigns the vast majority of counseled civil cases a preargument conference.[12] Briefing schedules are held in abeyance until 45 days after that conference. As part of the preargument conference, parties can propose transfer to the Supreme Court. The trial judge referee conducting the conference also can recommend transfer. A less well known procedure for transfer is a review by one or more former justices of the Supreme Court, who can also propose transferring the case from the appellate court. That review now occurs most frequently after briefing is complete. However, that review could still be conducted prior to briefing, after the preargument conference. While the former justices would not have the benefit of reading the full briefs, given their extensive experience they still should have sufficient information for an evaluation whether the case deserves an expedited transfer. If that filter becomes stricter, rejecting more questionable cases, the system does not suffer. To the extent full briefing might have revealed an issue of significance; the Supreme Court will not be forever precluded from considering it. Rather, the Supreme Court would have the opportunity for review on certification with the additional benefit of the appellate court's thoughtful consideration in the interim.

While projecting caseloads and dockets for arguments well in the future may be more difficult before briefing begins, as compared to after completion of all briefing, it still should be possible. Thus, the Supreme Court would retain an element of flexibility to fill out its docket with appropriate cases. Most importantly, transfer prior to briefing does not create the drafting problems for the attorneys, or the potential incomplete development of arguments of particular concern to the Supreme Court, described above. Given the new policy of considering all Supreme Court cases en banc, procedures that potentially reduce the number of cases transferred from the appellate court, while preserving the Supreme Court's ultimate opportunity for review, do not represent a bad trade off.

Transfer under Section 51-199(c) at present may unwittingly favor efficiency over more effective advocacy. The goal of any appellate system should be reaching the best possible result. That goal, as well as the interests of practitioners in knowing their audience, and appellate judges in reading a brief written with them in mind, would be best served by ordering the transfer of cases only prior to submission of any briefs. **CL**

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Permanent Guardianship

(Continued from page 11)

8. P.L. No. 105-89, § 101 (b), 4 U.S.C. § 675 (7)
9. This program is intended to provide a permanent plan for children in the care and custody of DCF who are placed by DCF with their licensed relative caregivers and who cannot return home due either to the death of a parent or the parents' inability to provide a home within the foreseeable future. The child(ren) must have resided with their relative caretaker for at least 6 months. A thorough assessment of the child's placement will be completed by DCF prior to recommending the transfer of guardianship to the relative. The subsidized guardianship program will then provide the relative caretaker with a monthly board and care payment equal to the prevailing foster care rate (minus any income the child has, such as Social Security) plus medical coverage in the state Medicaid HMO program (Public Acts 97-272, Sec. 7 and 05-254-eff. 10-1-05), DCF Policy 41-50-2, P.1-14. This program was authorized by the Connecticut legislature in September of 1998. This program recognizes the importance of financially supporting relative caretakers of children in DCF care who are willing to assume the legal guardianship of the children in their care.
10. V M.P.T.L Ch. 5 § 8

Transfer of Cases

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Notes

1. *See also* Practice Book § 65-1.
2. *See* Statement of Rep. Tulisano, Connecticut General Assembly House Proceedings, 1983 June Special Session PA 83-29 p. 1277; *see also* Article XX Amendments to Connecticut Constitution.
3. *Id*., Statement of Rep. Tulisano at p.1397.
4. *See e.g*. Code of Alabama § 12-3-15; North Carolina General Statutes § 7A-31.
5. The Alabama and North Carolina Supreme Courts, for example, have rarely used their authority and only in very significant cases.
6. A review in 2003 found that 70% of reported Supreme Court cases arose under this provision. *See* Wesley Horton and Kenneth Bartschi, *Rules of Appellate Procedure* (2007–2008 ed.), p.163.
7. Edward Re and Joseph Re, *Brief Writing and Oral Argument* (7th ed. 1993), p. 157 (emphasis in original). *See also* Herbert Levy, *How to Handle an Appeal* (1990), p. 152 ("Your approach will depend upon the level of the appellate court.")
8. Practice Book § 61-1; Conn. Gen. Stat. § 51-197a.
9. Conn. Gen. Stat. § 51-197f. *See also* Practice Book § 84-1. Transfer from the appellate court augments the certification process, expanding the pool of Supreme Court cases. A very limited number of cases may be appealed directly to the Supreme Court. *See* Conn. Gen. Stat. § 51-199(b). Most of those, however, can be transferred down to the appellate court pursuant to Conn. Gen. Stat. § 51-199(c).
10. *See e.g. State v. Salamon*, 287 Conn. 509 (2008).
11. *See e.g. Brief Writing and Oral Argument*, *supra* at p. 92.
12. Criminal cases do not receive this review. However, handling routine criminal appeals was one of the principal reasons for establishing the appellate court. Direct appeal under Conn. Gen. Stat. § 51-199(b) and certification after appellate court review provide adequate mechanisms for Supreme Court review of important criminal appeals.

Diane Alverio (Continued from page 27)

CL: How did you manage your time while writing this book?

DA: As I tell everyone when they ask me that question, thank goodness for winter weekends and rainy days. I've also learned with all my writing, I have to be in the right mind frame and focused; if not, I am not productive in the least bit. But, perhaps this book was completed due to all those years I spent in the newsroom. Whenever, I'd receive an e-mail from the editor looking for copy, my deadline mode kicked in and it was amazing how quickly I'd moved into that Zen writing mode.

CL: Looking back, is there anything you would have done differently?

DA: When I was asked to write this book, since I had taken on other huge projects before, I knew in the beginning it would be exciting and in the end it would be exciting, but those long months in the middle were exactly as I knew they would be—a lot of hours, a lot of work, and a lot of trying to remember why I started all this in the first place. But no, I would not do anything differently. It was a learning process as I realized at different stages of the book I needed to interview even more people than I had anticipated or do more research to feel as though I could comfortably support the points I wanted to make.

CL: What do you think readers will come away with when they read this book?

DA: Readers will gain a broader understanding of the practical workings of the media, of how newsrooms really work, what motivates a reporter, and the many aspects of how to market their law services. I'm sure many will enjoy some of the behind the scene stories of how the media was handled during a few high profile media events. Most importantly, for those who view the media as the enemy, I think those readers will leave with the same knowledge as one of the participants did in one of my media training sessions. She wrote me months later to let me know she had unexpectedly found herself dealing with the media, and that when they came she was still nervous, but at least she knew what to do!

CL: What are your plans for the near future?

DA: At this point in my life, it's about selecting and narrowing down what new special projects I'd like to tackle next. I always love and welcome a new challenge. I will of course continue my work in my public relations and marketing firm, as I truly enjoy its many challenges, the talented folks who work with me, and the clients. A second book is definitely in the plans as well as taking time to enjoy my family and friends, and oh, yes—improving my skills for my new found passion: my golf game! **CL**