Minutes of the Meeting
Rules Committee
June 1, 2009

On Monday, June 1, 2009, at 10:00 a.m. the Rules Committee conducted a public hearing in the Supreme Court Hearing Room to receive comments concerning proposed revisions to the Practice Book. At the conclusion of the public hearing the Committee met in the Attorneys' Conference Room from 11:13 a.m. to 1:43 p.m.

Members in attendance were:

HON. PETER T. ZARELLA, CHAIR
HON. BARBARA N. BELLIS
HON. JACK W. FISCHER
HON. C. IAN MCLACHLAN
HON. LESLIE I. OLEAR
HON. ANTONIO C. ROBAINA
HON. JANE S. SCHOLL
HON. MICHAEL R. SHELDON

Judge Thomas J. Corradino was not in attendance at this meeting. Also in attendance was Carl E. Testo, Counsel to the Rules Committee.

Agenda

1. The Committee considered comments from State's Attorney Stephen J. Sedensky, III, suggesting further changes to the proposed revisions to Sections 40-13 and 40-14 and to proposed new Section 40-13A concerning discovery in criminal matters.

After discussion, the Committee unanimously voted that no further changes be made to these proposed revisions.

2. The Committee noted a letter from Adele V. Patterson, Acting Chief of Habeas Corpus Services in the Office of the Chief Public Defender, in support of the proposed revisions to Practice Book Sections 23-41 and 23-42 concerning habeas corpus proceedings.

In connection with its discussion of these proposals, the Committee unanimously voted to further amend Section 23-41 (b) (2) as set forth in Appendix A attached hereto.

3. The members of the Committee who were present for the April 16, 2009, meeting unanimously approved the minutes of that meeting. (Judge Scholl, who was not in attendance at that meeting, abstained.)

4. The Rules Committee, by email vote in April, approved the following revisions to the last paragraph of Item 8 of the minutes of the March 30, 2009, meeting:

> After discussion, the Committee further revised the proposals and unanimously voted to submit to public hearing the revisions to Sections [s] 4-2, [11-20A and 25-59A] and proposed new Sections 4-7, 11-20B and 25-59B as set forth in Appendix C attached hereto.

At this meeting the Committee unanimously ratified that vote.

5. The Committee considered proposals by Attorney A. Reynolds Gordon to revamp the procedure concerning auction sales in foreclosure matters.

After discussion, the Committee referred the proposals to the Bench/Bar Foreclosure Committee for review and a recommendation.

6. The Committee considered letters from Attorneys Adam J. Olshan, Joseph P. Latino, Eric H. Opin, and Russell L. London (submitted on behalf of himself and others), letters from various business entities, and comments received at the public hearing concerning the proposed revisions to the small claims rules.

Nancy Kierstead, Director of Court Operations, and Maureen Finn, Chief Clerk of Centralized Small Claims, attended this part of the meeting to discuss these proposals with the Rules Committee.

The Rules Committee decided that the small claims proposals should be further revised to add a procedure whereby the plaintiff, before serving the writ, notice of suit and accompanying documents, would forward them to the clerk who would assign a docket number and answer date and return the documents to the plaintiff who would then cause them to be served. Judges Bellis, Fischer and Scholl agreed to be a subcommittee to draft these revisions and forward them to the Rules Committee for consideration.

The Rules Committee also decided that language concerning charge-off balances should be added to the proposed revisions to Section 24-24. Justice Zarella and Judge Olear agreed to draft proposed language and forward it to the Rules Committee for consideration.

7. The Committee suggested that technical revisions be made to the proposed revisions to Sections 9-8, 9-9 and 30a-8.

After discussion, the Committee unanimously voted to further amend Sections 9-8, 9-9 and 30a-8 as set forth in Appendix B attached hereto.

Respectfully submitted,

Carl E. Testo

Carl E. Testo
Counsel to the Rules Committee

CET:pt
Attachments

APPENDIX A (6-1-09 mins)

Sec. 23-41. —Motion for Leave to Withdraw Appearance of Appointed Counsel

(a) When counsel has been appointed pursuant to Section 23-26, and counsel, after conscientious investigation and examination of the case, concludes that the case is wholly frivolous, counsel shall so advise the judicial authority by filing a motion for leave to withdraw from the case.

(b) [Any motion for leave to withdraw shall be filed under seal and provided to the petitioner. Counsel shall serve opposing counsel with notice that a motion for leave to withdraw has been filed, but shall not serve opposing counsel with a copy of the motion or any memorandum of law. The petitioner shall have thirty days from the date the motion is filed to respond in writing.] At the time such motion is filed, counsel for the petitioner shall also file all relevant portions of the record of the criminal case, direct appeal and any post-conviction proceedings not already filed together with a memorandum of law outlining:

(1) the claims raised by the petitioner and any other potential claims apparent in the case;

(2) the efforts undertaken to investigate the factual basis and legal merit of each claim;

(3) the factual and legal basis for the conclusion that the case is wholly frivolous.

(c) [The judicial authority may order counsel for the petitioner to file a memorandum outlining:

(1) the claims raised by the petitioner or any other potential claims apparent in the case;

(2) the efforts undertaken to investigate the factual basis and legal merit of the claim;

(3) the factual and legal basis for the conclusion that the case is wholly frivolous.]

Any motion for leave to withdraw and supporting memorandum of law shall be filed under seal and provided to the petitioner. Counsel shall serve opposing counsel with notice that a motion for leave to withdraw has been filed but shall not serve opposing counsel with a copy of the motion or any supporting memorandum of law. The petitioner shall have thirty days from the date the motion and supporting memorandum are filed to file a response with the court.

