

February 26, 2007

Minutes of the Meeting  
Rules Committee  
February 26, 2007

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On Monday, February 26, 2007 the Rules Committee met in the Attorneys' Conference Room from 2:00 p.m. to 3:41 p.m.

Members in attendance were:

HON. PETER T. ZARELLA, CHAIR  
HON. JOAN K. ALEXANDER  
HON. THOMAS J. CORRADINO  
HON. RICHARD W. DYER  
HON. ROLAND D. FASANO  
HON. BARRY C. PINKUS  
HON. PATTY JENKINS PITTMAN  
HON. HILLARY B. STRACKBEIN  
HON. GEORGE N. THIM

Also in attendance was Carl E. Testo, Counsel to the Rules Committee.

Agenda

1. The Committee approved the minutes of the meeting held on January 29, 2007. The Committee authorized the undersigned to reformat the rules proposals set forth in Appendix A before printing them in the Connecticut Law Journal for public hearing so that they are consistent with the format used in the Practice Book.

2. The Committee considered a proposal by Attorney Lewis S. Lerman, submitted on behalf of the Connecticut Defense Lawyers Association, to amend Rules 1.2 and 1.8 of the Rules of Professional Conduct with regard to the informed consent requirement of those rules.

After discussion, the Committee unanimously voted to submit to public hearing the revisions to Rules 1.2 and 1.8 of the Rules of Professional Conduct as set forth in Appendix A attached hereto.

3. The Committee considered a proposal by Attorney Joseph R. Mirrione, submitted on behalf of the Connecticut Trial Lawyers Association to amend Rule 1.5 of the Rules of

Professional Conduct concerning reasonable fees.

After discussion, the Committee unanimously voted to submit to public hearing the revision to Rule 1.5 of the Rules of Professional Conduct as set forth in Appendix B attached hereto.

4. At its September meeting, the Rules Committee considered the report of the Civil Rules Task Force concerning the production of surveillance materials of a deponent. The Rules Committee had forwarded to the Task Force for review and a recommendation a proposal by Attorney Leonard M. Isaac on this topic. At that meeting, the Rules Committee asked the undersigned to draft a revision to the Task Force's proposed amendment to Practice Book Section 13-3 and to submit the draft to the Committee for consideration at a future meeting. Attorney Isaac also proposed revisions to Practice Book Forms 201 through 206 concerning this topic.

At this meeting, the Committee considered the further revision to Section 13-3 submitted by the undersigned and Attorney Isaac's proposed revisions to Practice Book Forms 201 through 206.

After discussion, the Committee unanimously voted to submit to public hearing the revision to Section 13-3 as set forth in Appendix C attached hereto and the revisions to Practice Book Forms 201 through 206 proposed by Attorney Isaac which, at the Rules Committee's request, the undersigned has incorporated into the forms and included in Appendix C herein. When the Rules Committee votes on approval of these minutes at its next meeting, it will advise the undersigned if his incorporation of Attorney Isaac's proposals into the forms requires further revision.

5. The Committee referred to the Civil Rules Task Force for review and a recommendation a letter from Judge Douglas C. Mintz concerning depositions of physicians to be taken for discovery purposes or whether the opposing party can invoke Practice Book Sections 13-27(f)(2) in conjunction with Section 13-31(a)(2) and videotape the deposition and introduce it at trial.

6. Justice Zarella updated the Committee concerning the work of the Rules Committee's subcommittee that is looking into how "media" should be defined in the rules. The next meeting of this subcommittee will be on March 22 at 2:00 p.m. and Senior Associate Justice David M. Borden will be invited to attend.

7. The Rules Committee considered proposals submitted by Justice Joette Katz, Chair of the Evidence Oversight Committee, to amend the Code of Evidence and a letter from Senior Assistant State's Attorney Susann E. Gill, on behalf of the Division of Criminal Justice, concerning the Evidence Oversight Committee's recommendation to amend Section 4-4(a).

The Rules Committee continued its discussion from the last meeting concerning whether the proposals submitted by Justice Katz contain substantive changes to the rules that are not the result of legislative changes or Supreme Court decisions and, if that is the case, whether such changes may be made by the Superior Court judges by revising the Code of Evidence.

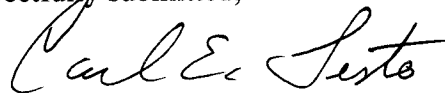
Justice Zarella absented himself from the meeting during the discussion of these proposals.

After discussion, the Committee unanimously voted to submit to public hearing the revisions to Sections 2-1(e), 7-2, 8-3(5), 8-5(1) and 8-6 of the Code of Evidence as set forth in Appendix D attached hereto.

The Committee then voted to table consideration of the proposed revisions to Section 4-4(a)(1) and 8-3(1) because these changes implicate the authority of the judges of the Superior Court to adopt rules of evidence that are not in accordance with common law or statute. Six members of the Committee voted in favor of tabling these proposals, two members voted against.

Justice Zarella returned to the meeting following the above discussion and votes.

Respectfully submitted,



Carl E. Testo

Counsel to the Rules Committee

CET:pt  
Attachments

## APPENDIX A (2-26-07 MINS)

### **Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) Subject to subsections (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. Subject to revocation by the client, a client's decision to settle a matter shall be implied where the lawyer is retained to represent the client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss, and the third party elects to settle a matter without contribution by the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Such informed consent shall not be required when a client cannot be located despite reasonable efforts where the lawyer is retained to represent a client by a third party which is obligated by contract to provide the client with a defense.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**COMMENTARY: Allocation of Authority between Client and Lawyer.** Subsection (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in subsection (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely

affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

**Independence from Client's Views or Activities.** Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

**Agreements Limiting Scope of Representation.** The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. Nothing in Rule 1.2 shall be construed to authorize limited appearances before any tribunal unless otherwise authorized by law or rule.

Although this Rule affords the lawyer and client substantial latitude to limit the scope of representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the

legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

**Criminal, Fraudulent and Prohibited Transactions.** Subsection (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally believed legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Subsection (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Subsection (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of subsection (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

**AMENDMENT NOTE:** The above revisions address the situation where an insured/client cannot be located despite diligent and good faith efforts by both the lawyer and the insurer.

