

ADVISORY COMMITTEE ON APPELLATE RULES
May 22, 2013

The meeting was called to order by Justice Vertefeuille at 10 a.m. in the Attorney Conference Room of the Supreme Court. The following committee members attended:

Justice Christine Vertefeuille, Co-Chair
Chief Judge Alexandra DiPentima, Co-Chair
Judge Eliot Prescott
Judge Sheila Huddleston
Attorney Michele Angers

Attorney Kathryn Calibey
Attorney Gregory D'Auria
Attorney John DeMeo
Attorney Steven Ecker
Attorney Richard Emanuel
Attorney Susan Marks
Attorney Pamela Meotti
Attorney Charles Ray
Attorney Thomas Smith
Attorney Martin Zeldis

Also in attendance were:

Justice Peter Zarella
Attorney Ken Bartschi
Attorney Jill Begemann
Attorney Lori Petruzzelli

Justice Vertefeuille congratulated Judge Huddleston on her recent appointment to the Superior Court bench and introduced new committee members Attorney Kathryn Calibey and Attorney Richard Emanuel.

I. OLD BUSINESS

A. Minutes of December 19, 2012 Meeting

The committee unanimously approved the minutes of the December 19, 2012 meeting.

B. Proposed Amendments of § 84-4 (filing of petitions for certification to Supreme Court)

In response to a letter to the committee from Attorney Daniel Krisch, Attorneys Angers and DeMeo drafted a proposed amendment that would permit a petitioner to file a petition for certification to appeal directly with the appellate clerk in cases where fees and costs have been waived. Attorney Angers also suggested that the final sentence of the proposed language should be further revised to state: "The petitioner shall serve a

copy of the petition for certification . . . upon every other party"

Attorney Zeldis moved that the committee adopt the proposal as modified, seconded by Attorney Ecker, and the motion passed unanimously.

C. Proposed Amendment of § 61-11 (stay of execution in noncriminal cases)

Justice Vertefeuille explained that the proposal to amend § 61-11 had been suggested by Judge Douglas Mintz and his foreclosure committee to address the fact that judges in foreclosure matters are often flooded with motions to open or to reopen immediately before a foreclosure sale or law date. When the proposal was discussed at the December 19, 2012 meeting, certain language changes were recommended and Attorney Horton raised some concerns.

Justice Vertefeuille noted that the language changes had been incorporated into the proposal and Attorney Bartschi indicated that Attorney Horton, who spoke with Judge Mintz, no longer had concerns about the proposal.

Judge Prescott suggested that the commentary should reflect that the amendment to the rule was intended to alleviate problems recognized by the Appellate Court in *First Connecticut Capital, LLC v. Homes of Westport, LLC*, 112 Conn. App. 750 (2009). The committee agreed to give the committee staff authority to draft such commentary.

The committee members also agreed to amend the proposal to streamline certain language.

After brief discussion, Attorney Angers moved that the committee adopt the proposal as modified, seconded by Attorney DeMeo, and the motion passed unanimously.

D. Proposed Amendment of § 63-3 (filing of appeal) and New § 63-3A (appeals in e-filed cases)

Judge Huddleston explained that the proposal was intended to simplify appeals in e-filed cases by consolidating information concerning such appeals in a new rule, § 63-3A.

When the committee first considered the matter at the December 19, 2012 meeting, it had suggested revising the first sentence of the proposed § 63-3A as follows: "An appeal may be e-filed in any case in which e-filing is permitted in the trial court." The committee reaffirmed that revision and also recommended revising § 63-3A to: 1) delete the third paragraph; 2) change "specified on the Judicial Branch E-Services webpage" to "specified by Judicial Branch E-Services"; 3) delete "court and" from the phrase "served on each court and party"; and 4) delete the phrase "as with appeals filed in paper" from the final sentence. With respect to § 63-3, the committee recommended deleting the phrase "and one copy."

Attorney Angers moved that the committee adopt the proposal as modified, seconded by Judge Huddleston, and the motion passed unanimously.

