

ADVISORY COMMITTEE ON APPELLATE RULES
ATTORNEY'S CONFERENCE ROOM, SUPREME COURT

March 27, 2007

The meeting was called to order by Justice Norcott at 2:00 p.m. The following individuals were in attendance:

Justice Flemming Norcott, co-chair
Chief Judge Joseph Flynn, co-chair
Attorney Michele Angers
Attorney Gail Giesen
Attorney Wesley Horton
Attorney Sheila Huddleston
Attorney Kevin Loftus
Attorney Susan Marks
Hon. Eliot Prescott
Attorney Carolyn Querijero
Attorney Charles Ray
Attorney Holly Sellers
Attorney Giovanna Weller
Attorney Martin Zeldis

I. New Business

Consideration of proposed rule changes to Practice Book §§ 70-9 and 70-10 regarding coverage of court proceedings by cameras and electronic media.

Justice Norcott first thanked the members for attending the meeting, and asked for discussion of the first agenda item. Attorney Horton moved adoption of the proposed changes with the deletion of proposed new subsection 70-9(c); Attorney Querijero seconded the motion. Justice Norcott noted that this proposal is based on the recommendations of the Public Access Task Force. It has been preliminarily discussed by the Supreme and Appellate courts, as commemorated in the letters previously circulated to Committee members.

Discussion ensued, first addressing the deletion of subsection (c), and then the timing of any motion under the rule. Attorney Horton referred to a letter to the co-chairs (distributed to committee members in advance of this meeting) wherein he articulated his concerns with subsection (c). Attorney Querijero added that she agrees with the contention

that any motion to preclude coverage should be taken up on a case-by-case basis.

Justice Norcott reiterated that the categories where an exception to the presumption of openness has been created are not intended to in any way to compromise the spirit of openness that has been endorsed by both courts. Rather, it is intended to avoid the possibility of electronic coverage of a case that clearly should not be covered. Attorney Zeldis asked how parties or victims would know that they could make a motion under this rule if subsection (c) was deleted and all cases were potentially subject to electronic coverage. Justice Norcott pointed to existing section (b)(ii) of the proposal that not only contemplates a motion but recognizes the possibility that the court itself may preclude coverage. A discussion of the impact of the deletion of subsection (c) included the mechanism, if any, to notify victims of this rule; the means that the court might utilize to identify such cases; the approach the state may take in criminal cases; the practical operation of the rule where there is a *pro se* litigant or a *guardian ad litem*; and the need to update the handbook to incorporate this and other recent Practice Book amendments. With respect to the last point, Attorney Ray pointed out that, if subsection (c) is deleted, the handbook will be useful in communicating the fact that all cases may be subject to electronic coverage.

In response to a question, Justice Norcott stated that the entire proposal as discussed by the committee at this meeting will be forwarded to both courts along with the recommendation of the committee. Judge Prescott stated that, in his view, the overwhelming majority of cases will not present issues that make them unsuitable for electronic coverage. For that reason, he prefers the rule provide that determination will be made on a case-by-case basis.

Attorney Weller added a comment and two points in favor of deleting (c). Her comment was to note that the second circuit categorically excludes all criminal and *pro se* cases. Having said that, she stated that, first, she agrees with Attorney Querijero's articulation of the reasons to address cases individually rather than categorically. Second, she expressed concern that subsection (c) could have the effect of suggesting that the courts are less than open when that is not the case and is certainly not the intent of this proposal.

Attorney Zeldis raised issues surrounding notice to parties and victims and expressed concern that victims know about their

ability to file a motion under this rule. Justice Norcott asked members to comment on the effect of deleting (c), specifically whether proposed (b)(ii) is sufficient as drafted. Judge Prescott questioned whether the term "any party or victim" is broad enough, and what notice is contemplated. Attorney Angers pointed out that, in the absence of a definition of "interested parties" this phrase is more workable. She suggested a notice be included on the assignment for days. Justice Norcott suggested the committee act on the outstanding motion to delete subsection (c) and then move to the timing depending on the committee's vote.