### **Rule 1.8. Conflict of Interest: Prohibited Transactions**

(a) A lawyer shall not enter into a business transaction, including investment services, with a client or former client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client or former client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client or former client and are fully disclosed and transmitted in writing to the client or former client in a manner that can be reasonably understood by the client or former client;

(2) The client or former client is advised in writing that the client or former client should consider the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction;

(3) The client or former client gives informed consent in writing signed by the client or former client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction;

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction; and

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and either (B) that the lawyer will provide legal services to the client or former client concerning the transaction, or (C) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn to for legal services concerning the transaction. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two-year period starting from the conclusion of representation has not expired.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related

persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may pay court costs and expenses of litigation on behalf of a client, the repayment of which may be contingent on the outcome of the matter;

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent; subject to revocation by the client, such informed consent shall be implied where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense;

(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) Information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. Subject to revocation by the client, such informed consent shall be implied and need not be in writing where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense.

(h) A lawyer shall not:

(1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) Settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.



(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) Contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing subsection (a) through (i) that applies to any one of them shall apply to all of them.

**COMMENTARY: Business transactions Between Client and Lawyer.** Subsection (a) expressly applies to former clients as well as existing clients. A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of subsection (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in subsection (a) are unnecessary and impracticable.

Subsection (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Subsection (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Subsection (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(f) (definition of informed consent).

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of subsection (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the subsection (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as subsection (a)(1) further requires.

**Use of Information Related to Representation.** Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Subsection (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Subsection (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

**Gifts to Lawyers.** A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subsection (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another

lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

**AMENDMENT NOTES:** The above two paragraphs were previously included under the "Transactions Between Client and Lawyer" heading located earlier in the Commentary for this rule.

This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

**Literary Rights.** An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Subsection (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and subsections (a) and (i).

**Financial Assistance.** Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

**Person Paying for a Lawyer's Services.** Subsection (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that subsection. Under Rule 1.7(b), the informed consent must be confirmed in writing.

**Aggregate Settlements.** Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

**Limiting Liability and Settling Malpractice Claims.** Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is

independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This subsection does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this subsection limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

**Acquiring Proprietary Interest in Litigation.** Subsection (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like subsection (e), the general rule, which has its basis in common law champerty and maintenance, is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in subsection (e). In addition, subsection (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of subsection (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

**Client-Lawyer Sexual Relationships.** The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual

relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interest and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

**Imputation of Prohibitions.** Under subsection (k), a prohibition on conduct by an individual lawyer in subsections (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. The prohibition set forth in subsection (j) is personal and is not applied to associated lawyers.

**AMENDMENT NOTE:** The above revisions address the situation where an insured/client cannot be located despite diligent and good faith efforts by both the lawyer and the insurer.

## **APPENDIX B (2-26-07 mins)**

### **Rule 1.5. Fees**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

(b) The scope of the representation, the basis or rate of the fee and expenses for which the client will be responsible, shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client in writing before the fees or expenses to be billed at higher rates are actually incurred. This subsection shall not apply to public defenders or in situations where the lawyer will be paid by the court or a state agency.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by subsection (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages of the recovery that shall accrue to the lawyer as a fee in the event of settlement, trial or appeal, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution of marriage or civil union or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) A contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) The client is advised in writing of the compensation sharing agreement and of the participation of all the lawyers involved, and does not object; and

(2) The total fee is reasonable.

**COMMENTARY: Basis or Rate of Fee.** Subsection (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Subsection (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

When the lawyer has regularly represented a client, the lawyer and the client ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding. Absent extraordinary circumstances the lawyer should send the written fee statement to the client before any substantial services are rendered, but in any event not later than ten days after commencing the representation.

Contingent fees, like any other fees, are subject to the reasonableness standard of subsection (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters. In matters where a contingent fee agreement has been signed by the client and is in accordance with Gen. Stat. § 52-251c, the fee is presumed to be reasonable.

**Terms of Payment.** A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16 (d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid



in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

**Prohibited Contingent Fees.** Subsection (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

**Division of Fee.** A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Contingent fee agreements must be in writing signed by the client and must otherwise comply with subsection (c) of this Rule. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

Subsection (e) does not prohibit or regulate divisions of fees to be received in the future for work done when lawyers were previously associated in a law firm.

**Disputes over Fees.** If an arbitration or mediation procedure such as that in Practice Book Section 2-32(a)(3) has been established for resolution of fee disputes, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

**AMENDMENT NOTE:** The above change adds to the rule the express provision that, where a signed contingent fee agreement is in accordance with Gen. Stat. § 52-251c, the fee is presumed to be reasonable.

## APPENDIX C (2-26-07 MINS)

### **Sec. 13-3. —Materials Prepared in Anticipation of Litigation; Statements of Parties**

(a) Subject to the provisions of Section 13-4, a party may obtain discovery of documents and tangible things otherwise discoverable under Section 13-2 and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the judicial authority shall not order disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(b) A party may obtain, without the showing required under this section, discovery of the party's own statement and of any nonprivileged statement of any other party concerning the action or its subject matter.

(c) A party may obtain, without the showing required under this section, discovery of any recording, by film, photograph, video tape, audio tape or any other digital or electronic means, of the requesting party and of any recording of any other party concerning the action or the subject matter, thereof, including any transcript of such recording. A party may obtain information identifying any such recording and transcript, if one was created, prior to the deposition of the party who is the subject of the recording; but the person from whom discovery is sought shall not be required to produce the recording or transcript until thirty days after the completion of the deposition of the party who is the subject of the recording or sixty days prior to the date the case is assigned to commence trial, whichever is earlier; except that if a deposition of the party who is the subject of the recording was not taken, the recording and transcript shall be produced sixty days prior to the date the case is assigned to commence trial. If a recording was created within such sixty day period, the recording and transcript must be produced immediately. No such recording or transcript is required to be identified or produced if neither it nor any part thereof will be introduced into evidence at trial. However, if any such recording or part or transcript thereof is required to be identified or produced, all recordings and transcripts thereof of the subject of the recording party shall be identified and produced, rather than only those recordings, or transcripts or parts thereof that the producing party intends to use or introduce at trial.

COMMENTARY: Section 13-3(c) is based on the position concerning the discoverability of pretrial surveillance materials taken in the majority of decisions from other jurisdictions where the issue was not addressed by a specific rule. See, e.g., *DiMichel v. South Buffalo Railway Co.*, 80 N.Y.Ed. 184, 604 N.E.Ed. 63, 590 N.Y.S.2d 1 (1992), cert. denied, 510 U.S. 816 (1993), *Wolford v. Joellen Smith Psychiatric Hospital, PIA*, 693 So.2d 1164 (La. 1997); *Shenk v. Berger*, 86 Md.

