Advisory Committee on Appellate Rules

June 19, 2017

The meeting was called to order by Justice Palmer 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 Kathryn Calibey
Attorney John DeMeo
Attorney Richard Emanuel
Attorney Michael Gentile
Attorney Paul Hartan
Attorney Wesley Horton
Hon. Sheila Huddleston
Attorney Jamie Porter
Attorney Jane Rosenberg
Attorney Lauren Weisfeld
Attorney Giovanna Weller
Attorney Carolyn Ziogas

Members not in attendance:
Attorney Susan Marks
Attorney Charles Ray

Additional Attendees:
Attorney Jill Begemann

Preliminary Matters

Justice Palmer welcomed Jane Rosenberg, Solicitor General, and Michael Gentile, acting Reporter of Judicial Decisions, as members of the committee.

Judge DiPentima discussed the formation of a work group composed of Attorneys Porter and Begemann, as well as attorneys from the staff attorney's office, the appellate clerk's office, and the office of the reporter of judicial decisions, that would work out the details of certain proposed amendments to the rules going forward.

In addition, Judge DiPentima thanked Attorney DeMeo for his years of service as the point person for the advisory committee on appellate rules and indicated that, going forward, Attorney Begemann would be taking on that role.

I. Old Business.

A. Approval of minutes of February 2, 2017 meeting.

The committee unanimously approved the minutes of the February 2, 2017 meeting.

B. Proposals to amend rules governing writs of error and § 66-8.

1. **Writs of error**.

Attorney Ziogas explained that there had been a threefold increase in the filing of writs of error since the advent of appellate electronic filing, but that few of those had been done properly, e.g., the writ had not been signed by a judge or clerk of the trial court or it had not been served by a marshal. The amendments to § 72-3 allowed the appellate clerk's office to reject such facially defective writs, as had been the practice before e-filing.

Attorneys Babbin, DeMeo, and Weller discussed whether the writ of error should be abolished, whether such a proposal would require legislative or judicial action, or both, and

how other jurisdictions that have abolished the writ provide relief to, e.g., aggrieved nonparties. At the suggestion of Justice Palmer, this discussion was tabled for a future meeting at which the committee will consider whether to submit a proposal to the Chief Justice, who could propose legislation on behalf of the judicial branch.

Attorney Horton moved to adopt the proposed amendments to the writ of error rules. That motion was seconded by Attorney Weller and passed unanimously.

2. **Motions to dismiss (§ 66-8)**.

Attorney DeMeo explained the proposal in which this rule was rewritten to make it clear that the limitation period for filing a motion to dismiss differs for appeals and writs of error, and, among writs of error, differs according to whether or not the writ is electronically filed. The proposal also gives additional time to file a motion to dismiss to a defendant in error who was not a party to the underlying action, which is consistent with rules of practice in the Superior Court (thirty days pursuant to § 10-30).

Attorney Weller questioned the necessity of the third sentence regarding timeliness of motions for sanctions. Attorney Porter explained that a party may move for dismissal of an appeal as a sanction, and the party opposing that dismissal sometimes argues that the motion is untimely. That sentence clarifies that a motion to dismiss as a sanction is not governed by the timeliness language in § 66-8.

Attorney Horton moved to adopt the proposal with respect to § 66-8. It was agreed that the commentary explained the rule change and did not need to be retained going forward. That motion was seconded by Attorney Porter and passed unanimously.

C. Proposal to adopt §§ 77-3 and 77-4 regarding sealing or limiting disclosure of documents on appeal.

Judge DiPentima acknowledged the work of Judge Sheldon and Attorneys Begemann, Hartan, and Porter to address the infrequent but recurrent problem of parties who ask that the court seal or limit the disclosure of documents for the first time on appeal. Attorney Hartan addressed concerns that were raised with respect to the use of the phrase "in aid of the court's jurisdiction" in subsections (b) and (e) of § 77-4. To resolve the concerns, Judge DiPentima proposed amending the first sentence of subsection (b) to read: "If the motion to seal pertains to a document previously filed with the appellate clerk, the appellate clerk will, upon receipt of the motion, promptly remove the document in question from the Judicial Branch website until the resolution of the motion." The language was unchanged in subsection (e).

Attorney Horton moved to adopt the new rules §§ 77-3 and 77-4, as amended. That motion was seconded by Attorney Porter and passed unanimously.

D. Further discussion re parties not involved in the appeal

At the last meeting, it was suggested that a rule could be crafted that would allow appellants to file a motion or a notice, certified to all parties, seeking permission to cease sending notice etc. to parties that are nominally appellees but are otherwise uninvolved in the appeal. This issue has been tabled until the next meeting and the matter will be referred to the work group.

E. Further discussion re courtesy e-mails concerning disposition of appeal

The committee revisited its discussion of the concern raised by Attorney Emanuel with respect to incarcerated clients, and the desire of attorneys representing such clients

to present bad news in person, to the extent it was possible. Justice Palmer indicated that although it was unlikely that the court would wish to alter its practice of not disclosing the outcome of the appeal in the courtesy notice, he suggested that this matter be tabled until the next meeting to allow him time to confer with his colleagues.

