

Meeting of the Advisory Committee on Appellate Rules

Thursday, April 4, 2024 at 2:00 p.m.

Justice D'Auria called the meeting to order at 2 p.m.

Members in attendance:

Justice Gregory T. D'Auria, Co-Chair
Judge Eliot D. Prescott, Co-Chair
Attorney Jeffrey Babbin
Attorney Colleen Barnett
Attorney Jill Begemann
Attorney Jennifer Bourn
Attorney Carl Cicchetti
Attorney Renee Cimino
Attorney Timothy Costello
Attorney Paul Hartan
Attorney James Healey
Hon. Sheila Huddleston
Attorney Daniel J. Krisch
Attorney Jessie Opinion
Attorney Joshua Perry

Attorney Charles Ray
Attorney René Robertson

Members not in attendance:

Attorney Richard Emanuel
Attorney Wesley Horton
Attorney Eric Levine
Attorney Giovanna Weller

Additional Attendees:

Attorney Ken Bartschi (for Attorney Horton)
Attorney Julia Herbst
Attorney Michael Mastrony
Attorney Evan O'Roark

This meeting was held in the Attorney Conference Room at the Connecticut Supreme Court. Justice D'Auria welcomed Attorney Renee Cimino, director of Delinquency Defense and Child Protection, to the committee.

I. OLD BUSINESS

A. Approval of minutes of October 26, 2023

Attorney Krisch moved to approve the minutes. Attorney Babbin seconded. The motion passed unanimously.

B. Whether to recommend a rule governing appellate intervention

Attorney Joshua Perry, Solicitor General, raised this issue at the October 2023 meeting, and it was marked over to the spring. He thereafter submitted a letter and written proposal to amend §§ 63-4 (a) (6) and 67-7A, to provide that the Attorney General's Office is allowed to intervene as party to the appeal as of right when the constitutionality of a state statute is questioned. The phrase "called into question" was suggested to parallel General Statutes § 3-125.

Following discussion, the marked revisions were made to the proposal such that § 63-4 (a) (6) would be amended to provide: "A constitutionality notice, in all noncriminal cases where the constitutionality of a state statute, rule, regulation, or executive action is called into question. Said notice shall identify the statute, rule regulation, or executive action; the name and address of the party questioning it; and whether the ~~statute's~~

constitutionality of the questioned item was upheld by the trial court. The appellate clerk shall deliver a copy of such notice to the attorney general. If a question becomes apparent to a party or to the court at any time after the preliminary papers are filed, the party shall immediately file or amend the notice mandated by this section, and the court, even absent a party filing a notice, shall issue such notice. This section does not apply to habeas corpus matters based on criminal convictions, or to any case in which the attorney general is a party, has appeared on behalf of a party, or has filed an amicus brief in proceedings prior to the appeal."

The proposal to amend § 67-7A was unchanged. It was determined that this proposal did not need to be referred to the work group.

Attorney Perry moved to adopt the proposal, as revised. Attorney Ray seconded. The motion passed unanimously, with Attorney Robertson abstaining.

C. Whether to amend § 78a-1 regarding motions for review of bail determinations

Judge Prescott explained that this proposal, which arose out of discussions in the Appellate Court following the Supreme Court decision in *State v. Pan*, 345 Conn. 922, 946-59 (2022), was on the October 2023 agenda. At that time, Attorneys Perry and Bourn expressed concern that the proposal placed an impediment to an incarcerated person filing a petition by requiring that the person seek modification first, which was not what *Pan* contemplated. The matter was tabled for further study. Attorney Barnett reported that she had brought the concerns raised to Chief Judge Bright and it was determined that the proposal could be withdrawn.

D. Whether to amend § 84-1 to clarify that the Office of the Appellate Clerk can reject an appeal to the Supreme Court from a final decision of the Appellate Court if a petition has not been granted

Attorney Cicchetti presented this proposal to address the concern that there is no express language in the rule permitting the Appellate Clerk's Office to reject an appeal filed in the Supreme Court where the party aggrieved by the decision of the Appellate Court has not sought or received certification. Following the October 2023 meeting, Attorneys Cicchetti and Robertson met separately with several members of the Advisory Committee to draft the revised proposal.

Following discussion, the proposed final sentence of the amendment to § 84-1 was revised to state: "Failure to obtain an order from the Supreme Court granting certification will result in the rejection of the appeal to the Supreme Court."

Attorney Kirsch moved to adopt the proposal, as revised. Judge Huddleston seconded. The motion passed unanimously.

E. Whether to amend §§ 84-9 and 84-11 to clarify the issues that can be raised following certification

In April 2023, Attorney Krisch raised the lack of a clear procedure in the appellate rules to ask the Supreme Court, following the granting of certification, to also consider issues that were briefed in the Appellate Court but were not reached by the Appellate Court in its disposition of the appeal. A proposal was considered at the October 2023 meeting. Concerns about that proposal included whether the contemplated procedure could be used to permit the appellant to circumvent the Supreme Court's limited grant of certification and whether a motion would be a better course of action. The matter was tabled for additional study.