498, 587 A.2d 551 (1991); *Dodson v. Persell*, 390 So.2d 704, 19 A.L.R. 4<sup>th</sup> 1228 (Fla. 1980), on remand, 393 So. 2d 1008 (Fla. App. 1980); *Jenkins v. Rainer*, 69 N.J. 50, 350 A.2d 473 (1976); *Snead v. American Export-Brandsten Lines, Inc.*, 59 F.R.D. 148 (E.D.Pa. 1973). This section permits discovery of the content of such materials only after the party obtaining the surveillance material has had an opportunity to depose the subject of the surveillance. It differs from the rule in New York, codified in CPLR 3101(i), enacted in 1993, which makes such material freely discoverable. The description of the material discoverable is taken from CPLR 3101(i). The surveillance material discoverable is limited to material concerning surveillance of a "party" as defined in Practice Book Section 13-1(2). Discovery of pretrial surveillance material is subject to the general limitation of Practice Book Section 13-2 that only information and documents "which are not privileged" are discoverable. Section 13-3(c) is applicable to family matters pursuant to Practice Book Section 25-31. Section 13-3 is not applicable to juvenile matters or criminal matters.

## Form 201

## Plaintiff's Interrogatories

No. CV-  
(Plaintiff)  
VS.  
(Defendant)

: SUPERIOR COURT  
: JUDICIAL DISTRICT OF  
: AT  
: (Date)

The undersigned, on behalf of the Plaintiff, hereby propounds the following interrogatories to be answered by the Defendant, \_\_\_\_\_, under oath, within thirty (30) days of the filing hereof insofar as the disclosure sought will be of assistance in the prosecution of this action and can be provided by the Defendant with substantially greater facility than could otherwise be obtained.

Definition: "You" shall mean the Defendant to whom these interrogatories are directed except that if that Defendant has been sued as the representative of the estate of a decedent, ward, or incapable person, "you" shall also refer to the Defendant's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

(1) State the following:

- (a) your full name and any other name(s) by which you have been known;
- (b) your date of birth;
- (c) your motor vehicle operator's license number;
- (d) your home address;
- (e) your business address;
- (f) if you were not the owner of the subject vehicle, the name and address of the owner or lessor of the subject vehicle on the date of the alleged occurrence.

(2) Have you made any statements, as defined in Practice Book Section 13-1, to any person regarding any of the incidents alleged in the Complaint?

COMMENT:

This interrogatory is intended to include party statements made to a representative of an insurance company prior to involvement of defense counsel.

(3) If the answer to Interrogatory #2 is affirmative, state:

- (a) the name and address of the person or persons to whom such statements were made;
- (b) the date on which such statements were made;
- (c) the form of the statement (i.e., whether written, made by recording device or recorded by a stenographer, etc.);
- (d) the name and address of each person having custody, or a copy or copies of each statement.

(4) State the names and addresses of all persons known to you who were present at the time of the incident alleged in the Complaint or who observed or witnessed all or part of the incident.

(5) As to each individual named in response to Interrogatory #4, state whether to your knowledge, or the knowledge of your attorney, such individual has given any statement or statements as defined in Practice Book Section 13-1 concerning the subject matter of the Complaint in this lawsuit. If your answer to this Interrogatory is affirmative, state also:

- (a) the date on which the statement or statements were taken;
- (b) the names and addresses of the person or persons who took such statement or statements;
- (c) the names and addresses of any person or persons present when such statement or statements were taken;
- (d) whether such statement or statements were written, made by recording device or taken by court reporter or stenographer;
- (e) the names and addresses of any person or persons having custody or a copy or copies of such statement or statements.

(6) Are you aware of any photographs depicting the accident scene, any vehicle involved in the incident alleged in the Complaint, or any condition or injury alleged to have been caused by the incident alleged in the Complaint? If so, for each set of photographs taken of each such subject by each photographer, please state:

- (a) the name and address of the photographer, other than an expert who will not testify at trial;
- (b) the dates on which such photographs were taken;
- (c) the subject (e.g., "Plaintiff's vehicle," "scene," etc.);
- (d) the number of photographs.

(7) If, at the time of the incident alleged in the Complaint, you were covered by an insurance policy under which an insurer may be liable to satisfy part or all of a judgment or reimburse you for payments to satisfy part or all of a judgment, state the following:

- (a) the name(s) and address(es) of the insured(s);
- (b) the amount of coverage under each insurance policy;
- (c) the name(s) and address(es) of said insurer(s).

(8) If at the time of the incident which is the subject of this lawsuit you were protected against the type of risk which is the subject of this lawsuit by excess umbrella insurance, or any other insurance, state:

- (a) the name(s) and address(es) of the named insured;
- (b) the amount of coverage effective at this time;
- (c) the name(s) and address(es) of said insurer(s).

(9) State whether any insurer, as described in Interrogatories #7 and #8 above, has disclaimed/reserved its duty to indemnify any insured or any other person protected by said policy.

- (10) If applicable, describe in detail the damage to your vehicle.

(11) If applicable, please state the name and address of an appraiser or firm which appraised or repaired the damage to the vehicle owned or operated by you.

(12) If any of the Defendants are deceased, please state the date and place of death, whether an estate has been created, and the name and address of the legal representative thereof.

(13) If any of the Defendants is a business entity that has changed its name or status as a business entity (whether by dissolution, merger, acquisition, name change, or in any other manner) since the date of the incident alleged in the Complaint, please identify such Defendant, state the date of the change, and describe the change.

(14) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether, at the time of the incident, you were operating that vehicle in the course of your employment with any person or legal entity not named as a party to this lawsuit, and, if so, state the full name and address of that person or entity.

(15) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you consumed or used any alcoholic beverages, drugs or medications within the eight (8) hours next preceding the time of the incident alleged in the Complaint and, if so, indicate what you consumed or used, how much you consumed, and when.

(16) Please state whether, within eight (8) hours after the incident alleged in the Complaint, any testing was performed to determine the presence of alcohol, drugs or other medications in your blood, and, if so, state:

- (a) the name and address of the hospital, person or entity performing such test or screen;
- (b) the date and time;
- (c) the results.

(17) Please identify, by stating the name and address of any person who obtained or prepared any and all recordings, by film, photograph, video tape, audio tape or any other digital or electronic means, of any party concerning this lawsuit or its subject matter, including any transcript thereof which are in your possession or control or in the possession or control of your attorney, and state the date on which each such recordings were obtained and the person or persons of whom each such recording was made.

