

ADVISORY COMMITTEE ON APPELLATE RULES
December 20, 2011

The meeting was called to order by Justice Vertefeuille at 10:00 a.m. in the Attorneys Conference Room of the Supreme Court. The following Committee members were in attendance:

Justice Christine Vertefeuille, co-chair
Chief Judge Alexandra DiPentima, co-chair
Attorney Michele Angers
Attorney Gregory D'Auria
Attorney John DeMeo
Attorney Steven Ecker
Attorney Wesley Horton
Attorney Sheila Huddleston
Attorney Susan Marks
Attorney Charles Ray
Attorney Thomas Smith
Attorney Giovanna Weller
Attorney Martin Zeldis

Also in attendance were:

Attorney Ken Bartschi
Attorney Jill Begemann
Attorney Lori Petruzzelli

Justice Vertefeuille reminded the committee that Attorney Gail Giesen had retired and was no longer a member of the committee after many years of dedicated service. She also announced that Attorney John DeMeo had replaced Gail as the Chief Staff Attorney and was appointed as a member of the committee and she introduced him to committee members.

I. OLD BUSINESS

A. Minutes from May 11, 2011

Justice Vertefeuille asked if there were any corrections or changes, and hearing none, asked for a motion to accept the minutes as distributed. The motion was made by Attorney Horton, seconded by Attorney Angers, and was unanimously approved.

B. Proposed amendment to § 61-10

Attorney Huddleston, on behalf of the Connecticut Bar Association Appellate Advocacy Committee, previously had submitted a proposed change to § 61-10 regarding the articulation process in Connecticut.

Justice Vertefeuille reminded the committee that it had agreed at the last meeting to refer the proposal to Justice Eveleigh as chair of the Rules Committee of the Superior Court to get input from the members of that committee on behalf of the trial judges. She stated that the Superior Court judges were happy to be consulted on the proposal but took no position on the proposal. They were interested, however, in having a provision in the proposal giving them the discretion to seek assistance from the parties and their counsel if a trial judge is required to provide an articulation on remand from an appellate court.

Justice Vertefeuille further indicated that she had drafted an alternative proposal that was before the committee with two changes to the CBA proposal. First, she substituted the word "should" for the mandatory word "shall" that was contained in the CBA proposal with respect to the failure of a party on appeal to seek articulation. As amended, the proposal provided that the failure should not be grounds for the court to decline to review an issue on appeal. She also added a last line to the proposal stating that after remand to the trial court for articulation, the trial court has discretion to request assistance from the parties in order to provide the articulation, including supplemental briefs, oral argument and copies of transcripts and exhibits. This provision is the one sought by the members of the Superior Court Rules Committee.

Judge DiPentima then explained a third proposal before the committee that was drafted by members of the Appellate Court. She prefaced her remarks by saying that the Appellate Court judges were not in favor of a change to § 61-10 and would not approve the CBA proposal as written. The Appellate Court judges felt that the CBA proposal providing for responses from the parties following a remand for articulation would cause serious delays. Although the Appellate Court judges felt that the problem as identified by the CBA proposal should not be addressed through a rule change, the judges would work from the alternative proposed by Justice Vertefeuille. The Appellate Court proposal suggested changing the language to indicate that the failure of a party to seek articulation "shall itself not be grounds" for the court to decline to review an issue on appeal.

Attorney Horton spoke on behalf of the practicing members of the bar who are in general agreement that the rule should be amended because it would eliminate the majority of the motions for articulation that are currently filed.

Attorneys Ecker, Ray and D'Auria then addressed the issue of proper word choice, namely, "shall" v. "should," the impact of the word choice on the court, and the intent behind the rule change to do away with motions for articulation. The word choice "alone" v. "itself" was also discussed by certain committee members.

Attorney Ecker offered the suggestion that the rule state that the failure of a party to seek articulation "is" not grounds for the court to decline to review an issue on appeal.

Attorney Lori Petruzzelli indicated that regardless of the word choice, a commentary to the rule could be used to explain the general intent of what the rule change is attempting to achieve and the reasoning behind the rule change.

Attorney Huddleston indicated that the members of the bar in proposing the change to the rule were less concerned with the word choice than with the intent behind the rule change and agreed that it could be explained in the commentary.

Justice Vertefeuille and Judge DiPentima agreed that an explanation in the commentary was a good idea and necessary.

The committee also agreed that the commentary should cross reference § 66-5, governing motions for rectification and articulation.

Justice Vertefeuille marked the issue over to the next meeting when a draft commentary will be submitted for consideration by the committee.

C. Proposed amendments to §§ 61-11, 61-12 and 25-5.

Attorney Kenneth Bartschi previously had submitted certain proposed amendments on behalf of the Connecticut Bar Association Appellate Advocacy Committee to §§ 61-11 and 61-12 to clarify when an automatic stay is in effect in appeals from domestic relations cases, and to identify certain factors that family court judges should consider when deciding whether to terminate an automatic stay or to impose a discretionary stay.

Attorney Ecker had raised the concern that in domestic relations cases where the trial court has gone to great lengths to draft its "mosaic of orders," the rule change seems to favor lifting stays, which can have a detrimental effect on property distribution as there is no provision for security. He indicated that he talked to Attorney Bartschi regarding the proposed amendments and that his concerns had been alleviated.

