Appendix A (040616)

ARTICLE I—GENERAL PROVISIONS

Sec. 1-1. Short Title; Application

(a) Short title. These rules shall be known and may be cited as the Code of Evidence. The Code of Evidence is hereinafter referred to as the "Code."

(b) Application of the Code. The Code and the commentary **[**applies**]** apply to all proceedings in the superior court in which facts in dispute are found, except as otherwise provided by the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

(c) Rules of privilege. Privileges shall apply at all stages of all proceedings in the court.

(d) The Code inapplicable. The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to, the following:

(1) Proceedings before investigatory grand juries, as provided for in General Statutes §§ 54-47b through 54-47f.

(2) Proceedings involving questions of fact preliminary to admissibility of evidence pursuant to Section 1-3 of the Code.

(3) Proceedings involving sentencing.

(4) Proceedings involving probation.

(5) Proceedings involving small claims matters.

(6) Proceedings involving summary contempt.

(7) Certain pretrial criminal proceedings in which it has been determined as a matter of statute or decisional law that the rules of evidence do not apply.

COMMENTARY

(b) Application of the Code.

[The Connecticut Code of Evidence was adopted by the Judges of the Superior Court. In *State v. DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), the Connecticut Supreme Court held that it is not bound by a code adopted by the Judges of the Superior Court.**]** When the Code was initially adopted by the judges of the Superior

Court in 1999 and then readopted by the Supreme Court in 2014, the adoption included both the rules and the commentary, thereby making both equally applicable. See *State* v. *Pierre*, 277 Conn. 42, 60, 890 A.2d 474 (2006).

The Code is broadly applicable. The Code applies to all civil and criminal bench or jury trials in the superior court. The Probate Assembly adopted Probate Rule 62.1, effective July 1, 2013, making the Code applicable to all issues in which facts are in dispute. The Code applies, for example, to the following proceedings:

(1) court-ordered fact-finding proceedings conducted pursuant to General Statutes § 52-549n and Practice Book § 23-53; see General Statutes § 52-549r;

(2) probable cause hearings conducted pursuant to General Statutes § 54-46a excepting certain matters exempted under General Statutes § 54-46a (b); see *State* v. *Conn.*, 234 Conn. 97, 110, 662 A.2d 68 (1995); *In re Ralph M.*, 211 Conn. 289, 305–306, 559 A.2d 179 (1989);

(3) juvenile transfer hearings conducted pursuant to General Statutes § 46b-127 as provided in subsection (b) of that provision; *In re Michael B.*, 36 Conn. App. 364, 381, 650 A.2d 1251 (1994); *In re Jose M.*, 30 Conn. App. 381, 384–85, 620 A.2d 804, cert. denied, 225 Conn. 921, 625 A.2d 821 (1993);

(4) juvenile proceedings; however, adoption of subsection (b) is not intended to abrogate the well established rule that the court may relax its strict application of the formal rules of evidence to reflect the informal nature of juvenile proceedings provided the fundamental rights of the parties are preserved; *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 190, 485 A.2d 1362 (1986); see *Anonymous* v. *Norton*, 168 Conn. 421, 425, 362 A.2d 532, cert. denied, 423 U.S. 925, 96 S. Ct. 294, 46 L. Ed. 2d 268 (1975); Practice Book **[**§ 34-2(a)**]** 32a-2 (a); and

(5) proceedings involving family relations matters enumerated under General Statutes § 46b-1.