PLAINTIFF,

BY \_\_\_\_\_

I, \_\_\_\_\_, hereby certify that I have reviewed the above Interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

\_\_\_\_\_  
(Defendant)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Notary Public/  
Commissioner of the Superior Court

**CERTIFICATION**

This is to certify that a copy of the foregoing has been mailed, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to (names and addresses of all opposing counsel and pro se parties upon whom service is required by Practice Book Section 10-12 et seq.).

\_\_\_\_\_  
(Attorney Signature)

(P.B. 1978-1997, Form 106.10A) (Amended June 21, 2004, to take effect Jan. 1, 2005.)

**COMMENTARY:** The above change is proposed in light of the proposed revision to Practice Book Section 13-3 concerning discovery of pretrial surveillance material.



## Form 202

**Defendant's Interrogatories**

No. CV-  
(Plaintiff)  
VS.  
(Defendant)

: SUPERIOR COURT  
: JUDICIAL DISTRICT OF  
: AT  
: (Date)

The undersigned, on behalf of the Defendant, hereby propounds the following interrogatories to be answered by the Plaintiff, \_\_\_\_\_, under oath, within thirty (30) days of the filing hereof insofar as the disclosure sought will be of assistance in the defense of this action and can be provided by the Plaintiff with substantially greater facility than could otherwise be obtained.

Definition: "You" shall mean the Plaintiff to whom these interrogatories are directed except that if suit has been instituted by the representative of the estate of a decedent, ward, or incapable person, "you" shall also refer to the Plaintiff's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

(1) State the following:

(a) your full name and any other name(s) by which you have been known;

(b) your date of birth;

(c) your motor vehicle operator's license number;

(d) your home address;

(e) your business address;

(f) if you were not the owner of the subject vehicle, the name and address of the owner or lessor of the subject vehicle on the date of the alleged occurrence.

(2) Identify and list each injury you claim to have sustained as a result of the incidents alleged in the Complaint.

(3) When, where and from whom did you first receive treatment for said injuries?

(4) If you were treated at a hospital for injuries sustained in the alleged incident, state the name and location of each hospital and the dates of such treatment and confinement therein.

(5) State the name and address of each physician, therapist or other source of treatment for the conditions or injuries you sustained as a result of the incident alleged in your Complaint.

(6) When and from whom did you last receive any medical attention for injuries alleged to have been sustained as a result of the incident alleged in your Complaint?

(7) On what date were you fully recovered from the injuries or conditions alleged in your Complaint?

(8) If you claim you are not fully recovered, state precisely from what injuries or conditions you are presently suffering?

(9) Are you presently under the care of any doctor or other health care provider for the treatment of injuries alleged to have been sustained as a result of the incident alleged in your Complaint?

(10) If the answer to Interrogatory #9 is in the affirmative, state the name and address of each physician or other health care provider who is treating you.

(11) Do you claim any present disability resulting from injuries or conditions allegedly sustained as a result of the incident alleged in your Complaint?

(12) If so, state the nature of the disability claimed.

(13) Do you claim any permanent disability resulting from said incident?

(14) If the answer to Interrogatory #13 is in the affirmative, please answer the following:

(a) list the parts of your body which are disabled;

(b) list the motions, activities or use of your body which you have lost or which you are unable to perform;

(c) state the percentage of loss of use claimed as to each part of your body;

(d) state the name and address of the person who made the prognosis for permanent disability and the percentage of loss of use;

(e) list the date for each such prognosis.

(15) If you were or are confined to your home or your bed as a result of injuries or conditions sustained as a result of the incident alleged in your Complaint, state the dates you were so confined.

(16) List each medical report received by you or your attorney relating to your alleged injuries or conditions by stating the name and address of the treating doctor or other health care provider, and of any doctor or health care person you anticipate calling as a trial witness, who provided each such report and the date thereof.

(17) List each item of expense which you claim to have incurred as a result of the incident alleged in your Complaint, the amount thereof and state the name and address of the person or organization to whom each item has been paid or is payable.

(18) For each item of expense identified in response to Interrogatory #17, if any such expense, or portion thereof, has been paid or reimbursed or is reimbursable by an insurer, state, as to each such item of expense, the name of the insurer that made such payment or reimbursement or that is responsible for such reimbursement.

(19) If, during the ten year period prior to the date of the incident alleged in the Complaint, you were under a doctor's care for any conditions which were in any way similar or related to those identified and listed in your response to Interrogatory #2, state the nature of said conditions, the dates on which treatment was received, and the name of the doctor or health care provider.

(20) If, during the ten year period prior to the date of the incident alleged in your Complaint, you were involved in any incident in which you received personal injuries similar or related to those identified and listed in your response to Interrogatory #2, please answer the following with respect to each such earlier incident:

(a) on what date and in what manner did you sustain such injuries?

(b) did you make a claim against anyone as a result of said accident?

(c) if so, provide the name and address of the person or persons against whom a claim was made;

(d) if suit was brought, state the name and location of the Court, the return date of the suit, and the docket number;

(e) state the nature of the injuries received in said accident;

(f) state the name and address of each physician who treated you for said injuries;

(g) state the dates on which you were so treated;

(h) state the nature of the treatment received on each such date;

(i) if you are presently or permanently disabled as a result of said injuries, please state the nature of such disability, the name and address of each physician who diagnosed said disability and the date of each such diagnosis.

(21) If you were involved in any incident in which you received personal injuries since the date of the incident alleged in the Complaint, please answer the following:

(a) on what date and in what manner did you sustain said injuries?

(b) did you make a claim against anyone as a result of said accident?

(c) if so, provide the name and address of the person or persons against whom a claim was made;

(d) if suit was brought, state the name and location of the Court, the return date of the suit, and the docket number;

(e) state the nature of the injuries received in said accident;

(f) state the name and address of each physician who treated you for said injuries;

(g) state the dates on which you were so treated;

(h) state the nature of the treatment received on each such date;

(i) if you are presently or permanently disabled as a result of said injuries, please state the nature of such disability, the name and address of each physician who diagnosed said disability and the date of each such diagnosis.

(22) Please state the name and address of any medical service provider who has rendered an opinion in writing or through testimony that you have sustained a permanent disability to any body part other than those listed in response to Interrogatories #13, #14, #20 or #21, and:

(a) list each such part of your body that has been assessed a permanent disability;

(b) state the percentage of loss of use assessed as to each part of your body;

(c) state the date on which each such assessment was made.