Judge Flynn stated that, in his view, this is not a question of openness. The courts have always been open. Rather, this discussion focuses on the most sensitive cases and the determination of whether those cases are subject to electronic coverage. This is the question that is of concern to the judges and justices. He further raised concerns about the constitutional rights of victims as they are implicated by this proposal. There are also statutory provisions to mask identities of minor victims and defendants where revealing a name may identify such a victim.

Judge Flynn questioned how this proposal addresses concerns about openness. He suggested that reversal of the presumption of openness for these categories of cases protects victims, especially minors and reiterated that there is no objection, per se, to cameras in the Appellate Court. As far as the experience of other states, Judge Flynn noted that materials previously distributed to committee members include information from New Hampshire indicating that, although there may be streaming video, there is a provision for stopping coverage. New Hampshire does not have a rape shield law, which further distinguishes the permissible parameters of their coverage. The Florida example is also noteworthy because, in addition to provisions for electronic coverage, there is a provision that any member of a panel of judges scheduled to hear a case may object to electronic coverage, which results in the case not being covered.

Attorney Horton stated that he agrees substantially with Judge Flynn's comments, but maintains that the court's own motion can be used rather than changing the presumption for a large class of cases. He suggests leaving the decision to the parties and the experienced judges and justices to address electronic coverage on a case-by-case basis. Attorney Huddleston questioned how likely it is that a case that would be

categorically excluded under proposed subsection (c) might nonetheless be covered if (c) is deleted - or even if not deleted. Judge Norcott stated that he sees at least three clear levels of review that should avoid inadvertent coverage: parties objecting to coverage, the court when reviewing briefs, and other persons such as victims. Attorney Giesen added the Staff Attorneys Office to those who review cases and might be in a position to identify such a case. Attorney Ray suggested that the media itself may identify and choose to not cover such a case even if coverage had not been precluded by court order, adding a fifth level of review. Judge Flynn noted that, under the CT-N contract, there is no editing permitted. In his experience, the print media has shown professionalism and common sense when covering sensitive cases.

Attorney Querijero suggested that the final protection, afforded up to and including the date of oral argument, is always with the court itself. Justice Norcott called the question as to the motion to delete subsection (c). The motion passed by a vote of 10 to 4, with Justice Norcott abstaining.

Discussion then turned to the timing of any motion filed under subsection (b) as drafted. Justice Norcott stated that he believes earlier timing of motions is preferable to motions filed shortly before oral argument. Attorney Angers pointed out that the motion cannot be acted upon until the panel is composed, which may give rise to a delay from the time of the filing of the motion to the time it is ultimately acted upon by the court. Following discussion, it was the consensus of the committee that the proposal permits the filing of a motion at any time. Even if it cannot be acted on, it is valuable to have the motion in the file to raise a flag for that case, and to permit objections if any to be filed as well. It is also good for parties and victims to know that an objection has been filed. The benefit of early notice may even extend to the assignment for days to address the logistics of electronic coverage.

Attorney Ray questioned the procedural requirements to properly bring an objection before the court. Attorney Angers stated that any document raising an objection would be within the court's discretion to entertain. Justice Norcott and Judge Flynn stated that they were certain that any such document would certainly be considered by the court, acknowledging the latitude afforded pro se filers.

The final matter raised for discussion was the manner of

notice to parties and victims. Attorney Zeldis questioned how victims would know that they could file a motion. Justice Norcott asked whether the state would be in a position to inform the victim in criminal cases. Attorney Marks stated that the same procedure that is followed by the state now would be followed under this proposal; that is, a change in the rule will not create an institutional change in this regard. Attorney Zeldis questioned whether another notice would be provided at the appellate level, and Attorney Loftus suggested that the possibility of appeal is known at the trial level where provision currently exists to provide some form of notice to parties and victims. The Committee agreed that this question is beyond the scope of this proposal, but that the concern should be noted and addressed.

A technical change to add a reference to Practice Book section 69-1 in proposed section (b) (2) was made for clarity, and the first sentence of subsection (a) was amended to conform the language to the deletion of subsection (c).

Justice Norcott concluded the meeting by once again thanking all of the members of the committee for attending the meeting on such short notice, and for providing thoughtful comments regarding the proposal both by e-mail and at the meeting.