[Because the Code is applicable only to proceedings in the court, the Code does not apply to: (1) matters before probate courts; see *Prince* v. *Sheffield*, 158 Conn. 286, 293, 259 A.2d 621 (1968); although the Code applies to appeals from probate courts that are before the court in which a trial de novo is conducted; see *Thomas* v. *Arefeh*, 174 Conn. 464, 470, 391 A.2d 133 (1978); and (2) administrative hearings conducted

pursuant to General Statutes § 4-176e; see General Statutes § 4-178; *Jutkowitz* v. *Dept. of Health Services*, 220 Conn. 86, 108, 596 A.2d 394 (1991); *Lawrence* v. *Kozlowski*, 171 Conn. 705, 710, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L.Ed.2d 1066 (1977); or administrative hearings conducted by agencies that are exempt from the Uniform Administrative Procedure Act, General Statutes §§ 4-166 through 4-189.**]**

[An example of a provision within subsection (b)'s "except as otherwise provided" language is Practice Book § 23-12, which states that the court "shall not be bound by the technical rules of evidence" when trying cases placed on the expedited process track pursuant to General Statutes § 52-195b.**]**

The Code is not intended to apply to matters to which the technical rules of evidence traditionally have not applied. Thus, for example, the Code would be inapplicable to hearings on the issuance of bench warrants of arrest or search warrants conducted pursuant to General Statutes §§ 54-2a and 54-33a, respectively; see *State* v. *DeNegris*, 153 Conn. 5, 9, 212 A.2d 894 (1965); *State* v. *Caponigro*, 4 Conn. Cir.Ct. 603, 609, 238 A.2d 434 (1967).

Matters to which the Code specifically is inapplicable are set forth in subsection (d).

(c) Rules of privilege.

Subsection (c) addresses the recognition of evidentiary privileges only with respect to proceedings in the court. See Article V—Privileges. It does not address the recognition of evidentiary privileges in any other proceedings outside the court, whether legislative, administrative or quasi-judicial, in which testimony may be compelled.

(d) The Code inapplicable.

Subsection (d) specifically states the proceedings to which the Code, other than with respect to evidentiary privileges, is inapplicable. The list is intended to be illustrative rather than exhaustive and subsection (d) should be read in conjunction with subsection (b) in determining the applicability or inapplicability of the Code. The removal of these matters from the purview of the Code generally is supported by case law, the General Statutes or the Practice Book. They include:

(1) proceedings before investigatory grand juries; e.g., *State* v. *Avcollie*, 188

Conn. 626, 630-31, 453 A.2d 418 (1982), cert. denied, 461 U.S. 928, 103 S.Ct. 2088, 77 L.Ed.2d 299 (1983);

(2) preliminary determinations of questions of fact by the court made pursuant to Section 1-3 (a); although there is no Connecticut authority specifically stating this inapplicability, it is generally the prevailing view. E.g., Fed. R. Evid. 104(a); Unif. R. Evid. 104(a), 13A U.L.A. **[**93–94 (1994)**]** 16–17 (1999); **[**1 C. McCormick, Evidence (5th Ed. 1999) § 53, p. 234**]**;

(3) sentencing proceedings following trial; e.g., *State* v. *Huey*, 199 Conn. 121, 126, 505 A.2d 1242 (1986); *State* v. *Pena*, 301 Conn. 669, 680–83, 22 A.3d 611 (2011) (in sentencing, trial judge may rely on evidence bearing on charges for which defendant was acquitted). The Code, however, does apply to sentencing proceedings that constitutionally require that a certain fact be found by the trier of fact beyond a reasonable doubt before the defendant is deemed eligible for a particular sentence. See, e.g., *Bullington* v. *Missouri*, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981) ("many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing . . . in a capital case"); *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt");

(4) hearings involving the violation of probation conducted pursuant to General Statutes § 53a-32 (a); *State* v. *White*, 169 Conn. 223, 239–40, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975); *In re Marius M.*, 34 Conn. App. 535, 536, 642 A.2d 733 (1994);

(5) proceedings involving small claims matters; General Statutes § 52-549c (a); see Practice Book § 24-23; **[**and**]**

(6) summary contempt proceedings; see generally Practice Book § 1-16.

(7) certain criminal pretrial proceedings; see, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 26–30, 981 A.2d 427 (2009); General Statutes § 54-64f (b) (hearing on revocation of release).