(23) If you claim that as a result of the incident alleged in your Complaint you were prevented from following your usual occupation, or otherwise lost time from work, please provide the following information:

- (a) the name and address of your employer on the date of the incident alleged in the Complaint;
- (b) the nature of your occupation and a precise description of your job responsibilities with said employer on the date of the incident alleged in the Complaint;
- (c) your average, weekly earnings, salary, or income received from said employment for the year preceding the date of the incident alleged in the Complaint;
- (d) the date following the date of the incident alleged in the Complaint on which you resumed the duties of said employment;
- (e) what loss of income do you claim as a result of the incident alleged in your Complaint and how is said loss computed?
- (f) the dates on which you were unable to perform the duties of your occupation and lost time from work as a result of injuries or conditions claimed to have been sustained as a result of the incident alleged in your Complaint;
- (g) the names and addresses of each employer for whom you worked for three years prior to the date of the incident alleged in your Complaint.
- (24) Do you claim an impairment of earning capacity?
- (25) List any other expenses or loss and the amount thereof not already set forth and which you claim to have incurred as a result of the incident alleged in your Complaint.
- (26) If you have signed a covenant not to sue, a release or discharge of any claim you had, have or may have against any person, corporation or other entity as a result of the incident alleged in your Complaint, please state in whose favor it was given, the date thereof, and the consideration paid to you for giving it.
- (27) If you or anyone on your behalf agreed or made an agreement with any person, corporation or other entity to limit in any way the liability of such person, corporation or other entity as a result of any claim you have or may have as a result of the incident alleged in your Complaint, please state in whose favor it was given, the date thereof, and the consideration paid to you for giving it.
- (28) If since the date of the incident alleged in your Complaint, you have made any claims for Workers' Compensation benefits, state the nature of such claims and the dates on which they were made.
- (29) Have you made any statements, as defined in Practice Book Section 13-1, to any person regarding any of the events or happenings alleged in your Complaint?

## COMMENT:

This interrogatory is intended to include party statements made to a representative of an insurance company prior to involvement of defense counsel.

- (30) State the names and addresses of all persons known to you who were present at the time of the incident alleged in your Complaint or who observed or witnessed all or part of the accident.
- (31) As to each individual named in response to Interrogatory #30, state whether to your knowledge, or the knowledge of your attorney, such individual has given any statement or statements as defined in Practice Book Section 13-1 concerning the subject matter of your Complaint or alleged injuries. If your answer to this Interrogatory is affirmative, state also:

- (a) the date on which such statement or statements were taken;
- (b) the names and addresses of the person or persons who took such statement or statements;
- (c) the names and addresses of any person or persons present when such statement or statements were taken;
- (d) whether such statement or statements were written, made by recording device or taken by court reporter or stenographer;
- (e) the names and addresses of any person or persons having custody or a copy or copies of such statement or statements.

(32) Are you aware of any photographs depicting the accident scene, any vehicle involved in the incident alleged in the Complaint, or any condition of injury alleged to have been caused by the incident alleged in the Complaint? If so, for each set of photographs taken of each such subject by each photographer, please state:

- (a) the name and address of the photographer, other than an expert who will not testify at trial;
- (b) the dates on which such photographs were taken;
- (c) the subject (e.g., "Plaintiff's vehicle," "scene," etc.);
- (d) the number of photographs.

(33) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you consumed or used any alcoholic beverages, drugs or medications within the eight (8) hours next preceding the time of the incident alleged in the Complaint and, if so, indicate what you consumed or used, how much you consumed, and when.

(34) Please state whether, within eight (8) hours after the incident alleged in the Complaint, testing was performed to determine the presence of alcohol, drugs or other medications in your blood and, if so, state:

- (a) the name and address of the hospital, person or entity performing such test or screen;
- (b) the date and time;
- (c) the results.

(35) Please identify, by stating the name and address of any person who obtained or prepared any and all recordings, by film, photograph, video tape, audio tape or any other digital or electronic means, of any party concerning this lawsuit or its subject matter, including any transcript thereof which are in your possession or control or in the possession or control of your attorney, and state the date on which each such recordings were obtained and the person or persons of whom each such recording was made.

DEFENDANT,

BY \_\_\_\_\_

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I, \_\_\_\_\_, hereby certify that I have reviewed the above Interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

\_\_\_\_\_  
(Plaintiff)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

**CERTIFICATION**

This is to certify that a copy of the foregoing has been mailed, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to \_\_\_\_\_.

\_\_\_\_\_  
(Attorney Signature)

(P.B. 1978-1997, Form 106.10B.) (Amended June 21, 2004, to take effect Jan. 1, 2005.)

**COMMENTARY:** The above change is proposed in light of the proposed revision to Practice Book Section 13-3 concerning discovery of pretrial surveillance material.

## Form 203

**Plaintiff's Interrogatories  
Premises Liability Cases**

No. CV- : SUPERIOR COURT  
(Plaintiff) : JUDICIAL DISTRICT OF  
VS. : AT  
(Defendant) : (Date)

The undersigned, on behalf of the Plaintiff, hereby propounds the following interrogatories to be answered by the Defendant, \_\_\_\_\_, under oath, within thirty (30) days of the filing hereof insofar as the disclosure sought will be of assistance in the prosecution of this action and can be provided by the Defendant with substantially greater facility than could otherwise be obtained.

(1) Identify the person(s) who, at the time of the Plaintiff's alleged injury, owned the premises where the Plaintiff claims to have been injured.

(a) If the owner is a natural person, please state:

- (i) your name and any other name by which you have been known;
- (ii) your date of birth;
- (iii) your home address;
- (iv) your business address.

(b) If the owner is not a natural person, please state:

- (i) your name and any other name by which you have been known;
- (ii) your business address;
- (iii) the nature of your business entity (corporation, partnership, etc.);
- (iv) whether you are registered to do business in Connecticut;
- (v) the name of the manager of the property, if applicable.

(2) Identify the person(s) who, at the time of the Plaintiff's alleged injury, had a possessory interest (e.g., tenants) in the premises where the Plaintiff claims to have been injured.

(3) Identify the person(s) responsible for the maintenance and inspection of the premises at the time and place where the Plaintiff claims to have been injured.

(4) State whether you had in effect at the time of the Plaintiff's injuries any written policies or procedures that relate to the kind of conduct or condition the Plaintiff alleges caused the injury.

