

Advisory Committee on Appellate Rules

October 2, 2018

The meeting was called to order by Judge DiPentima at 10 a.m. in the Attorney Conference Room of the Supreme Court.

Members in attendance:

Justice Richard N. Palmer, Co-Chair
Chief Judge Alexandra D. DiPentima, Co-Chair
Attorney Jeffrey Babbin
Attorney Colleen Barnett
Attorney Kenneth Bartschi
(for Attorney Wesley Horton)
Attorney John DeMeo
Attorney Richard Emanuel
Attorney Eric Levine
Attorney Paul Hartan
Hon. Sheila Huddleston
Attorney Daniel Krisch
Attorney Susan Marks
Attorney Jamie Porter
Attorney Charles Ray

Attorney Jane Rosenberg
Attorney Lauren Weisfeld
Attorney Carolyn Ziogas

Members not in attendance:

Attorney Kathryn Calibey
Attorney Wesley Horton
Attorney Giovanna Weller

Additional attendees:

Attorney Jill Begemann
Attorney Jean Kelly Cummings

I. OLD BUSINESS

A. Approval of minutes.

The committee unanimously approved the minutes of April 23, 2018 meeting.

B. Proposal to amend § 66-6 to require that the trial court's denial of certification to appeal in a habeas corpus case be subject to a motion for review rather than an appeal.

Attorney Bartschi discussed the proposal. He presented statistics regarding recent decisions of the Appellate Court in habeas corpus appeals and noted that the Appellate Court devoted approximately one full week of argument to cases where the habeas court denied the petition for certification to appeal and the Appellate Court, following briefing and argument, dismissed the appeal. He discussed how a motion for review, similar to a petition for certification to appeal to the Supreme Court, could be focused on the limited question of whether reasonable jurists could disagree as to whether certification to appeal should have been granted.

Attorneys Weisfeld and Marks indicated that they would prepare a response to this proposal for consideration at a future meeting. In the meanwhile, Attorney Weisfeld reiterated her practical concern that currently, forty-seven attorneys are eligible to be assigned counsel for habeas trials but are not approved to do appellate work, and a motion for review, like the petition for certification to appeal to the Supreme Court, is appellate work. Attorney Marks mentioned that such a proposal may have to be part of comprehensive habeas corpus reform from the legislature.

The matter would be referred to the work group following the response to the proposal from Attorneys Weisfeld and Marks. The matter was tabled for further discussion at a future meeting.

II. NEW BUSINESS

A. Whether to amend § 63-10 to clarify what matters are exempt from the Preargument Conference Program.

Attorney DeMeo presented the proposal. Judge Pellegrino recommended that summary process appeals be exempt from the preargument conference program. The proposal also clarified terms concerning appeals in child protection matters. The committee also discussed replacing semicolons with commas in the list in the first paragraph.

Attorney Krisch moved to adopt the proposal. Attorney Marks seconded. The motion passed unanimously.

B. Whether to amend § 77-1 to provide a deadline for the filing of a transcript and to eliminate the requirement that the hearing take place within five business days of the filing of the transcript.

Attorney Porter presented the proposal. She noted that the Appellate Court addressed five such motions in the month of July alone. The statute concerning expedited review of an order concerning the closure of the court or sealing or limiting disclosure of files does not contain the five day requirement. That mandate exists only in the rule, and the five day timeline has become impracticable. Removing the five day requirement allows the court some flexibility, but the orders would still be reviewed on an expedited basis.

Attorney Marks questioned why the proposal required the movant to file the transcript and certificate of completion within one day of receipt. Attorney Porter explained that movants have sought to delay proceedings by not filing the transcript. The movant, and not the court reporter, is now responsible for filing the receipt of the certificate of completion of the transcript. This requirement gave the clerk's office guidance as to when the filing should be expected and a basis to issue a nisi order, if necessary.

Attorney Ray moved to adopt the proposal. Attorney Levine seconded. The motion passed unanimously.

C. Whether to amend § 79a-6 to clarify that redaction is not needed in child protection cases because only orders and opinions are available to the public in those cases.