Nothing in subdivision **[**(1)**]** (d) (2) abrogates the common-law rule that in

determining preliminary questions of fact upon which the application of certain exceptions to the hearsay rule depends, the court may not consider the declarant's out-of-court statements themselves in determining those preliminary questions. E.g., *State* v. *Vessichio*, 197 Conn. 644, 655, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986) (court may not consider coconspirator statements in determining preliminary questions of fact relating to admissibility of those statements under coconspirator statement exception to hearsay rule; see Section 8-3 [1] [D]); *Robles* v. *Lavin*, 176 Conn. 281, 284, 407 A.2d 958 (1978) (in determining whether authorized admissions against party opponent exception to hearsay rule applies, authority to speak must be established before alleged agent's declarations can be introduced; see Section 8-3 [1] [C]); *Ferguson* v. *Smazer,* 151 Conn. 226, 231, 196 A.2d 432 (1963) (in determining whether hearsay exception for statements of pedigree and family relationships applies, declarant's relationship to person to whom statement relates must be established without reference to declarant's statements; see Section 8-6 [7]).

Sec. 1-2. Purposes and Construction

(a) Purposes of the Code. The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rule making to the end that the truth may be ascertained and proceedings justly determined.

(b) Saving clause. Where the Code does not prescribe a rule governing the admissibility of evidence, the court shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience, except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book. The provisions of the Code shall not be construed as precluding any court from recognizing other evidentiary rules not inconsistent with such provisions.

(c) Writing. Any reference in the Code to a writing or any other medium of evidence includes electronically stored information.

COMMENTARY

(a) Purposes of the Code.

Subsection (a) provides a general statement of the purposes of the Code. Case-by-case adjudication is integral to the growth and development of evidentiary law and, thus, future definition of the Code will be effected primarily through interpretation of the Code and through judicial rule making.

One of the goals of drafting the Code was to place common-law rules of evidence and certain identified statutory rules of evidence into a readily accessible body of rules to which the legal profession conveniently may refer. The Code sometimes states common-law evidentiary principles in language different from that of the cases from which these principles were derived. Because the Code was intended to maintain the status quo, i.e., preserve the common-law rules of evidence as they existed prior to adoption of the Code, its adoption is not intended to modify any prior common-law interpretation of those rules. Nor is the Code intended to change the common-law interpretation of certain incorporated statutory rules of evidence as it existed prior to the Code's adoption.

In some instances, the Code embraces rules or principles for which no Connecticut case law presently exists, or for which the case law is indeterminate. In such instances, these rules or principles were formulated with due consideration of the recognized practice in Connecticut courts and the policies underlying existing common law, statutes and the Practice Book.

Although the Code follows the general format and sometimes the language of the Federal Rules of Evidence, the Code does not adopt the Federal Rules of Evidence or cases interpreting those rules. Cf. *State* v. *Vilalastra*, 207 Conn. 35, 39–40, 540 A.2d 42 (1988) (Federal Rules of Evidence influential in shaping Connecticut evidentiary rules, but not binding).

Unlike the Federal Rules of Evidence, which govern both the admissibility of evidence at trial and issues concerning the court's role in administering and controlling the trial process, the Code was developed with the intention that it would address issues concerning the admissibility of evidence and competency of witnesses, leaving trial management issues to common law, the Practice Book and the discretion of the court.

(b) Saving clause.

Subsection (b) addresses the situation in which courts are faced with evidentiary issues not expressly covered by the Code. Although the Code will address most evidentiary matters, it cannot possibly address every evidentiary issue that might arise during trial. Subsection (b) sets forth the standard by which courts are to be guided in such instances.

Precisely because it cannot address every evidentiary issue, the Code is not intended to be the exclusive set of rules governing the admissibility of evidence. Thus, subsection (b) makes clear that a court is not precluded from recognizing other evidentiary rules not inconsistent with the Code's provisions.

(c) Writing.