(5) State whether it is your business practice to prepare, or obtain from your employees, a written report of the circumstances surrounding injuries sustained by persons on the subject premises.

(6) State whether any written report of the incident described in the Complaint was prepared by you or your employees in the regular course of business.

(7) State whether any warnings or caution signs or barriers were erected at or near the scene of the incident at the time the Plaintiff claims to have been injured.

(8) If the answer to the previous interrogatory is in the affirmative, please state:

(a) the name, address and employer of the person who erected the warning or caution signs or barriers;

(b) the name, address and employer who instructed the person to erect the warning or caution signs or barriers;

(c) the time and date a sign or barrier was erected;

(d) the size of the sign or barrier and wording that appeared thereon.

(9) State whether you received, at any time six months before the incident described by the Plaintiff, complaints from anyone about the defect or condition that the Plaintiff claims caused the Plaintiff's injury.

(10) If the answer to the previous interrogatory is in the affirmative, please state:

(a) the name and address of the person who made the complaint;

(b) the name, address and person to whom said complaint was made;

(c) whether the complaint was in writing;

(d) the nature of the complaint.

(11) Please identify, by stating the name and address of any person who obtained or prepared any and all recordings, by film, photograph, video tape, audio tape or any other digital or electronic means, of any party concerning this lawsuit or its subject matter, including any transcript thereof which are in your possession or control or in the possession or control of your attorney, and state the date on which each such recordings were obtained and the person or persons of whom each such recording was made.

12-23. 11-22. (Interrogatories #1(a)-(e), #2 through #9, #12, #13 and #16 of Form 201 may be used to complete this standard set of interrogatories.)

PLAINTIFF,

BY \_\_\_\_\_

(P.B. 1978-1997, Form 106.10C.) (Amended June 20, 2005, to take effect Jan. 1, 2006.)

**COMMENTARY:** The above change is proposed in light of the proposed revision to Practice Book Section 13-3 concerning discovery of pretrial surveillance material.



## Form 204

**Plaintiff's Requests for Production**

No. CV- : SUPERIOR COURT  
 (Plaintiff) : JUDICIAL DISTRICT OF  
 VS. : AT  
 (Defendant) : (Date)

The Plaintiff(s) hereby request(s) that the Defendant provide counsel for the Plaintiff(s) with copies of the documents described in the following requests for production, or afford counsel for said Plaintiff(s) the opportunity or, if necessary, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorization shall take place at the offices of \_\_\_\_\_ on (day), (date) at (time).

Definition: "You" shall mean the Defendant to whom these interrogatories are directed except that if that Defendant has been sued as the representative of the estate of a decedent, ward, or incapable person, "you" shall also refer to the Defendant's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

(1) A copy of the appraisal or bill for repairs as identified in response to Interrogatory #11.

(2) A copy of declaration page(s) of each insurance policy identified in response to Interrogatory #7 and/or #8.

(3) If the answer to Interrogatory #9 is in the affirmative, a copy of the complete policy contents of each insurance policy identified in response to Interrogatory #7 and/or #8.

(4) A copy of any photographs identified in response to Interrogatory #6.

(5) A copy of any nonprivileged statement, as defined in Practice Book Section 13-1, of any party in this lawsuit concerning this action or its subject matter.

(6) A copy of all lease agreements pertaining to any motor vehicle involved in the incident which is the subject of this action, which was owned or operated by you or your employee, and all documents referenced or incorporated therein.

(7) A copy of all records of blood alcohol testing or drug screens referred to in answer to Interrogatory #16, or a signed authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act or those of the Public Health Service Act, whichever is applicable, to obtain the same for each hospital, person or entity that performed such test or screen. Information obtained pursuant to the provisions of HIPAA or the Public Health Service Act shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(8) A copy of each and every recording, by film, photograph, video tape, audio tape or any other digital or electronic means, of any party to this lawsuit concerning this lawsuit or the subject matter thereof, including any transcript of such recording.

PLAINTIFF,

BY \_\_\_\_\_

**CERTIFICATION**

This is to certify that a copy of the foregoing has been mailed, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_ to \_\_\_\_\_.

\_\_\_\_\_  
 (Attorney Signature)

(P.B. 1978-1997, Form 106.11A.) (Amended June 21, 2004, to take effect Jan. 1, 2005; amended June 20, 2006, to take effect Jan. 1, 2006.)

**COMMENTARY:** The above change is proposed in light of the proposed revision to Practice Book Section 13-3 concerning discovery of pretrial surveillance material.

## Form 205

## Defendant's Requests for Production

No. CV- : SUPERIOR COURT  
 (Plaintiff) : JUDICIAL DISTRICT OF  
 VS. : AT  
 (Defendant) : (Date)

The Defendant(s) hereby request(s) that the Plaintiff provide counsel for the Defendant(s) with copies of the documents described in the following requests for production, or afford counsel for said Defendant(s) the opportunity or, where requested, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorizations shall take place at the offices of \_\_\_\_\_ not later than thirty (30) days after the service of the Requests for Production.

(1) All hospital records relating to treatment received as a result of the alleged incident, and to injuries, diseases or defects to which reference is made in the answers to Interrogatories #19, #20, #21 and #22, or written authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act, to inspect and make copies of said hospital records. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(2) All reports and records of all doctors and all other care providers relating to treatment allegedly received by the Plaintiff(s) as a result of the alleged incident, and to the injuries, diseases or defects to which reference is made in the answers to Interrogatories #19, #20, #21 and #22 (exclusive of any records prepared or maintained by a licensed psychiatrist or psychologist) or written authorization, sufficient to comply with provisions of the Health Insurance Portability and Accountability Act, to inspect and make copies of said reports. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(3) Copies of, or sufficient written authorization to inspect and make copies of, the wage and employment records of all employers of the Plaintiff(s) for three (3) years prior to the date of the incident and for all years subsequent to the date of the incident to and including the date hereof.

(4) If a claim of impaired earning capacity or lost wages is being alleged, provide copies of, or sufficient written authorization to obtain copies of, that part of all income tax returns relating to lost income filed by the Plaintiff(s) for a period of three (3) years prior to the date of the incident and for all years subsequent to the date of the incident through the time of trial.

(5) All property damage bills that are claimed to have been incurred as a result of this incident.