II. NEW BUSINESS

A. Proposed Revisions to Rules of Appellate Procedure Governing Preparation and Filing of the Record

Judge DiPentima noted that many individuals in attendance at the meeting had played a major role in the proposed revisions, which would eliminate the prepared yellow record and would, instead, require the parties to include relevant materials in their appendices. Justice Zarella, in particular, had invested a great deal of time and effort in obtaining input from judges, members of the appellate bar and judicial branch staff. Judge DiPentima explained that the purpose for the proposed revisions was to eliminate delays in the appellate process, and that the proposal would have the added benefit of eliminating confusion as to the terms "yellow record" versus "record." With respect to the procedure for considering the proposed revisions, Judge DiPentima explained that the rules would be considered as they had been distributed to the committee and that the committee would then address any additional concerns.

Several committee members raised concerns about specific rules as distributed, which were discussed and resolved as follows:

1) In order to refine the definition of the term "record" in **§ 60-4**, the committee agreed to the following: "Record" shall include the case file, any decisions, documents, transcripts, recordings and exhibits from the proceedings below and, in appeals from administrative agencies, the record returned to the trial court by the administrative agency."

2) Because the term "pleadings" can have more than one meaning, the phrase "relevant portions of the pleadings, findings, opinions, or decisions of the trial court" in **§ 67-8 (b) (1)** was changed to "all relevant pleadings, motions, requests, findings, opinions, or decisions of the trial court"

3) To be consistent with § 67-8 (b) (1), **§ 67-8 (c)** was revised as follows: "If the appellee determines that part one of the appellant's appendix does not contain portions of the proceedings below, the appellee shall include any such items that are required to be included pursuant to section 67-8 (b) (1) that it deems necessary in part one of its appendix."

4) In order to ensure that the parties have continued guidance as to the materials that should or should not be included in their appendices, the commentary to **§ 67-8** and will be retained indefinitely.

5) In response to a question concerning the policy behind the rule prohibiting an appellee from including materials that have already been included in the appellant's

appendix; see **proposed § 67-8 (c)**; Justice Vertefeuille and Judge DiPentima clarified that the court would like to prevent unnecessary duplication of materials, especially in particularly complex or lengthy matters.

6) With respect to **§ 67-2 (a)**, Judge DiPentima clarified that the margin requirements pertain to both briefs and appendices. Judge DiPentima also circulated language that had been proposed by Attorney Bartschi with respect to double-sided printing of appendices. Justice Zarella and Justice Vertefeuille indicated that it can be difficult to read pages that are double-sided, depending on the quality of the paper and the ink. The committee determined that it would note that the issue had been raised, and leave a decision on the issue to the Justices of the Supreme Court and the Judges of the Appellate Court.

7) The reference to 100 pages in **§ 67-2 (b)** was increased to 150 pages as follows: "When either part of the appendix exceeds one hundred and fifty numbered pages, part one and two of the appendix shall be separately bound."

8) Attorney D'Auria noted that in criminal and habeas appeals filed by incarcerated self-represented parties, part one of the appendix will be filed by the Office of the Chief State's Attorney or the Office of the Attorney General. **See proposed §§ 67-8 (b) (1) and 68-1**. Attorney D'Auria indicated that if special circumstances arise in any given case, it could be necessary for either office to seek relief from the court. Both Attorney D'Auria and Attorney Marks agreed that if the rules result in unanticipated consequences, it might be necessary to seek adjustments to the rules.

9) With respect to **§§ 66-5 and 66-7**, pertaining to motions for rectification and articulation, the committee agreed with Judge Prescott's observation that various references in the rule and in the commentary to "corrections" should be changed to "corrections or articulations."

After the committee discussed the foregoing concerns, Judge DiPentima explained that additional amendments had been proposed. The additional amendments were discussed and resolved as follows:

1) With respect to **§ 61-9**, pertaining to amended appeals (not previously distributed to the committee), the committee agreed to change several references to "the brief" to "the brief and appendix."

2) In **§ 63-4**, the committee agreed to require the appellant to file the original, rather than the original plus one copy, of the papers specified in the rule.

3) The committee decided to add the following sentence to **§ 66-5**: "Any addendum shall be filed within ten days after issuance of notice of the trial court's order correcting the record or articulating the decision." The committee also agreed to permit the party seeking articulation or rectification to file fewer copies of the motion.

