Practice Book Revisions

Superior Court

Rules of Professional Conduct

Forms

Code of Evidence Revisions

July 5, 2011

NOTICE

SUPERIOR COURT

Notice is hereby given that on June 20, 2011, the judges of the Superior Court adopted the revisions to the Practice Book and to the Code of Evidence which are contained herein.

These revisions become effective on January 1, 2012, except that the amendments to Sections 25-31, 25-34, and 25-60 and new Sections 25-2A, 25-32A, 25-32B, and 25-60A become effective on August 15, 2011, and that the amendment to Section 2-5A becomes effective on September 1, 2011.

Attest:

Carl E. Testo
Director of Legal Services

INTRODUCTION

Contained herein are amendments to the Superior Court rules and forms, to the Rules of Professional Conduct, and to the Code of Evidence. These amendments are indicated by brackets for deletions and underlines for added language. The designation "NEW" is printed with the title of each new rule. This material should be used as a supplement to the Practice

Book and the Code of Evidence until the next editions of these publications become available.

With regard to the Practice Book revisions herein, the Amendment Notes to the Rules of Professional Conduct and the Commentaries to the Superior Court rules and Form 205 are for informational purposes only.

Rules Committee of the
Superior Court

AMENDMENTS TO THE CONNECTICUT CODE OF EVIDENCE

TABLE OF SECTIONS AFFECTED

Sec. 1-1. Short Title; Application

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

(b) Application of the Code. The Code applies to all proceedings in the superior court in which facts in dispute are found, except as otherwise provided by the Code, the General Statutes or the Practice Book.

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

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

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

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

(3) Proceedings involving sentencing.

(4) Proceedings involving probation.

(5) Proceedings involving small claims matters.

(6) Proceedings involving summary contempt.

COMMENTARY

(b) Application of the Code.

The Connecticut Code of Evidence was adopted by the Judges of the Superior Court. In *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), the Connecticut Supreme Court held that it is not bound by a code adopted by the Judges of the Superior Court. The Code is broadly applicable. The Code applies to all civil and criminal bench or jury trials in the superior court. The Code applies, for example, to the following proceedings:

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

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

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

(4) juvenile proceedings; however, adoption of subsection (b) is not intended to abrogate the well established rule that the court may relax its strict application of the formal rules of evidence to

reflect the informal nature of juvenile proceedings provided the fundamental rights of the parties are preserved; *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 190, 485 A.2d 1362 (1986); see *Anonymous* v. *Norton*, 168 Conn. 421, 425, 362 A.2d 532, cert. denied, 423 U.S. 925, 96 S.Ct. 294, 46 L.Ed.2d 268 (1975); Practice Book § 34-2(a); and

(5) proceedings involving family relations matters enumerated under General Statutes § 46b-1. Because the Code is applicable only to proceedings in the court, the Code does not apply to:

(1) matters before probate courts; see *Prince* v. *Sheffield*, 158 Conn. 286, 293, 259 A.2d 621 (1968); although the Code applies to appeals from probate courts that are before the court in which a trial de novo is conducted; see *Thomas* v. *Arefeh*, 174 Conn. 464, 470, 391 A.2d 133 (1978); and

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

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

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

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

(c) Rules of privilege.

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

(d) The Code inapplicable.

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

(1) proceedings before investigatory grand juries; e.g., *State* v. *Avcollie*, 188 Conn. 626, 630-31, 453 A.2d 418 (1982), cert. denied, 461 U.S. 928, 103 S.Ct. 2088, 77 L.Ed.2d 299 (1983);

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

(3) sentencing proceedings; e.g., *State* v. *Huey*, 199 Conn. 121, 126, 505 A.2d 1242 (1986);

(4) hearings involving the violation of probation conducted pursuant to General Statutes § 53a-32 (a); *State* v. *White*, 169 Conn. 223, 239-40, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96

S.Ct. 469, 46 L.Ed.2d 399 (1975); *In re Marius M.*, 34 Conn. App. 535, 536, 642 A.2d 733 (1994);

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

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

Nothing in subdivision (1) abrogates the common-law rule that in determining preliminary questions of fact upon which the application of certain exceptions to the hearsay rule depends, the court may not consider the declarant's out-of-court statements themselves in determining those preliminary questions. E.g., *State* v. *Vessichio*, 197 Conn. 644, 655, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986) (court may not consider coconspirator statements in determining preliminary questions of fact relating to admissibility of those statements under coconspirator statement exception to hearsay rule; see Section 8-3 [1] [D]); *Robles* v. *Lavin*, 176 Conn. 281, 284, 407 A.2d 958 (1978) (in determining whether authorized admissions against party opponent exception to hearsay rule applies, authority to speak must be established before alleged agent's declarations can be introduced; see Section 8-3 [1] [C]); *Ferguson* v. *Smazer,* 151 Conn. 226, 231, 196 A.2d 432 (1963) (in determining whether hearsay exception for statements of pedigree and family relationships applies, declarant's relationship to person to whom statement relates must be established without reference to declarant's statements; see Section 8-6 [7]).