Attorney Ziogas explained the proposal that redaction was unnecessary under the court's policy because the documents were not publicly available.

Attorney DeMeo moved to adopt the proposal. Attorney Ray seconded. The motion passed unanimously.

D. Whether to amend § 60-7 to add language regarding the failure to submit the appellate access form; whether to amend §§ 60-7 and 63-3 to clarify procedures

when documents are returned or rejected; supplemental proposal as to §§ 62-3, 66-3, and 84-4.

Attorney Ziogas explained that the proposed amendment to subsection (c) of Section 60-7 was to increase compliance with the requirement that nonexempt self-represented parties enroll in E-Services for the purpose of receiving electronic notice.

Attorney Ziogas also explained that the proposed amendment to §§ 60-7 and 63-3 clarified that whether a document was returned or rejected, it was done with the court's authority. Attorney Begemann distributed a supplemental proposal adding §§ 62-3, 66-3, and 84-4 as rules in which the same language concerning when documents are returned or rejected that needed to be amended if the proposal was accepted as to §§ 60-7 and 63-3.

Attorney Emanuel suggested that the phrase "may be returned or rejected upon for review for compliance with the rules" should instead read "may be returned or rejected for noncompliance with the rules." It was agreed that this proposed change in language would apply to all the rules under consideration.

Attorney Babbin moved to adopt the proposal, as amended. Attorney Krisch seconded. The motion passed unanimously.

E. Whether to amend § 67-2 to clarify the information that is required on the cover of the briefs and appendices and to specify that the brief and appendix are to be submitted electronically as separate documents.

Attorney Ziogas explained this proposal. The amendment to subsection (f) was to clarify that (2) referred to the appellate docket number and (3) referred to the appellate case name. The amendment to subsection (g) was to remove surplus language.

Attorney Levine moved to adopt the proposal. Attorney Porter seconded. The motion passed unanimously.

F. Whether to amend §§ 67-3, 67-4 and 67-5 to specify that the briefs of the appellant and appellee shall contain a table of contents.

Attorney Ziogas explained the proposal arose out of the court's expressed preference for a table of contents. She indicated that the cross references to subsections would be updated if the new subsection (a) was adopted in §§ 67-4 and 67-5 and that an additional instance of "if any" would be deleted.

Attorney Bartschi queried whether a similar change was required for the briefing rule for amicus curiae (§ 67-7), but that rule does not specifically outline all of the requirements of the contents of the brief; rather, it incorporates the applicable provisions of chapter 67 by reference.

Attorney Babbin moved to adopt the proposal. Attorney Krisch seconded. The motion passed unanimously.

G. Whether to amend §§ 68-1 and 76-3 to clarify that in workers' compensation appeals, the appellant and the appellee must comply with the appendix requirements of § 67-8.

Attorney DeMeo explained that this proposal arose out of a potential lack of clarity in the rules in that, regardless of whether the trial court clerk or workers' compensation commissioner must deliver the file to the appellate clerk, the parties remained obligated to include the relevant pleadings in their appendix.

Attorney Ray moved to adopt the proposal. Attorney Krisch seconded. The motion passed unanimously.

H. Whether to amend § 62-7 to include the definition of "notice."

Attorney Ziogas explained the proposal.

Attorney Marks moved to adopt the proposal. Attorney Babbini seconded. The motion passed unanimously.

I. Whether to amend §§ 60-4, 66-2, 66-3 and 66-5 to clarify and make additions to the procedures that apply to appellate motions and trial motions.

This written proposal was submitted by Attorney Joel Ellis. Judge DiPentima summarized the proposal regarding his concern that motions that go from the appellate clerk to the trial court should not be subject to the appellate rules concerning, for example, surreplies.

Attorney Ray mentioned that perhaps the concern could be addressed by noting that the trial court could take whatever additional action it needed to adjudicate the motion within its discretion, including allowing surreplies or ordering transcripts.

The committee discussed the purpose of the requirement that such motions be filed with the appellate clerk at all, and Attorneys Ziogas, Porter, and Hartan discussed the history of this requirement. The appellate clerk's office needs to know whether, for example, a motion for rectification is pending, before the case is assigned for argument.