II. New Business.

A. Proposals to amend §§ 82-5 and 82-6 (certified questions from courts of other jurisdictions)

Attorney Ziogas presented this proposal, which was in response to the Chief Justice's desire to expedite the timeline for the presentation of certified questions of law to the court. Justice Palmer provided additional insight into the concerns of the federal judiciary with respect to certified questions. Attorneys Weller and Babbin expressed concern that the amended rule did not seem to allow for reply briefs. Attorney Horton proposed the following amendments to accommodate reply briefs within the court's expedited timeline:

"Briefs and appendices filed by the parties shall conform to the rules set forth in Chapter 67, except that the parties shall file simultaneous briefs and appendices within forty-five days of issuance of the notice of an order of preliminary acceptance. The parties may file simultaneous reply briefs within twenty days thereafter. Extensions of time will not be granted except for extraordinary cause. The supreme court may assign certified questions without the matter appearing on the docket and before reply briefs are filed. Oral argument shall be as provided in Chapter 70, unless otherwise ordered by the court."

Attorney Horton moved to adopt the proposal with respect to §§ 82-5 and 82-6, as amended. That motion was seconded by Attorney Babbin and passed unanimously.

B. Proposal to amend § 67-8 (b) (2) (part two of the appellant's appendix)

Attorney Ziogas explained that this proposal was meant to clarify that parties cannot include excerpts from a transcript in their appendices if that transcript was not among the transcripts deemed necessary in their § 63-4 papers. Attorney DeMeo expressed concern that this change would prevent parties from getting relevant material before the court. Attorneys Porter and Ziogas explained that parties routinely filed motions to amend their § 63-4 papers to include additional transcripts, if necessary. Judge DiPentima thought that the clarification was necessary, as parties had filed uncertified excerpts from transcripts in their appendices.

Attorney Horton moved to adopt the proposal with respect to § 67-8 (b) (2). That motion was seconded by Attorney Babbin and passed unanimously.

C. Proposals to amend §§ 63-1 (b) and 79a-2 (b) as to when the appeal period begins

Attorney Hartan explained that this proposal was meant to further accommodate electronic filing. Attorney Babbin expressed concern as to what constituted "electronic delivery" from the trial court. The proposed amendments were to conform the language in the appellate rules to § 7-5 of the Superior Court rules, which resolved that concern.

Attorney Horton moved to adopt the proposal. That motion was seconded by Attorney DeMeo and passed unanimously.

D. Proposal to amend § 62-7 as to certification

Attorney Ziogas explained that the amendment made it clear that filers can check the box during the electronic filing process certifying compliance with subdivisions (2) and (3) of subsection (b), but that a separate sheet containing the names, addresses, etc., was still required in order to comply with subdivision (1). The members of the committee agreed that it would reduce duplication of effort and reduce documents returned by the clerk's office for noncompliance.

Attorney Horton moved to adopt the proposal. That motion was seconded by Attorney Babbin and passed unanimously.

E. Proposal to amend § 62-8A (pro hac vice participation on appeal)

Attorney Babbin had asked whether it was still necessary to certify that payment of the pro hac vice filing fee had been made to the clerk of the Superior Court when the motion to appear pro hac vice on appeal is now e-filed and payment would be made during the appellate e-filing transaction. It was agreed that the October, 2013 commentary should no longer be retained, but that perhaps some brief commentary should accompany this amendment. Suggested: "A member of the bar of this state pays the fee required by General Statutes § 52-259 (i) when presenting the pro hac vice application."

Attorney Horton moved to adopt the proposal. That motion was seconded by Attorney Babbin and passed unanimously.

F. Request that appellate briefing rules be amended as they apply to incarcerated self-represented parties

This proposal was submitted by Mr. Kacey Lewis and primarily sought to amend the rules to allow incarcerated self-represented parties to file handwritten motions, briefs, etc., and sought relief from other requirements such as the necessity of copies, colored paper covers, and applications for fee waivers when prior applications had been granted. Judge DiPentima explained how the court handles such requests on a case-by-case basis, that the court has allowed handwritten briefs in criminal and habeas corpus matters, and how accommodations are made with respect to fee waivers, giving extra time for filing briefs, having copies printed by COLP, etc. Attorney Porter explained that the issue mostly arises when the incarcerated self-represented person is appealing from a judgment in a civil matter unrelated to a habeas corpus claim. It was decided that no rules would be amended at this time, and the court would continue to address such requests on a case-by-case basis. Final resolution of this request was tabled until the next meeting. Judge DiPentima indicated that she would send a response to Mr. Lewis on behalf of the committee.

G. Discussion re whether rules should be amended to address failure to appear for oral argument

Attorney Ziogas said that at least once per term, counsel of record in a case assigned for argument before the Appellate Court does not appear for the argument. Attorney Ziogas indicated that this was not a failure of notice issue. In such circumstances, the party is generally deemed to have forfeited argument and the matter is decided by the court on the record, briefs, and arguments of the appearing party. After some discussion, it was agreed that the question of whether the rules concerning sanctions or oral argument should be amended to address failure to appear at oral argument should be referred to the work group.

H. Discussion re whether rules should be amended to address whether the filing of a writ of error operates to stay proceedings to enforce or carry out the judgment (see § 61-11)

Discussion of this matter was tabled until the next meeting.

III. Any other business that may come before the committee

Justice McDonald has asked this committee to consider whether the rules should be amended to require a more comprehensive list of interested parties, including, for example, the members of a partnership or LLC, so that members of the court may more readily determine whether they should recuse themselves from a particular matter. He proposed that the disclosures should be more comprehensive than what is presently required under the federal rules of appellate procedure. This matter will be referred to the work group to consider a possible amendment to § 63-4.

IV. Next meeting

The date of the next meeting was left to the discretion of the chairs. It is expected that the next meeting will occur in October, 2017.

Respectfully submitted,

Colleen Barnett