The rules and principles in the Code are intended to govern evidence in any form or medium, including without limitation, written and printed material, photographs, video and sound recordings, and electronically stored information. As a result of advances in technology, the widespread availability and use of electronic devices for storage and communication, and the proliferation of social media, courts are frequently called upon to rule on the admissibility of electronically stored information. That term, as used in the Code, refers to information that is stored in an electronic medium and is retrievable in perceivable form. See Practice Book § 13-1 (a) (5).

Sec. 1-3. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification and competence of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court.

(b) Admissibility conditioned on fact. When the admissibility of evidence depends upon connecting facts, the court may admit the evidence upon proof of the connecting facts or subject to later proof of the connecting facts.

COMMENTARY

(a) Questions of admissibility generally

The admissibility of evidence, qualification of a witness, authentication of evidence or assertion of a privilege often is conditioned on a disputed fact. Was the declarant's

statement made under the stress of excitement? Is the alleged expert a qualified social worker? Was a third party present during a conversation between husband and wife? In each of these examples, the admissibility of evidence, qualification of the witness or assertion of a privilege will turn upon the answer to these questions of fact. Subsection (a) makes it the responsibility of the court to determine these types of preliminary questions of fact. E.g., *State* v. *Stange*, 212 Conn. 612, 617, 563 A.2d 681 (1989); *Manning* v. *Michael*, 188 Conn. 607, 610, 453 A.2d 1157 (1982); *D'Amato* v. *Johnston*, 140 Conn. 54, 61–62, 97 A.2d 893 (1953).

As it relates to authentication, this Section operates in conjunction with Section 1-1 (d) (2) and Article IX of the Code. The preliminary issue, decided by the court, is whether the proponent has offered a satisfactory foundation from which the finder of fact could reasonably determine that the evidence is what it purports to be. The court makes this preliminary determination in light of the authentication requirements of Article IX. Once a prima facie showing of authenticity has been made to the court, the evidence, if otherwise admissible, goes to the fact finder, and it is for the fact finder ultimately to resolve whether evidence submitted for its consideration is what the proponent claims it to be. *State v. Carpenter*, 275 Conn. 785, 856–57, 882 A.2d 604 (2005); *State v. Colon*, 272 Conn. 106, 188–89, 864 A.2d 666 (2004); *State v. Shah*, 134 Conn. App. 581, 593, 39 A.3d 1165 (2012).

Pursuant to Section 1-1 (d) (2), courts are not bound by the Code in determining preliminary questions of fact under subsection (a), except with respect to evidentiary privileges.

(b) Admissibility conditioned on fact.

Frequently, the admissibility of a particular fact or item of evidence depends upon proof of another fact or other facts, i.e., connecting facts. For example, the relevancy of a witness' testimony that the witness observed a truck swerving in and out of the designated lane at a given point depends upon other testimony identifying the truck the witness observed as the defendant's. Similarly, the probative value of evidence that *A* warned *B* that the machine *B* was using had a tendency to vibrate depends upon other evidence establishing that *B* actually heard the warning. When the admissibility of evidence depends upon proof of connecting facts, subsection (b) authorizes the court to

admit the evidence upon proof of the connecting facts or admit the evidence subject to later proof of the connecting facts. See, e.g., *State* v. *Anonymous (83-FG)*, 190 Conn. 715, 724–25, 463 A.2d 533 (1983); *Steiber* v. *Bridgeport*, 145 Conn. 363, 366–67, 143 A.2d 434 (1958); see also *Finch* v. *Weiner*, 109 Conn. 616, 618, 145 A. 31 (1929) (when admissibility of evidence depends upon connecting facts, order of proof is subject to discretion of court).

If the proponent fails to introduce evidence sufficient to prove the connecting facts, the court may instruct the jury to disregard the evidence or order the earlier testimony stricken. *State* v. *Ferraro*, 160 Conn. 42, 45, 273 A.2d 694 (1970); *State* v. *Johnson*, 160 Conn. 28, 32–33, 273 A.2d 702 (1970).

Sec. 1-4. Limited Admissibility

Evidence that is admissible as to one party but not as to another, or for one purpose but not for another, is admissible as to that party or for that purpose. The court may, and upon request shall, restrict the evidence to its proper scope.