4) An additional amendment to **§ 67-1** would require a separate certification in cases involving protected personal identifying information or in cases that have been ordered sealed or subject to limited disclosure. Judge Prescott noted that the Superior Court Rules Committee may soon amend §§ 11-20A and 11-20B, which pertain to personal identifying information, and that these amendments could have some impact on § 61-7. In response, the committee initially decided to monitor the changes to §§ 11-20A and 11-20B and to amend § 67-1 if necessary, but ultimately decided to further revise § 67-1 to eliminate references to specific rules of practice or statutory provisions. The commentary will provide some examples of statutes and rules of practice that pertain to personal identifying information and matters that have been sealed.

5) The proposed changes to § 67-7 were no longer necessary because the amendment was already contained in the 2013 version of the Practice Book.

6) In order to be consistent with § 67-1, the committee removed references to specific rules of practice and statutory provisions from **§ 67-8 (d)** as follows: "In appeals where personal identifying information is protected by rule, statute, court order or case law, and in appeals that have been ordered sealed in part or in their entirety or are subject to limited disclosure, all appendices shall be prepared in accordance with section 67-1."

7) In **§ 67-8**, the committee also agreed to replace the term "paper" with "item" and to add "endorsed" before "appeal form." In addition, because different terms are used to refer to case related documents in civil and criminal cases, the committee agreed to add the terms "case detail" and "court action entries" after "docket sheets."

8) With respect to **§ 79a-6 (e)**, the committee agreed to the following language: "the case shall be deemed ready for assignment by the court after the filing of the appellee's brief and appendix."

Judge DiPentima asked whether committee members had concerns related to a letter that had been submitted by Attorney James H. Lee. Judge DiPentima noted that Attorney Lee's primary concerns pertained to the mechanics of obtaining the appropriate documents for inclusion in the appendices, whether revisions to the record rules should be implemented in a transitional manner and whether counsel should be required to collaborate on an agreed joint appendix.

Justice Zarella noted that some of the concerns related to the mechanics of obtaining the appropriate documents for inclusion in the appendices could be alleviated by changing the practice of the bar to ensure that all documents are signed before copies are made. Judge DiPentima further noted that e-filing will eventually alleviate many of Attorney Lee's concerns.

After discussion, Attorney Angers moved that the committee adopt the proposed revisions to the rules pertaining to the filing of the appellate record as modified and the proposed commentary as modified. Attorney Ray seconded the motion and it passed unanimously.

B. Proposed amendment of § 62-8A (attorneys participating pro hac vice on appeal)
Attorney DeMeo circulated a modified proposal to amend § 62-8A. Attorney Angers explained that the proposal was intended to reconcile § 62-8A with § 2-16, which governs pro hac vice applications to the Superior Court. The proposal also would require the applicant to certify that any fee required by the General Statutes for admission pro hac vice had been paid. The commentary to § 62-8A will be retained indefinitely.

Attorney Ecker moved that the committee adopt the proposal as modified, seconded by Judge Prescott, and the motion passed unanimously.

C. Discussion Concerning §§ 63-6 and 63-7 (appellate fee waiver rules)

Judge DiPentima initiated a discussion concerning whether the appellate fee waiver rules, which require a hearing on an application for a waiver of costs and fees, should be amended to be consistent with General Statutes § 52-259b (c).

According to Attorney Zeldis, a hearing is necessary in criminal cases because there must be a renewed decision concerning the defendant's eligibility and because the hearing tends to focus trial and appellate counsel on the shared goal of preparing and filing the necessary appellate papers. Attorney DeMeo noted that in criminal cases, the hearing also focuses on issues concerning the appointment of counsel.

The committee asked Attorney DeMeo to prepare a proposed amendment to the civil rule, § 63-6, for consideration at the committee's next meeting.

D. Such Other Matters as may come before the Committee

Attorney Smith mentioned that in order for the revisions to the record rules to become effective on July 1, 2013, the Office of the Reporter of Judicial Decisions will need the final version of the rules by June 7, 2013. Justice Vertefeuille and Judge DiPentima agreed to schedule review of the rules in both courts so that the deadline can be met.

III. Next Meeting

The date for the next meeting was left to the discretion of the committee chairpersons.