ADVISORY COMMITTEE ON APPELLATE RULES
February 22, 2012

The meeting was called to order by Justice Vertefeuille at 2:00 p.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
Judge Eliot Prescott
Attorney Michele Angers
Attorney Gregory D'Auria
Attorney John DeMeo
Attorney Steven Ecker
Attorney Sheila Huddleston
Attorney Susan Marks
Attorney Charles Ray
Attorney Thomas Smith
Attorney Martin Zeldis

Also in attendance were:

Attorney Ken Bartschi
Attorney Jill Begemann
Attorney Pamela Meotti
Attorney Lori Petruzzelli

Justice Vertefeuille announced that Attorney Pamela Meotti had been appointed to replace Attorney Holly Sellers as the Chief Administrative Officer and would soon be appointed as a member of the committee, and she introduced Pam to the committee members.

I. OLD BUSINESS

A. Minutes from meeting of December 20, 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 Marks, seconded by Attorney Zeldis, and was unanimously approved. Judge Prescott abstained as he was not present at that meeting.

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 had submitted an alternate proposal that was before the committee with two changes to the CBA proposal. The proposal stated that the failure of a party on appeal to seek articulation "*should not be grounds*" for the court to decline to review an issue on appeal. The proposal also stated that if the court determines that articulation is required it "*shall remand the case*" to the trial court for articulation, and that 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.

The Appellate Court judges had submitted a third proposal to the committee that 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, and also included the same language as Justice Vertefeuille's proposal with respect to remanding the case to the trial court.

Justice Vertefeuille, Judge DiPentima and Attorney DeMeo submitted for discussion a new proposed commentary for the new subsection (b) of § 61-10.

Justice Vertefeuille pointed out that the commentary as drafted states that the court, after declining to review an issue, "*may*" remand the case to the trial court for articulation, and questioned whether the wording should be the same as the rule, which states that the court "*shall*" remand the case.

Discussion ensued as to the proper word choice of "shall," "should," and "may," and the impact of the word choice on the court.

Judge DiPentima agreed that the rule and the commentary should be consistent. She further stated that the rule is clear that the court on appeal is to decide whether it has enough information to decide an issue and if remand is required.

Justice Vertefeuille proposed that the second sentence of the commentary be modified to state: "In lieu of refusing to review the issue, *when the court determines that articulation is required, the court shall* now remand the case to the trial court for an articulation, and then address the merits of the issue after articulation is provided."

Attorney Petruzzelli suggested that the commentary be published with the rule each year, similar to the practice used with respect to the sealing rules, and Justice Vertefeuille directed her to do so.

Attorney Ecker stated that discussions with various members of the appellate bar indicated satisfaction with the Appellate Court proposal.

Attorney Huddleston moved that the committee adopt the Appellate Court rule proposal and the commentary as modified, seconded by Attorney Ecker, and the motion passed unanimously.

C. Proposed amendments to §§ 61-11 and 61-12

Attorneys Huddleston and 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. They supplied the committee with the most recent version of the proposed rule change.

Attorney Ecker questioned whether the reference to "*sua sponte*" contained in the last sentence of § 61-11 (c) meant that the court could terminate a stay without a hearing.

Attorney Huddleston stated that subsection (c) contains a cross-reference to subsection (d), which requires a hearing.

Attorney Bartschi stated that the commentary to the rule should make clear that such a hearing is required.

Attorney Petruzzelli questioned whether the language in the proposed rule should be changed from "domestic relations" to "*family matters*" so as to be consistent with other provisions of the Practice Book.

Justice Vertefeuille agreed that the rule should be consistent with the other provisions.

Attorney Ecker moved that the committee adopt the proposed rule with the suggested changes to the rule and commentary as modified, seconded by Attorney Huddleston, and the motion passed unanimously.

D. Proposed amendment to § 61-9

Attorney Angers had proposed the rule change to eliminate confusion on the part of certain practitioners and self-represented parties with respect to amended appeals.

Justice Vertefeuille suggested changing the third sentence of the proposed new second paragraph to eliminate the repetition of the reference to § 63-4, and to state the appellant's duty in the affirmative: "If the appellant does not file *such* certification, *the*

appellant shall file an original and one copy of a preliminary statement of issues . . . ."

Attorney Ecker questioned whether the intent of the proposal is to include options that an appellant may follow in filing an amended appeal.

Judge DiPentima questioned whether it is clear that § 63-4 papers filed with an amended appeal must include all of the original papers or whether an appellant may simply add to it.

Attorney Angers indicated that she would discuss the matter further with committee members and personnel in the clerk's office for clarifying the proposed rule change and revising the commentary.