(6) All medical bills that are claimed to have been incurred as a result of this incident or written authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act, to inspect and make copies of said medical bills. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(7) All bills for each item of expense that is claimed to have been incurred in the answer to Interrogatory #18, and not already provided in response to ¶5 and ¶6 above.

(8) Copies of all documentation of claims of right to reimbursement provided to the Plaintiff by third party payors, and copies of, or written authorization, sufficient to comply with provisions of the Health Insurance Portability and Accountability Act, to obtain any and all documentation of payments made by a third party for medical services received or premiums paid to obtain such payment. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(9) All documents identified or referred to in the answers to Interrogatory #26.

(10) A copy of any nonprivileged statement, as defined in Practice Book Section 13-1, of any party in this lawsuit concerning this action or its subject matter.

(11) Any and all photographs identified in response to Interrogatory #32.

(12) A copy of all records of blood alcohol testing or drug screens referred to in answer to Interrogatory #35, or a signed authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act or those of the Public Health Service Act, whichever is applicable, to obtain the same. Information obtained pursuant to the provisions of HIPAA or the Public Health Service Act shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(13) A copy of each and every recording, by film, photograph, video tape, audio tape or any other digital or electronic means, of any party to this lawsuit concerning this lawsuit or the subject matter thereof, including any transcript of such recording.

DEFENDANT,

BY \_\_\_\_\_

#### CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to \_\_\_\_\_.

\_\_\_\_\_  
(Attorney Signature)

(P.B. 1978-1997, Form 106.11B.) (Amended June 21, 2004, to take effect Jan. 1, 2005; amended June 20, 2005, to take effect Jan. 1, 2006.)

COMMENTARY: The above change is proposed in light of the proposed revision to Practice Book Section 13-3 concerning discovery of pretrial surveillance material.

## Form 206

**Plaintiff's Requests for Production  
Premises Liability**

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The Plaintiff hereby requests that the Defendant provide counsel for the Plaintiff with copies of the documents described in the following requests for production, or afford counsel for said Plaintiff the opportunity or, if necessary, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorization shall take place at the offices of \_\_\_\_\_ on (day), (date) at (time).

(1) A copy of the policies or procedures identified in response to Interrogatory #4.

(2) A copy of the report identified in response to Interrogatory #6.

(3) A copy of any written complaints identified in Interrogatory #10.

(4) A copy of declaration page(s) evidencing the insurance policy or policies identified in response to Interrogatories numbered \_\_\_\_ and \_\_\_\_ .

(5) A copy of any nonprivileged statement, as defined in Practice Book Section 13-1, of any party in this lawsuit concerning this action or its subject matter.

(6) A copy of each and every recording, by film, photograph, video tape, audio tape or any other digital or electronic means, of any party to this lawsuit concerning this lawsuit or the subject matter thereof, including any transcript of such recording.

PLAINTIFF,

BY \_\_\_\_\_

(P.B. 1978-1997, Form 106.11C.)

**COMMENTARY:** The above change is proposed in light of the proposed revision to Practice Book Section 13-3 concerning discovery of pretrial surveillance material.

**APPENDIX D (2-26-07 mins)**

**Section 2-1(e). Judicial Notice of Adjudicative Facts; Instructing Jury.**

a. Proposed revision of Section 2-1:

Sec. 2-1. Judicial Notice of Adjudicative Facts

(a) Scope of section. This section governs only judicial notice of adjudicative facts.

(b) Taking of judicial notice. A court may, but is not required to, take notice of matters of fact, in accordance with subsection (c).

(c) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) within the knowledge of people generally in the ordinary course of human experience, or (2) generally accepted as true and capable of ready and unquestionable demonstration.

(d) Time of taking judicial notice. Judicial notice may be taken at any stage of the proceeding.

~~(e) Instructing jury. The court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.~~

b. Proposed amendment to Commentary regarding deletion of subsection (e):

(e) Instructing jury provision deleted.

The 2000 edition of the Code contained a subdivision (e) which read as follows:

“(e) Instructing jury. The court shall instruct the jury that it may, but is not required to accept as conclusive any fact judicially noticed.”

The Commentary contained the following text:

“(e) Instructing jury.

In accordance with common law, whether the case is civil or criminal, the court shall instruct the jury that it may, but need not, accept the judicially noticed fact as conclusive. See, e.g., *State v. Tomanelli*, supra, 153 Conn. 369; cf. Fed.R.Evid. 201(g). Because the jury need not accept the fact as conclusive, other parties may offer evidence in disproof of a fact judicially noticed. *State v. Tomanelli*, supra, 369; *Federal Deposit Ins. Corp. v. Napert-Boyer Partnership*, supra, 40 Conn. App. 441.”

The subdivision was deleted with the recognition that the Code of Evidence is not the appropriate repository for jury instructions.

## **Section 7-2. Testimony by Experts**

- a. Proposed amendment to first sentence of commentary:

Section ~~702~~ 7-2 imposes two conditions on the admissibility of expert testimony.

## Section 8-3(5). Hearsay Exceptions: Availability of Declarant Immaterial

### a. Proposed amendment to subsection (5):

(5) Statement for purposes of obtaining medical diagnosis or treatment or advice pertaining thereto. A statement made for purposes of obtaining a medical diagnosis or medical treatment or advice pertaining thereto and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment or advice.

### b. Proposed amendment to Commentary:

(5) Statement for purposes of obtaining medical diagnosis or treatment or advice pertaining thereto.

Statements made in furtherance of obtaining medical diagnosis or treatment or advice pertaining thereto are excepted from the hearsay rule. E.g., *State v. DePastino*, 228 Conn. 552, 565, 638 A.2d 578 (1994); *Gilmore v. American Tube & Stamping Co.*, 79 Conn. 498, 504, 66 A. 4 (1907).

It is intended that the term "medical" be read broadly so that the exception would cover statements made for the purpose of obtaining diagnosis or treatment or advice for both somatic and psychological maladies and conditions. See *State v. Wood*, 208 Conn. 125, 133-34, 545 A.2d 1026, cert. denied, 488 U.S. 895, 109 S.Ct. 235, 102 L.Ed.2d 225 (1988); *Main v. Main*, 17 Conn. App. 670, 674, 555 A.2d 997 (1989).