Attorney Bartschi stated that the purpose of the amendment was to clarify what trial court orders will remain in effect while an appeal is pending, particularly with respect to the security issue, and that he had worked with Attorney Giesen to address this matter.

Attorney Huddleston pointed out that she still had concerns with certain language in the draft proposal with respect to § 63-11 (b) and (c), and it was then discovered that the committee might not have the most recent version of the draft proposal with the corrected language.

Attorney Huddleston indicated that she would circulate the correct version to the committee, and Justice Vertefeuille marked the matter over to the next meeting.

D. Proposed amendment to § 61-9

Attorney Angers spoke in favor of the proposed rule to clarify some confusion on the part of certain practitioners and self-represented parties who think they can resuscitate "dead appeals" by filing only an amended appeal form.

Attorney Horton stated that if the Chief Clerk felt that the rule change was necessary then the committee should approve it. He moved to adopt the proposal and it was seconded by Attorney Ecker.

Attorney Marks asked whether the proposal should instead retain the word "original" appeal so as to distinguish it from amended appeals. Attorney Huddleston agreed that retaining the word "original" would help clarify the timing of appeals.

Attorney Bartschi raised certain questions with respect to the proposed rule change: What effect it would have on PAC? Is an amended statement of issues required with an amended appeal? What supporting § 63-4 papers are needed to be filed with an amended appeal? A question also arose as to the meaning of the phrase "and all subsequent proceedings" contained in the new language to the proposed rule.

Attorney Huddleston suggested that the confusion could be solved by adding a new sentence to the proposal stating that an attorney can certify that the § 63-4 papers previously filed are adequate when filing an amended appeal.

Attorney Angers indicated that she would seek further clarification and get more information with respect to the proposed rule change from personnel in her office who are often confronted with this problem involving dead appeals.

Justice Vertefeuille marked the proposal over to the next meeting.

E. Proposed amendment to § 84-4.

Attorney Angers indicated that the primary purpose of the rule change was to make sure that a copy of the petition for certification is served on the clerk of the original trial court if the fee is paid at a location other than the original trial court. She stated that frequently the original trial clerk and/or judge are unaware of the petition for certification.

Attorney Huddleston moved that the committee adopt the proposal, seconded by Attorney Horton, and the motion passed unanimously.

F. Appellate e-filing rules

Judge DiPentima spoke on the progress of the appellate e-filing rules. She indicated that Justice Zarella was involved with ongoing discussions with respect to the e-filing rules and was working with the Superior Court on drafting the rules pertaining to the record, but that the appellate e-filing rules are not yet at the drafting stage. She stated that the committee will be involved in the drafting of the e-filing rules at a future date.

II. NEW BUSINESS

A. Letter from Attorney Karl Fleischmann

Attorney Fleischmann sent a letter to the committee seeking review of the appellate filing requirements of a pen signature and § 66-3 format certification. He proposed that in light of the use of e-filing in the Superior Court and the use of juris numbers in lieu of pen signatures, the appellate rules should be amended as well to allow for the use of a juris number signature.

Attorney Angers spoke in favor of retaining the appellate rule requirement of a pen signature rather than a juris number signature.

The committee decided to take no action on Attorney Fleischmann's letter at this time, and Judge DiPentima indicated that she would communicate that to him.

B. Proposed amendment to § 66-2 (e) (3)

Attorney Huddleston proposed that the language in § 66-2 (e) (3) requiring a movant to "include a proper order for the trial court pursuant to § 11-1" be deleted in light of a recent amendment of § 11-1 that largely did away with the order page requirement. She pointed out the existing inconsistencies between §§ 66-2 and 11-1.

Justice Vertefeuille suggested that the language of § 66-2 (e) (3) be changed to read "if required by" rather than "pursuant to."

Attorney Ecker moved to adopt the proposal with the amended language suggested by Justice Vertefeuille, seconded by Attorney Horton, and passed unanimously.

C. Proposal to permit filing of supplemental briefs on transfer to Supreme Court.

Justice Vertefeuille raised for discussion whether a rule should be adopted to

permit the filing of supplemental briefs in the Supreme Court after a case has been transferred from the Appellate Court. She said that some justices had suggested that the courts adopt a rule expressly allowing for the filing of supplemental briefs on transfer so that the parties could address certain issues to the Supreme Court that had not been addressed in their briefs to the Appellate Court.

Attorney Horton spoke in favor of the rule because it is awkward to raise the argument in a brief to the Appellate Court that it should overturn Supreme Court precedent and hope that the case gets transferred to the Supreme Court, whereas the new rule would permit such argument directly to the Supreme Court in new briefing.

Attorney D'Auria questioned whether such a rule is necessary because the Supreme Court currently entertains such motions for supplemental briefing.

Attorney Weller asked whether the rule should set forth certain guidelines for when a motion for supplemental briefing should be filed, i.e., good cause.

Attorney Zeldis did not see the need for a rule providing for the filing of supplemental briefing because the current rules already provide for allowing supplemental briefing pursuant to the supervisory powers of the court.

Justice Vertefeuille indicated that the proposal will rest on the agenda without any action taken by the committee.

D. No new matters were raised by the committee.

III. NEXT MEETING

The next meeting will take place in approximately six weeks at a date to be determined. Upon motion of Justice Vertefeuille, which was seconded by Judge DiPentima, the meeting adjourned at 11:15 a.m.