October 29, 2007

Minutes of the Meeting
Rules Committee
October 29, 2007

On Monday, October 29, 2007 the Rules Committee met in the Attorneys' Conference Room from 2:34 p.m. to 4:02 p.m.

Members in attendance were:

HON. PETER T. ZARELLA, CHAIR
HON. THOMAS J. CORRADINO
HON. RICHARD W. DYER
HON. ROLAND D. FASANO
HON. C. IAN McLACHLAN
HON. BARRY C. PINKUS
HON. PATTY JENKINS PITTMAN
HON. RICHARD A. ROBINSON
HON. MICHAEL R. SHELDON

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

Agenda

1. The Committee approved with certain revisions the minutes of the meeting held on September 24, 2007.

2. At its meeting on September 24, 2007 the Rules Committee considered materials concerning electronic discovery that were submitted by Judge Susan A. Peck. The Committee tabled this matter and asked the undersigned to find out whether these materials had been forwarded to the Civil Division Task Force for comment and to report back to the Committee.

At this meeting, the undersigned advised the Committee that the electronic discovery materials had been referred to the Civil Division Task Force and that Judge John J. Langenbach, then the Chair of the Task Force, reported that the Task Force was in the process of reviewing the material and believed that no action need be taken concerning it at that time, especially in light of the fact that electronic filing in our courts was just beginning. He noted, however, that the materials should be kept in mind for future consideration.

After discussion, the Rules Committee unanimously voted to adopt the report of the Civil

Division Task Force and decided not to take action concerning this matter at this time.

Judge Pittman suggested that the discovery rules should be reviewed to bring them up to date in light of the computer era. For example, certain discovery rules contain a provision that the party serving interrogatories shall leave sufficient space following each interrogatory in which the party to whom the interrogatories are directed can insert the answer. The Committee asked the undersigned to review the discovery rules in light of Judge Pittman's suggestion and submit proposed revisions to the Committee at a future meeting.

3. The Committee considered proposals by Judge Pittman to amend Sections 11-18 and 15-8. The Committee had forwarded these proposals to the Civil Division Task Force for comment and Judge Arthur Hiller, Chair of the Task Force, reported that the proposals may, to some extent, conflict with revisions to Sections 11-14 and 11-18 of the short calendar rules.

After discussion, the Committee further amended the proposed revision to Section 15-8 and unanimously voted to submit to public hearing the revision to Section 15-8 as set forth in Appendix A attached hereto.

The Committee unanimously denied the proposed revision to Section 11-18.

4. At a prior meeting the Rules Committee referred to the Civil Division Task Force for comment a proposal by Judge Samuel Sferrazza to amend Sections 13-30(d) and 13-31 concerning depositions. Judge Arthur Hiller reported that the Task Force believes there is no need to make these changes and that cross-examination is an acceptable method to address the issue of changes made to a deposition.

The Committee decided that instead of amending the rules, a commentary should be added to Section 13-30 to provide that the purpose of the provision in paragraph (d) of that rule, which allows the deponent to make changes in form or substance to the deposition, is to allow the deponent to correct errors in the transcription. If a deponent realizes that his or her testimony was incorrect, such changes are not contemplated by this section. The commentary should also state that there is a continuing duty to disclose and that an attorney has a duty to correct perjury.

The Committee asked the undersigned to draft a commentary incorporating the above and to submit it to the Committee for consideration at a future meeting.

5. The Committee put over to its next meeting a letter from Judge Mintz concerning depositions of physicians.

6. The Committee considered a proposal submitted by Justice Joette Katz on behalf of

the Code of Evidence Oversight Committee to add a tender years hearsay exception to the Code of Evidence.

After discussion, the Committee made a technical change to the proposal and unanimously voted to submit to public hearing the revision to the Code of Evidence as set forth in Appendix B attached hereto.

7. The Committee continued its consideration of a proposal submitted by Judge Joseph H. Pellegrino on behalf of the Civil Commission to amend the civil pleading rules.

Justice Zarella agreed to ask the Civil Commission if it is still interested in pursuing this proposal, and, if so, to have someone from that commission attend a future Rules Committee meeting to address it.

8. The Committee considered a proposal submitted on behalf of the Connecticut Bar Association by its president, Attorney William H. Prout, Jr., to adopt rules concerning minimum continuing legal education.

Justice Zarella agreed to obtain input from the Judicial Branch administration concerning this proposal and to report back to the Rules Committee at a future meeting.

9. At its last meeting, the Rules Committee referred to the Client Security Fund Committee for comment a letter from Attorney John W. Fertig, Jr. suggesting that the penalties in the client security fund rules for failure to pay the client security fund fee be increased.

Justice Zarella reported to the Rules Committee that he had discussed this matter with Justice Katz, Chair of the Client Security Fund Committee, who stated that the committee does not believe there is a significant problem with the collection of these fees and that it is not clear whether the committee would have the power to assess such a penalty.

After discussion, the Committee voted unanimously to deny the proposal.

10. The Rules Committee considered a letter from the American Bar Association to Justice David M. Borden concerning the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.

The Committee had discussed this matter when it met with the Judiciary Committee earlier in the day.