Sec. 4-5 Evidence of Other Crimes, Wrongs or Acts Generally Inadmissible [to Prove Character Admissible for Other Purposes; Specific Instances of Other Conduct].

(a) **[Evidence of other crimes, wrongs or acts inadmissible to prove character] General Rule.** Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

(b) **When evidence of other sexual misconduct is admissible to prove propensity.** Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

(c) **When evidence of other crimes, wrongs or acts is admissible.** Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

[(c)](d) Specific instances of conduct when character in issue. In cases in which character or a trait of character of a person in relation to a charge, claim or defense is in issue, proof shall be made by evidence of specific instances of the person's conduct.

COMMENTARY: **(a) Evidence of other crimes, wrongs or acts generally inadmissible [to prove character].**

Subsection (a) is consistent with Connecticut common law. E.g., *State* v. *Santiago*, 224 Conn. 325, 338, 618 A.2d 32 (1992); *State* v. *Ibraimov*, 187 Conn. 348, 352, 446 A.2d 332 (1982). Other crimes, wrongs or acts evidence may be admissible for other purposes as specified in subsections (b) and (c). Although the issue typically arises in the context of a

criminal proceeding; see *State* v. *McCarthy*, 179 Conn. 1, 22, 425 A.2d 924 (1979); subsection (a)'s exclusion applies in both criminal and civil cases. See, e.g., *Russell* v. *Dean Witter Reynolds, Inc.*, 200 Conn. 172, 191–92, 510 A.2d 972 (1986).

(b) When evidence of other sexual misconduct is admissible to prove propensity.

Subsection (a) specifically prohibits the use of other crimes, wrongs or acts evidence to prove a person's propensity to engage in the misconduct with which he has been charged. However, the court may admit evidence of a defendant's uncharged sexual misconduct to prove that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual behavior; *State v. DeJesus,* 288 Conn. 418 (2008)*; State v. Snelgrove,* 288 Conn. 742 (2008); *State v. Johnson,* 289 Conn. 437 (2008). Although *State v. DeJesus* involved a sexual assault charge, later, the Supreme Court, in *State v. Snelgrove*, made it clear that the DeJesus propensity rule is not limited to cases in which the defendant is charged with a sex offense. In *State v. Snelgrove*, the court stated: "We conclude that this rationale for the exception to the rule

barring propensity evidence applies whenever the evidence establishes that both the prior misconduct and the offense with which the defendant is charged were driven by an aberrant sexual compulsion, regardless of whether the prior misconduct or the conduct at issue resulted in sexual offense charges." *State v. Snelgrove, supra,* 760. The admission of the evidence of a defendant's uncharged sexual misconduct to prove that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual behavior should be accompanied by an appropriate cautionary instruction limiting the purpose for which it may properly be used. *State v. DeJesus, supra*, 474.

(c) When evidence of other crimes, wrongs or acts is admissible.

Subsection (a) specifically prohibits the use of other crimes, wrongs or acts evidence to prove a person's bad character or criminal tendencies. Subsection ([b]c) however, authorizes the court, in its discretion, to admit other crimes, wrongs or acts evidence for other purposes, such as to prove:

(1) intent; e.g., *State* v. *Lizzi*, 199 Conn. 462, 468–69, 508 A.2d 16 (1986);

(2) identity; e.g., *State* v. *Pollitt*, 205 Conn. 61, 69, 530 A.2d 155 (1987);

(3) malice; e.g., *State* v. *Barlow*, 177 Conn. 391, 393, 418 A.2d 46 (1979);

(4) motive; e.g., *State* v. *James*, 211 Conn. 555, 578, 560 A.2d 426 (1989);

(5) a common plan or scheme; e.g., *State* v. *Morowitz*, 200 Conn. 440, 442–44, 512 A.2d 175 (1986);

(6) absence of mistake or accident; e.g., *State* v. *Tucker*, 181 Conn. 406, 415–16, 435 A.2d 986 (1980);

(7) knowledge; e.g., *State* v. *Fredericks*, 149 Conn. 121, 124, 176 A.2d 581 (1961);

(8) a system of criminal activity; e.g., *State* v. *Vessichio*, 197 Conn. 644, 664–65, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986);

(9) an element of the crime [charged]; e.g., *State* v. *Jenkins*, 158 Conn. 149, 152–53, 256 A.2d 223 (1969); or

(10) to corroborate crucial prosecution testimony; e.g., *State* v. *Mooney*, 218 Conn. 85, 126–27, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991).

Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered, and that its probative value [is not outweighed by] outweighs its prejudicial effect. E.g., *State* v. *Figueroa*, 235 Conn. 145, 162, 665 A.2d 63 (1995); *State* v. *Cooper*, 227 Conn. 417, 425–28, 630 A.2d 1043 (1993). The purposes enumerated in subsection ([b] c) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive. Neither subsection (a) nor subsection ([b] c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors.

([c] d) Specific instances of conduct when character in issue.

Subsection ([c] d) finds support in Connecticut case law. See *State* v. *Miranda*, 176 Conn. 107, 112, 365 A.2d 104 (1978); *Norton* v. *Warner*, 9 Conn. 172, 174 (1832).