COMMENTARY

Section 1-4 is consistent with Connecticut law. See *Blanchard* v. *Bridgeport*, 190 Conn. 798, 805, 463 A.2d 553 (1983); *State* v. *Tryon*, 145 Conn. 304, 309, 142 A.2d 54 (1958).

Absent a party's request for a limiting instruction, upon the admission of evidence, the court is encouraged to instruct the jury on the proper scope of the evidence or inquire whether counsel desires a limiting instruction to be given. See *Rokus* v. *Bridgeport*, 191 Conn. 62, 67, 463 A.2d 252 (1983); cf. *State* v. *Cox*, 7 Conn. App. 377, 389, 509 A.2d 36 (1986). Nothing precludes a court from excluding evidence offered for a limited purpose or taking other action it deems appropriate when a limiting instruction will not adequately protect the rights of the parties. See *Blanchard* v. *Bridgeport*, supra, 190 Conn. 805.

Sec. 1-5. Remainder of Statements

(a) Contemporaneous introduction by proponent. When a statement is introduced by a party, the court may, and upon request shall, require the proponent at

that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it.

(b) Introduction by another party. When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it.

COMMENTARY

(a) Contemporaneous introduction by proponent.

Subsection (a) recognizes the principle of completeness. Sometimes, one part of a statement may be so related to another that, in fairness, both should be considered contemporaneously. Subsection (a) details the circumstances under which a court may or shall require a proponent of one part of a statement to contemporaneously introduce the other part. See *Clark* v. *Smith*, 10 Conn. 1, 5 (1833); *Ives* v. *Bartholomew*, 9 Conn. 309, 312–13 (1832); see also Practice Book § 13-31 (a) (5) (depositions); cf. *Walter* v. *Sperry*, 86 Conn. 474, 480, 85 A. 739 (1912).

The basis for the rule is that matters taken out of context can create misleading impressions or inaccuracies**[**,**]** and that waiting until later in the trial to clear them up can be ineffectual. **[**See 1 C. McCormick, Evidence (5th Ed. 1999) § 56, pp. 248–49; C. Tait & J. LaPlante, Connecticut Evidence (Sup. 1999) § 8.1.4, p. 151.**]** See *State* v. *Arthur S.*, 109 Conn. App. 135, 140–41, 950 A.2d 615, cert. denied, 289 Conn. 925, 958 A.2d 153 (2008).

"Statement," as used in this subsection, includes written, recorded and oral statements. Because the other part of the statement is introduced for the purpose of placing the first part into context, the other part need not be independently admissible. See *State* v. *Tropiano*, 158 Conn. 412, 420, 262 A.2d 147 (1969), cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288 (1970).

(b) Introduction by another party.

Unlike subsection (a), subsection (b) does not involve the contemporaneous introduction of evidence. Rather, it recognizes the right of a party to subsequently introduce another part or the remainder of a statement previously introduced in part by

the opposing party under the conditions prescribed in the rule. See *State* v. *Paulino*, 223 Conn. 461, 468–69, 613 A.2d 720 (1992); *State* v. *Castonguay*, 218 Conn. 486, 496–97, 590 A.2d 901 (1991); *Rokus* v. *Bridgeport*, 191 Conn. 62, 69, 463 A.2d 252 (1983); see also Practice Book § 13-31 (a) (5) (depositions).

Although the cases upon which subsection (b) is based deal only with the admissibility of oral conversations or statements, the rule logically extends to written and recorded statements. Thus, like subsection (a), subsection (b)'s use of the word ''statement" includes oral, written and recorded statements. In addition, because the other part of the statement is introduced under subsection (b) for the purpose of putting the first part into context, the other part need not be independently admissible. See *State* v. *Paulino*, supra, 223 Conn. 468–69; *State* v. *Castonguay*, supra, 218 Conn. 496; cf. *Starzec* v.*Kida*, 183 Conn. 41, 47 n.6, 438 A.2d 1157 (1981).