Thereafter, the proposed amendments to §§ 84-9 and 84-11 presented at this meeting were prepared with input from the work group and Advisory Committee members including Judge Huddleston and Attorneys Krisch and Bourn.

Justice D'Auria indicated that he would be in favor of keeping the final sentence of § 84-11 (b) ("Such permission will be granted only in exceptional cases where the interests of justice so required") but did not oppose sending the proposed amendments to the Court as drafted.

Following discussion, the proposal was revised to state in the final sentence of § 84-11 (c) (2): "any claim that the relief afforded by the Appellate Court in its judgment should be modified, provided the arguments underlying such claim were briefed in the Appellate Court or raised in a motion for reconsideration."

Attorney Kirsch moved to adopt the proposal, as revised. Attorney Robertson seconded. The motion passed unanimously.

II. NEW BUSINESS

A. Whether to eliminate §§ 63-1 (d) and 67-12

Attorney Cicchetti presented this proposal. Sections 63-1 (d) and 67-12 provide that if, after an appeal has been filed but before the appeal period has expired, any motion is filed that would render the judgment or verdict ineffective, any party may move to stay the briefing obligations of the parties. The recommendation is to delete these rules as unnecessary because this could be accomplished by a motion for extension of time if the brief is due, which is typically is not.

Attorney Robertson moved to adopt the proposal. Attorney Barnett seconded. The motion passed unanimously.

B. Whether to amend §§ 61-11, 61-12, 61-14, 71-6 and 84-3 regarding stays

Judge Prescott explained that these proposals were meant to simplify and clarify the

procedures regarding stays to address recurring questions that arise.

Attorney Barnett explained that the proposed amendment to § 61-11 (a) made explicit in the rule what has been held in cases such as *Deutsche Bank v. Fraboni*, 182 Conn. App. 811 (2018). The amendment to § 61-11 (h) clarifies that the foreclosure auction can still go forward where the trial court has denied a motion to open the judgment and extend the sale date (or denied a motion to reargue the same) as it is the confirmation of the judicial sale—and not the sale itself—that cuts off the equity of redemption. The change to § 61-12 is technical. Section 61-14 was reordered; only the last sentence of subsection (b) is new, and that sentence is designed to assist the clerk's office in screening for "emergency stay" matters that must be sent to the Appellate Court immediately.

Attorney Robertson explained that the proposed amendment to § 71-6 clarifies whether there is a stay after disposition of an appeal, and how long it stays in effect. Section 84-3 clarifies how stays work when a petition is filed, and where a party would file a motion for stay when a petition for certification is pending. Following discussion, two improperly placed commas were deleted from the second sentence of § 84-3 (b) and the word "presiding" was deleted from the final sentence.

Attorney Krisch moved to adopt the proposal with the technical revisions. Attorney Robertson seconded. The motion passed unanimously.

C. Whether to amend § 66-1 regarding motions for extension of time

Attorney Cicchetti presented this proposal. The proposal adds an option to use a form instead of a drafted motion seeking an extension of time and streamlines the requirements for a drafted motion by removing the brief history and legal grounds requirements. The proposal also removes the prohibition on late motions for extension of time, allowing the clerk the flexibility to grant extensions for good cause even if the motion is filed late.

There was opposition from practitioners to the portion of the proposal that suggested deleting the final sentence of subsection (a); that portion of the proposal was withdrawn. Attorney Krisch proposed a future project in which the rules were reviewed for the "good cause" standard and whether it should be excised from the rules altogether.

Attorney Krisch moved to adopt the proposal with the technical revisions. Attorney Babbitt seconded. The motion passed unanimously.

D. Whether to amend § 70-4 regarding the time allowed for oral argument; who may argue

Attorney Cicchetti presented this proposal. The existing rule provides that the time allowed may be apportioned among counsel on the same side of a case as they may choose. However, permission is required to allow more than one counsel to present

argument for one party to the appeal. The amendment clarifies when permission of the court or simply notice to the court is required.

Attorney Ray proposed clarifying that the request be made by letter; what is now the fifth sentence of the rule would state "file a request by letter with the appellate clerk . . ."

Attorney Krisch moved to adopt the proposal as revised. Attorney Babbinn seconded. The motion passed unanimously.

E. Whether to amend § 72-3 regarding writs of error

Attorney Barnett presented this proposal to clarify that permission is needed to file an amended writ of error.

Attorney Krisch moved to adopt the proposal. Attorney Robertson seconded. The motion passed unanimously.

F. Whether to amend § 62-8A regarding attorneys appearing pro hac vice

Attorney Robertson presented this proposal. Everyone already uses the pro hac vice form, so the proposed amendment makes it mandatory. It is therefore unnecessary to list all the requirements in the rule.

