



STATE OF CONNECTICUT  
SUPREME COURT

CHAMBERS OF  
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**Testimony of Senior Associate Justice David M. Borden  
Judiciary Committee Public Hearing  
April 9, 2007**

**Senate Joint Resolution 32, Resolution Proposing An Amendment  
To The State Constitution Concerning The Practices  
and Procedures Of The Courts**

Good afternoon, Senator McDonald, Representative Lawler, members of the Committee. I am David Borden, and I am the Senior Associate Justice of the Connecticut Supreme Court. I come before you today to discuss the Judicial Branch's concerns with *Senate Joint Resolution 32, Resolution Proposing An Amendment to the State Constitution Concerning the Practices and Procedures of the Courts*.

The Judicial Branch strongly opposes this resolution, which would transfer from the judiciary to the legislature the power to make the procedural rules that govern court practice. We believe that the rule-making power should remain within the province of the judiciary, where it has been for nearly two hundred years since Connecticut's Constitution created a separate and independent Judicial Department of government.

It is useful to this discussion to understand just what we mean when we refer to rule-making. Rule-making is a detailed and arduous undertaking. As many of you know, there are more than 1100 rules of civil, family, juvenile, criminal and appellate procedure. These rules, which are published in the Connecticut Practice Book and are available on the Judicial Branch's website, are sets of instructions to the lawyers and judges that are designed to ensure a level playing field in the litigation process. Most of them involve specific matters that are of great importance to the fair and efficient operation of the litigation process but of limited interest to the general public, such as the procedures and time limits for a litigant to amend a complaint filed with the court.

The rules of practice are adopted by a vote of all our state judges at the Annual Meeting of the Judges of the Superior Court, which is open to the public. Prior to this vote, however, the Rules Committee of the Judges of the Superior Court - which also meets openly - holds a public hearing on proposed rules or amendments to rules that have been submitted by judges, lawyers, or members of the public.

This public hearing provides an opportunity for individuals to appear and to voice their support for, concerns with, or opposition to the proposed rules. In fact, it is very similar to the procedure I am participating in here today. It affords a meaningful opportunity for the public, including the media, the bench, and the bar, to make suggestions or offer criticisms.

I believe that this framework ought to be maintained. Because the judges work with the rules every day, they have the detailed knowledge and every-day courtroom experience that informs them of whether the rules are working. In addition, I believe that transferring the rule-making power to the legislature could subject that power to political factors that should not be allowed to influence the formulation of our rules of court.

There is an additional reason that I believe the state should not take the extreme step of enacting a constitutional amendment -- it is unnecessary. For decades, the General Assembly and the judges of the Superior Court have acted in comity on issues of court practice and procedure. While inconsistencies between Practice Book rules and statutes are rare, they have occurred from time to time. In these instances, we have worked cooperatively to harmonize the language, either by amending the rule or by requesting amendments to the statute. Simply put, we have been good partners and we have worked diligently to reach mutually agreeable solutions. In fact, in my nearly 30 years in the state judiciary, I cannot recall a single instance where this was not so.

For example, just this past July, technical amendments were adopted by the judges to conform sections of the Practice Book to recent enactments of the General Assembly. Specifically, two sections regarding offers of compromise were amended to conform to Public Act 05-275, *An Act Concerning Medical Malpractice*. Similarly, sixteen sections of the Practice Book rules regarding

family matters procedures were amended in light of Public Act 05-10, an act that authorized civil unions.

In other instances, new initiatives have required both statutory changes and changes to our rules. For example, when it became clear that the state generally needed to create a program for crisis intervention and referral assistance to attorneys who suffer from alcohol, substance abuse, or gambling problems, our two branches of government worked together to create the program and make the necessary changes in statute and rule. My point is that we have not been at loggerheads; we have respected one another and acted cooperatively. Neither branch of government has found it necessary to usurp the power and authority of the other.

Lastly, it has often and rightly been said that a constitutional amendment should be a remedy of last resort. I strongly urge to you that we are nowhere near that point of last resort. Recent issues, such as the super-sealing of cases and the delayed release of the GA 7 case, did not arise because of a provision in the rules. In addition, they have both been appropriately addressed and resolved.

The reason often given by those who argue for a constitutional amendment on the rule-making power is to ensure that the courts are accountable to the people of our state. I submit that the courts *are* accountable to the people. Recently, the Judicial Branch has undertaken historic and unprecedented steps to enhance that accountability by increasing the openness,

transparency, and public accessibility of the courts. I have previously spoken to you about these specific steps, and will speak to you at greater length regarding our progress when we discuss *Senate Bill 1479, An Act Concerning Judicial Branch Openness*. I am confident that these steps will ensure that the courts are and remain appropriately accountable to the public that we serve, without compromising the courts' independence as the only non-political branch of government.

I, in my capacity as Senior Associate Justice - in effect, Acting Chief Justice - since April of last year, began this process of openness and accessibility. As you know, Judge Rogers, whom the Governor has nominated to be our next Chief Justice, fully supports this change and direction, and intends to continue it. Thus, there should be no fear that this is a temporary phenomenon. I am confident that it will be permanent and healthy--both for the Branch and for the public that we serve. At the least, I urge you to give us time to prove this to you and to that public.

Thus, I respectfully suggest that the adoption of a constitutional amendment would be unwise. It might politicize the rule-making process, disregard our history of working cooperatively on behalf of the citizens of this state, and would be, in my opinion, an over-reaction to events that transpired last year. Instead, I believe that a period of reflection and observation would be the wiser course. I urge you to wait and watch how the Judicial Branch operates in an open, transparent and accessible fashion.

The Judicial Branch's mission is to resolve matters brought before it in a fair, timely, efficient and open manner. We are committed to fulfilling this mission to the best of our abilities, and believe that in order to do so we must maintain the authority to adopt our Rules of Practice. Therefore, I respectfully request that the Committee not act favorably on this resolution.

Thank you for the opportunity to testify.