Attorney Babbini explained that the Appellate Advocacy section of the Connecticut Bar Association was considering refining Attorney Ellis' proposal. The committee elected to table the matter and, should the CBA submit such a proposal, it could be referred to the work group.

J. Whether to amend the rules to allow the appellate clerk's office to provide broader guidance to counsel regarding the procedural requirements of the rules.

This proposal was also submitted by Attorney Ellis. Attorney Ziogas explained that the clerk's office regularly gives litigants, both appellants and appellees, procedural advice, but not legal advice. It was agreed that the proposed rule was not necessary.

Attorney Krisch moved to reject the proposed new rule. Attorney Babbini seconded. The proposal was rejected unanimously.

Justice Palmer and Judge DiPentima indicated that Attorney Ellis would be notified by letter of the outcome of these proposals.

K. Whether to amend § 70-6 regarding reconsideration when the court is evenly divided and § 71-5 regarding reconsideration "en banc."

Attorney Bartschi explained the proposal on behalf of Attorney Horton. He further explained that the committee could also consider a proposal, in the alternative, that the court

must reconsider with an odd number of judges or justices, including on a motion for reconsideration or reconsideration en banc. Attorneys Krisch and Babbin discussed various scenarios involving reconsideration. It was generally agreed that there is a need for clarity in this area.

Justice Palmer indicated that these questions might be better resolved as a matter of court policy, rather than a proposed amendment to the rules, and indicated that the justices were considering precisely these questions—e.g., whether “en banc” referred to the justices currently available to sit on a case, or to seven justices and judges. Justice Palmer indicated that the court might wish to adopt a policy before the advisory committee next meets. He indicated that he would report back as to whether the justices would want input from the work group on this issue.

The matter was tabled for possible discussion at a future meeting.

L. Discussion regarding whether rules should be amended to allow for the use of images in briefs.

Attorney Lisa J. Steele submitted a written proposal concerning this agenda item. Attorneys Marks and Weisfeld agreed that if a litigant wants to use space in the brief for an image, within the existing constraints with respect to page count, etc., it should be allowed. Although the rules do not expressly prohibit the practice of using images in briefs, leading some to think that it was permitted, the clerk’s office currently has no guidance as to what images would be acceptable. There have been instances of briefs that included images. Questions were raised whether an image had to be part of the record or whether it could be something created for the appeal, such as a chart or graph.

This proposal was referred to the work group for consideration.

III. ANY OTHER BUSINESS THAT MAY COME BEFORE THE COMMITTEE

A. Judge DiPentima indicated that should any member of the committee have proposals to share, or know of proposals from others, please send them to Attorney Begemann and she will ensure that they are included on the agenda.

B. Judge DiPentima also indicated that appellate courts and the clerk’s office are exploring the feasibility of electronic briefing and eliminating the requirement of filing paper appellate briefs. Chief Justice Robinson has approved a committee to work on this issue, which will include members of the bar. If adopted, the change will eventually require significant amendments to the appellate rules.

C. Attorney Weisfeld indicated that Judge Newsome expressed concern that there was some inconsistency among the rules concerning fee waivers, §§ 43-33, 63-6 and 63-7. The matter was referred to the work group for consideration.

D. Attorney Weisfeld also brought up a concern raised by Attorney Steele concerning transcription of certain exhibits, such as videotapes or 911 recordings played at trial. Currently, transcripts usually read “whereupon the exhibit was played.” Although a motion for rectification could result in the trial court ordering that the exhibit be transcribed, it was suggested that such

a motion could result in significant delay beyond the time that would ordinarily be extended for filing an appellate brief. The matter was referred to the work group for consideration.

IV. NEXT MEETING

The date of the next meeting was left to the discretion of the chairs. It was expected that the meeting would be in January or February, 2019.

Closing matters:

The chairs recognized the contributions of the members of the advisory committee and thanked them for their time and attention.

Respectfully submitted,

Colleen Barnett