The Rules Committee determined that it cannot do anything concerning this until it knows what the Statewide Disaster Plan is. Since the development of that plan is in progress, the Committee put this matter off the agenda until such time as a plan is developed.

11. The Rules Committee considered a proposal by Greater Hartford Legal Aid to amend Rule 1.14 of the Rules of Professional Conduct to conform with recent changes in Connecticut's Conservatorship Laws.

After discussion, the Committee decided to refer the proposal to the CBA Committee on Professional Ethics and to Chief Child Protection Attorney Carolyn Signorelli for comment.

12. At its last meeting the Rules Committee considered proposals submitted by Judge Arthur Hiller, Chief Administrative Judge for Civil Matters, to amend the rules concerning defaults for failure to appear and plead in civil cases. At that meeting, Justice Zarella agreed to discuss the proposals with Joseph D'Alesio, Executive Director of Court Operations, and to report back to the Committee.

At this meeting, Justice Zarella reported to the Committee that the proposals have been withdrawn.

Respectfully submitted,

Carl E. Testo
Counsel to the Rules Committee

CET:pt
Attachments

APPENDIX A (10-29-07 Mins)

Sec. 15-8. Dismissal in Court Cases for Failure to Make Out a Prima Facie Case

If, on the trial of any issue of fact in a civil matter **[**action**]** tried to the court, the plaintiff has produced evidence and rested **[**his or her cause**]**, **[**the**]** a defendant may move for judgment of dismissal, and the judicial authority may grant such motion**[**,**]** if **[**in its opinion**]** the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made.

COMMENTARY: The above changes are made for clarity.

APPENDIX B (10-29-07 mins)

(NEW) Sec. 8-10. Hearsay Exception: Tender Years

(a) A statement made by a child, twelve years of age or under at the time of the statement, concerning any alleged act of sexual assault or other sexual misconduct of which the child is the alleged victim, or any alleged act of physical abuse committed against the child by its parent, guardian or any other person then exercising comparable authority over the child at the time of the act, is admissible in evidence in criminal and juvenile proceedings if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness;

(2) The statement was not made in preparation for a legal proceeding; and

(3) The child either:

(A) Testifies and is subject to cross-examination in the proceeding, either by appearing at the proceeding in person or by video telecommunication or by submitting to a recorded video deposition for that purpose; or

(B) Is unavailable as a witness, provided that:

(i) There is independent corroborative evidence of the alleged act. Independent corroboration does not include hearsay admitted pursuant to this section; and

(ii) The statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement, the content of the statement, the approximate time, date, and location of the statement, the person to whom the statement was made, and the circumstances surrounding the statement that indicate its trustworthiness. If the statement is in writing, the proponent must provide the adverse party a copy of the writing; if the statement is otherwise recorded by audiotape, videotape, or some other equally reliable medium, the proponent must provide the adverse party a copy in the medium in the possession of the proponent in which the statement will be proffered. Except for good cause shown, notice and a copy must be given sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare to meet the statement.

(c) This section does not prevent admission of any statement under another hearsay exception. Courts, however, are prohibited from:

(1) applying broader definitions in other hearsay exceptions for statements made by children twelve years of age or under at the time of the statement concerning any alleged act described in the first paragraph of section (a) than they do for other declarants; and

(2) admitting by way of a residual hearsay exception statements described in the first paragraph of section (a).

COMMENTARY: This section addresses the unique and limited area of statements made by children concerning alleged acts of sexual assault or other sexual misconduct against the child, or other alleged acts of physical abuse against the child by a parent, guardian or other person with like authority over the child at the time of the alleged act. It recognizes that children, because of their vulnerability and psychological makeup, are not as likely as adults to exclaim spontaneously about such events, making section 8-3(2) unavailable to admit statements about such events; are not as likely to seek or receive timely medical diagnoses or treatment after such events, making section 8-3(5) unavailable; and it provides more specific guidance for this category of statements than does the residual exception, section 8-9.

Subsection (a) defines the factual scope of the statements that may be admitted under the exception and the types of proceedings to which the exception applies. The proceedings included are criminal proceedings, with or without a jury, and juvenile proceedings; civil proceedings are not included. The rule applies to alleged acts of sexual assault or sexual misconduct committed by anyone against the child. It only applies to alleged acts of physical abuse committed by a parent, guardian or someone in a comparable position of authority at the time of the alleged act of physical abuse. It provides guidance on the test of trustworthiness the court must apply to the proffered statement (subdivision (1)); addresses the exclusion of testimonial statements prohibited by *Crawford. V. Washington*, 541 U.S. 36 (2004) (subdivisions (2) and (3)(B)(ii)); and, sets forth separate requirements when the child testifies and is subject to cross-examination and when the child is unavailable (subdivision (3)(B)).

Subsection (b) provides for notice to the adverse party of the proponent's intent to offer the statement.

Subsection (c)(1) prohibits expanded interpretations of other hearsay exceptions where statements covered by this section are not admissible. It is not intended to limit exceptions that, heretofore, have been legally applied to such statements. Subsection(c) (2), however, prohibits the use of the residual exception for statements treated by this section.