Statements concerning the cause of an injury or condition traditionally were inadmissible under the exception. See *Smith v. Hausdorf*, 92 Conn. 579, 582, 103 A. 939 (1918). Recent cases recognize that, in some instances, causation may be pertinent to medical diagnosis or treatment or advice. See *State v. Daniels*, 13 Conn. App. 133, 135, 534 A.2d 1253 (1987); cf. *State v. DePastino*, supra, 228 Conn. 565. Section 8-3 (5), thus, excepts from the hearsay rule statements describing "the inception or general character of the cause or external source" of an injury or condition when reasonably pertinent to medical diagnosis or treatment or advice.

Statements as to causation that include the identity of the person responsible for the injury or condition ordinarily are neither relevant to nor in furtherance of the patient's medical treatment. *State v. DePastino*,

supra, 228 Conn. 565; *State v. Dollinger*, 20 Conn. App. 530, 534, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990).

Both the supreme and appellate courts have recognized an exception to this principle in cases of domestic child abuse. *State v. DePastino*, supra, 565; *State v. Dollinger*, supra, 534-35; *State v. Maldonado*, 13 Conn. App. 368, 372-74, 536 A.2d 600, cert. denied, 207 Conn. 808, 541 A.2d 1239 (1988); see C. Tait & J. LaPlante, supra, (Sup. 1999) § 11.12.3, p. 233. The courts reason that "[i]n cases of sexual abuse in the home, hearsay statements made in the course of medical treatment which reveal the identity of the abuser, are reasonably pertinent to treatment and are admissible. . . . If the sexual abuser is a member of the child victim's immediate household, it is reasonable for a physician to ascertain the identity of the abuser to prevent recurrences and to facilitate the treatment of psychological and physical injuries." (Citation omitted; internal quotation marks omitted.) *State v. Dollinger*, supra, 535, quoting *State v. Maldonado*, supra, 374; accord *State v. DePastino*, supra, 565.

Traditionally, the exception seemingly required that the statement be made to a physician. See, e.g., *Wilson v. Granby*, 47 Conn. 59, 76 (1879). Statements qualifying under Section 8-3 (5), however, may be those made not only to a physician, but to other persons involved in the treatment of the patient, such as a nurse, a paramedic, an interpreter or even a family member. This approach is in accord with the modern trend. See *State v. Maldonado*, supra, 13 Conn. App. 369, 374 n. 3 (statement by child abuse victim who spoke only Spanish made to Spanish speaking hospital security guard enlisted by treating physician as translator).

Common-law cases address the admissibility of statements made only by the patient. E.g., *Gilmore v. American Tube & Stamping Co.*, supra, 79 Conn. 504. Section 8-3 (5) does not, by its terms, restrict statements admissible under the exception to those made by the patient. For example, if a parent were to bring his or her unconscious child into an emergency room, statements made by the parent to a health care provider for the purpose of obtaining treatment and pertinent to that treatment fall within the scope of the exception.

The Early common law distinguished between statements made to physicians consulted for the purpose of treatment and statements made to physicians consulted solely for the purpose of qualifying as an expert witness to testify at trial. Statements made to these so-called "nontreating" physicians were not accorded substantive effect. See, e.g., *Zawisza v. Quality Name Plate, Inc.*, 149 Conn. 115, 119, 176 A.2d 578 (1961); *Rowland v. Phila., Wilm. & Baltimore R. Co.*, 63 Conn. 415, 418-19, 28 A. 102 (1893). This distinction was virtually eliminated by the Court in *George v. Ericson*, 250 Conn. 312, 736 A.2d 889 (1999), which held that



nontreating physicians could rely on such statements. The distinction between admission only as foundation for the expert's opinion and admission for all purposes was considered too inconsequential to maintain. Accordingly, the word "diagnosis" was added to, and the phrase "advice pertaining thereto" was deleted from. By use of the phrase "medical treatment or advice pertaining thereto," from in Section 8-3 (5) retains this common-law distinction.

## Section 8-5 (1). Hearsay Exceptions: Declarant Must Be Unavailable

### a. Proposed amendment to section text:

(1) Prior inconsistent statement. A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape, or some other equally reliable medium, (B) the statement ~~is signed by~~ or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.

### b. Proposed amendment to Commentary:

#### (1) Prior inconsistent statement.

Section 8-5 (1) incorporates the rule of *State v. Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 598 (1986). ~~The *Whelan* rule has been subject to further and later developments and clarifications. E.g., *State v. Hopkins*, 222 Conn. 117, 126, 609 A.2d 236 (1992) (prior inconsistent statement must be made under circumstances assuring reliability, which is to be determined on case-by-case basis); *State v. Holloway*, 209 Conn. 636, 649, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S.Ct. 2078, 104 L.Ed.2d 643 (1989) (tape-recorded statement admissible under *Whelan*); *State v. Luis F.*, 85 Conn. App. 264, 269 (2004) (videotaped statement admissible); see also *State v. Woodson*, 227 Conn. 1, 21, 629 A.2d 386 (1993) (signature of witness unnecessary when tape-recorded statement offered under *Whelan*). These post-*Whelan* developments were not expressly incorporated into the language of Section 8-5 (1), with one exception noted below. These and other post-*Whelan* developments nevertheless are considered to be an integral part of this rule.~~

~~The one post-*Whelan* development incorporated into Section 8-5 (1) is set forth in proviso (C). Proviso (C) is based on the court's holding in *State v. Grant*, 221 Conn. 93, 99-102, 602 A.2d 581 (1992). See also *State v. Buster*, 224 Conn. 546, 558-59, 620 A.2d 110 (1993).~~

Use of the word "witness" in Section 8-5 (1) assumes the declarant has testified at the proceeding in question, as required by the *Whelan* rule.

As to the requirements of authentication, see section 9-1.

## Section 8-6. Hearsay Exceptions: Declarant Must Be Unavailable

- a. Proposed new subsection (8).

### Sec. 8-6. Hearsay Exceptions: Declarant Must Be Unavailable

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: ...

(8) Forfeiture by wrongdoing. A statement offered against a party that has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

- b. Proposed amendment to Commentary:

#### (8) Forfeiture by Wrongdoing.

This provision has roots extending far back in English and American common law. See, e.g., *Lord Marley's Case*, 6 State Trials 769 (1666) (Eng.); *Reynolds v. United States*, 98 U.S. 145 (1878). "The rationale for the rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong." *Reynolds*, 98 U.S. at 159. See also, *State v. Henry*, 76 Conn. App. 515 (2003). Section 8-6 (8) represents a departure from Fed. R. Evid. 804 (b) (6), which provides an exception for statements by unavailable witnesses, where the party against which the statement is offered "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Subsection (8) requires more than mere "acquiescence."