Justice Vertefeuille marked the proposal over to the next meeting.

II. NEW BUSINESS

A. Proposed amendment to § 81-2

Attorney Angers stated that the rule change to petitions for certification would require counsel to provide the Appellate Court with the operative complaint and all party briefs in addition to the opinion or order of the trial court. She indicated that there has been a request by the judges of the Appellate Court to have all the original papers before deciding the petitions, that the clerk's office has encountered delays in getting these papers, and that the proposed change would place the burden on counsel rather than on the trial court and the clerk's office.

Justice Vertefeuille indicated that the committee should consider revising the commentary before adopting the rule change and Attorney Angers agreed.

Justice Vertefeuille marked the proposal over to the next meeting.

B. Proposed amendment to § 62-9A

Attorney Zeldis proposed adding a new second sentence to § 62-9A stating: "*If self-represented, the defendant or habeas petitioner also has no right to standby appellate counsel*." He stated that currently there is uncertainty as to whether a trial judge has the ability to appoint standby appellate counsel to assist a self-represented defendant or habeas petitioner. The proposed rule change would remove that uncertainty.

Attorney Marks agreed that there is confusion with respect to the role of standby counsel on appeal and that the proposal would remove that uncertainty.

Attorney D'Auria questioned whether this problem is unique to criminal proceedings or whether it is also a problem in child protection cases.

Attorney Zeldis raised the issue whether the proposed rule would be in conflict with the Superior Court rules (§§ 44-4 and 44-5) pertaining to standby counsel.

Judge DiPentima pointed out the difficulty that arises when standby appellate counsel is appointed but the parameters of that role have not been defined. She indicated that if standby appellate counsel is permitted, the duties of that counsel must be clear. She also indicated that while this proposal might be a good idea, the potential ramifications must be considered.

Attorney Zeldis indicated that although this is not a proposal from the office of the chief public defender, many attorneys in that office are in agreement with the rule change and that there should be no standby counsel.

Justice Vertefeuille suggested that the committee obtain input from the public defender's office, the trial judges and the state's attorney's office concerning the impact of the proposed rule change before considering the proposal.

Judge DiPentima stated that the chief administrative judge of criminal matters should also be consulted.

Justice Vertefeuille stated that the proposal should also be referred to Judge Keller with regard to child protection matters, and the Connecticut Criminal Defense Lawyers Association for input as well.

Justice Vertefeuille marked the proposal over to the next meeting at which time the committee hopes to have input from the above groups.

C. Proposed amendment to § 63-4 and Chapter 68

Judge DiPentima explained that Justice Zarella has indicated that the rules pertaining to the preparation of the record need to be amended to relieve the burden on the clerk's office and to coincide with the advent of e-filing in the appellate system. The intent is to move toward the practice in the federal courts, where the record is prepared by the appellant with some input from the clerk's office.

Attorney Marks inquired as to the vision of the rule with respect to how it will work with self-represented parties.

Attorney Angers raised the issue of the cost to the judicial branch with respect to providing help to self-represented parties in preparing the record and the issue of waiver of costs. She also raised the question of whether self-represented parties should be exempt from the rule when initially adopted.

Attorney Huddleston indicated that she had recently given the proposal to the Connecticut Bar Association Appellate Advocacy Committee for review. She raised the following concerns: the record may not be adequate due to the lack of knowledge by self-represented parties; the procedure in the state system is much more simplified than the procedure in the federal system; and the new procedure may not accomplish the goal of getting the record faster due to perceived difficulties in dealing with the self-represented parties.

Attorney Ray explained to the committee the appellant's responsibility of preparing the appendix under the federal system.

Attorney Ecker indicated that he thought the rule change was a good idea because it will help to prepare a brief record without additional cost and time. He also stated that attorneys will include all relevant material in the appendices and this will relieve the bottleneck in the clerk's office caused by the burden of preparing the record under the current system.

Attorney DeMeo questioned whether the failure by appellants to provide adequate records on appeal would be another reason for the court to default them.

Attorney Huddleston suggested that the new rule would result in over inclusiveness of the record and questioned whether the courts want to continue to require a record.

Justice Vertefeuille and Judge DiPentima indicated that both the Supreme and Appellate Courts want to maintain the current practice of having a record available to the courts.

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

D. No new matters were raised by the committee.

III. NEXT MEETING

A date for the next meeting was set for Wednesday, April 11, 2012 at 2:00 p.m. in the Attorneys Conference Room of the Supreme Court. Upon motion of Justice Vertefeuille, seconded by Judge DiPentima, the meeting adjourned at 3:35 p.m.