Attorney Ray moved to adopt the proposal. Attorney Robertson seconded. The motion passed unanimously.

G. Whether to amend § 62-7 regarding matters of form; filings; delivery and certification to counsel of record

Attorney Cicchetti presented this proposal. The fifteen day period to refile a document that was returned for noncompliance remains in place for parties exempt from electronic filing; the period has been shortened to seven days for electronic filers.

Attorney Robertson moved to adopt the proposal. Attorney Krisch seconded. The motion passed unanimously.

H. Whether to amend § 61-7 regarding joint and consolidated appeals

Attorney Robertson presented this proposal to make clear that in a joint appeal, the appellees may jointly or separately file their brief. They don't have to file a single consolidated brief. It also clarifies that if an appellant is using a fee waiver for a joint appeal, a granted waiver is required for each trial court docket number being appealed.

Attorney Babbinn proposed keeping language deleted from (b) (2) in the proposal as drafted. Following discussion, the phrase ", on motion of any party or its own motion," was restored to (b) (2).

Judge Huddleston proposed revising the new penultimate sentence of subsection (c) to read: "Multiple appellees may file a joint or separate brief."

Attorney Babbin moved to adopt the proposal as revised. Attorney Ray seconded. The motion passed unanimously.

I. Whether to amend § 61-9 regarding decisions subsequent to the filing of appeal; amended appeals

Attorney Robertson presented this proposal, which includes new language to provide a cutoff for when an amended appeal may be filed. Once an appeal is ready for assignment, any appeal from a subsequent decision in the trial court shall be filed as a new appeal. The proposal also clarifies the documents that need to be filed upon the filing of an amended appeal.

There was some discussion of whether it is ever proper for a "ready" appeal to be amended, and the proposal was clarified to provide that a party could file a motion to amend a ready appeal. Specifically, in the new penultimate paragraph, the first sentence was revised to state in part: "Once an appeal is ready pursuant to Section 69-2, absent permission to file an amended appeal, any appeal from a subsequent decision in the trial court shall be filed as a new appeal in accordance with the provisions of Section 63-3."

Attorney Babbin moved to adopt the proposal as revised. Attorney Krisch seconded. The motion passed unanimously.

J. Whether to amend § 66-5 regarding motions for rectification and articulation

Attorney Robertson presented this proposal to add clarity to the rule regarding motions for articulation and rectification. It deletes as unnecessary the provision regarding motions for further articulation. There are very few motions for further articulation. When the court needs further information, it will issue an order. Moreover, a party dissatisfied with an articulation order can file a motion for review and request that the Appellate Court direct the trial court to articulate.

Attorney Ray moved to adopt the proposal. Attorney Cicchetti seconded. The motion passed unanimously.

K. Whether to amend §§ 77-1, 78-1, 78a-1, 78b-1, 81-3 and 84-6 to clarify that responses to oppositions are not permitted for petitions

Attorney Robertson presented this proposal. When the motion and petition rules were separated last year, the language providing that responses to oppositions are not allowed was inadvertently left off the petition rules. This proposal adds that language back into the petition rules.

Attorney Krisch moved to adopt the proposal. Attorney Robertson seconded. The motion passed unanimously.

L. Whether to amend §§ 63-4 (a) (5), 63-4 (b) and 63-10 regarding preargument conferences

Judge Prescott introduced this proposal at the request of Chief Judge Bright, following consultation with Chief Justice Robinson. Pursuant to these amendments, a PAC will only be scheduled if it is jointly requested by the parties. This is part of an effort to move cases along so that they are ready for oral argument without delay. Under the current rules, every civil case automatically goes to PAC unless it is exempt under the rules (habeas, juvenile/child protection, summary process, foreclosure and appeals from a license suspension due to operating under the influence).

To see the benefit of this rule during the next court year, we may wish to consider whether this rule should be effective upon passage or by another date prior to January of 2025. Notice of the proposed rule with the effective date will be posted on the Judicial Branch website. That notice will indicate that the parties can still request a PAC after the briefs are filed.

Discussion took place regarding the proposed amendment to § 63-4 (a) (5), specifically, whether "may" should be changed to "shall" and whether this section should become § 63-4 (b). Absent substantive objection to the proposal, a motion was made to approve the proposal with the understanding that the final language would be circulated to the members of Advisory Committee by email for their information.

Attorney Krisch moved to adopt the proposal. Attorney Robertson seconded. The motion passed unanimously.

III. ANY OTHER BUSINESS THAT MAY COME BEFORE THE COMMITTEE

None.

IV. NEXT MEETING

The next meeting will be at the discretion of the co-chairs, anticipated for fall 2024.

The meeting adjourned at 3:53 p.m.

Respectfully submitted,

Colleen Barnett