COMMENTARY: The changes proposed in Sections 23-41 and 23-42 will prevent a judge from ordering a dismissal of a habeas corpus petition on a motion for leave to withdraw as appointed counsel; will require counsel who seek to withdraw their appearance to file a memorandum explaining why the case was wholly frivolous; will require a judge in ruling that a petition is wholly frivolous to state his or her reasons for that finding in a written memorandum of decision; and will provide the judge with an option either of appointing new counsel to review an Anders brief or, in the event the motion to withdraw is denied, to appoint new counsel to proceed with the petitioner's representation instead of forcing the petitioner to proceed with the same counsel who has attempted to withdraw or to proceed pro se.

APPENDIX B (6-1-09 mins)

Sec. 9-8. —Class Actions Maintainable

An action may be maintained as a class action if the prerequisites of Section 9-7 are satisfied [and the judicial authority finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.], and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of class action.

COMMENTARY: The above amendments to this rule and to Section 9-9 include the provisions of Federal Rules of Civil Procedure Rule 23, with minor variations. The current rule contains some, but not all, provisions of the federal rule which creates uncertainty as to which federal cases have precedential value in Connecticut courts. Although the Connecticut Supreme Court has stated that it would look to federal cases when reviewing

class action cases, Collins v. Anthem Health Plans, Inc., 266 Conn. 12, 32 (2003), class action litigation is rare in Connecticut and the resulting body of state case law is light. This amendment will enable Connecticut to access useful case law from thirty three states and the District of Columbia, all of whom have adopted Rule 23 or some variation of it.

Sec. 9-9. —[Dismissal or Compromise of Class Action] Procedure for Class Certification and Management of Class

[A class action shall not be withdrawn or compromised without the approval of the judicial authority. The judicial authority may require notice of such proposed dismissal or compromise to be given in such manner as it directs.]

(a)(1)(A) When a person sues or is sued as a representative of a class, the court must, at an early practicable time, determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues or defenses, and must appoint class counsel.

(C) An order under Section 9-9 (a)(1)(A) may be altered or amended before final judgment.

(2)(A) For any class certified under Section 9-8(1) or (2), the court must direct notice to the class.

(B) For any class certified under Section 9-8(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues or defenses;

(iv) that a class member may enter an appearance through counsel if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and

(vi) the binding effect of a class judgment on class members under Section 9-8(3).

(3) The judgment in an action maintained as a class action under Section 9-8(1) or (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Section 9-8(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Section 9-9(a)(2)(B) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of Sections 9-7 and 9-8 shall then be construed and applied accordingly.

(b) In the conduct of actions to which Sections 9-7 et seq. apply, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

(c)(1)(A) The court must approve any settlement, withdrawal, or compromise of the claims, issues, or defense of a certified class. Court approval is not required for settlement, withdrawal or compromise of a claim in which a class has been alleged but no class has been certified.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, withdrawal or compromise.

(C) The court may approve a settlement, withdrawal, or compromise that would bind class members only after a hearing and on finding that the settlement, withdrawal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, withdrawal, or compromise of an action in which a class has been certified must file a statement identifying any agreement made in connection with the proposed settlement, withdrawal or compromise.

(3) In an action previously certified as a class action under Section 9-8(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, withdrawal or compromise that requires court approval under (c)(1)(A).

(B) An objection made under (c)(4)(A) may be withdrawn only with the court's approval.

(d) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(1) In appointing class counsel, the court must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources counsel will commit to representing the class.

(2) The court may:

(i) consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(ii) direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorneys fees and nontaxable costs; and

(iii) make further orders in connection with the appointment.

(e) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action. When there is one applicant for appointment as class counsel the court may appoint that applicant only if the applicant is adequate under subsection (d). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class. The order appointing class counsel may include provisions about the award of attorneys fees or nontaxable costs under subsection (f).

(f) In an action certified as a class action, the court may award reasonable attorneys fees and nontaxable costs authorized by law or by consent of the parties as follows:

(1) a request for an award of attorneys fees and nontaxable costs must be made by motion subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its conclusions of law on such motion.

COMMENTARY: The above amendments to this rule and to Section 9-8 include the provisions of Federal Rules of Civil Procedure Rule 23, with minor variations. The current rule contains some, but not all, provisions of the federal rule which creates uncertainty as to which federal cases have precedential value in Connecticut courts. Although the Connecticut Supreme Court has stated that it would look to federal cases when reviewing class action cases, Collins v. Anthem Health Plans, Inc., 266 Conn. 12, 32 (2003), class action litigation is rare in Connecticut and the resulting body of state case law is light. This amendment will enable Connecticut to access useful case law from thirty three states and the District of Columbia, all of whom have adopted Rule 23 or some variation of it.

Sec. 30a-8. Records

(a) Except as otherwise provided by statute, all records maintained in juvenile matters brought before the judicial authority, either current or closed, including transcripts of hearings, shall be kept confidential.

(b) Except as otherwise provided by statute, no material contained in the court records, including the predispositional study, medical or clinical reports, school reports, police reports, or the reports of social agencies, may be copied or otherwise reproduced in written form in whole or in part by the parties [or their counsel] without the express consent of the judicial authority.

(c) Each counsel in a delinquency matter shall have access to and be entitled to copies, at his or her expense, of the entire court record, including transcripts of all proceedings, without express consent of the judicial authority.

COMMENTARY: As officers of the court, attorneys should have access to the record without obtaining prior judicial approval. Parties may require more oversight, as provided in subsection (b).