Meeting of the Advisory Committee on Appellate Rules

Thursday, October 26, 2023, 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 Timothy Costello
Attorney Richard Emanuel
Attorney Paul Hartan
Attorney James Healey
Attorney Wesley Horton
Hon. Sheila Huddleston
Attorney Eric Levine
Attorney Jessie Opinion
Attorney Joshua Perry
Attorney René Robertson
Attorney Giovanna Weller

Members not in attendance:
Attorney Daniel J. Krisch
Attorney Charles Ray

Additional Attendees:
Attorney Julie Lavoie (for Attorney Krisch)
Attorney Andrew Redman
Attorney Michael Skold

This meeting was held in the Attorney Conference Room at the Connecticut Supreme Court.

I. OLD BUSINESS

A. Approval of minutes of April 6, 2023.

Attorney Weller moved to approve the minutes. Attorney Robertson seconded. The motion passed unanimously, with Attorney Horton abstaining.

B. Whether to recommend a rule governing appellate intervention

Attorney Perry has met once with the work group and is preparing a memorandum regarding the different approaches to appellate intervention in state and federal courts. Such a proposal requires careful consideration, but it is his belief that there are some instances in which intervention at the appellate level may be appropriate. He requested that this matter be marked over to the next agenda as the proposal was still a work in progress.

II. NEW BUSINESS

A. Whether to amend § 63-4 to clarify the time for filing amendments to the preliminary papers

Attorney Cicchetti presented this proposal, which removed the language in subsection (b) as to how and when different § 63-4 papers could be amended and added that information to subsection (a) following the requirements for filing each paper. What had been subsections (c) and (d) were redesignated as (b) and (c), respectively.

Attorney Horton moved to adopt the proposal. Attorney Perry seconded. The motion passed unanimously.

B. Whether to adopt § 67-14 regarding joint briefs and statements adopting briefs and amend § 70-4 to reference § 67-14

Judge Prescott explained that this proposal grew out of a concern that the rules were unclear as to whether a person who filed a statement adopting the brief of another party is entitled to oral argument. Attorney Robertson explained that the new § 67-14 contrasts the joining of a brief with filing a statement adopting the brief of another party and the proposed amendment to § 70-4 clarifies that only those who have joined a brief may argue.

A statement adopting the brief must be filed before the case is ready for assignment. Discussion included the timing and the adoption of reply briefs, and whether the rule should more clearly require the parties filing a joint brief work out among themselves the time to be apportioned for oral argument. No amendments were ultimately proposed.

A technical correction to § 67-14 (a) ("want" was made singular) was incorporated.

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

C. Whether to amend § 61-4 to reference §§ 66-2 and 66-3.

Attorney Robertson explained that this proposal was to make this rule consistent with the proposal adopted in spring concerning motions. A motion filed under § 61-4 (b) should comply with the usual motion requirements of §§ 66-2 and 66-3.

Attorney Horton moved to adopt the proposal. Attorney Weller seconded. The motion passed unanimously.

D. Whether to amend § 67-10 to provide a 350-word limit for supplemental authority letters

Attorney Cicchetti presented this proposal, which was to amend the rule to make it consistently refer to a "letter" (as opposed to "filing" or "notice"), to place a word limit on such letters, and to make it clear that replies to responses were not permitted.

There was general agreement among practitioners with the proposed 350-word limit.

Attorney Babbin proposed an additional amendment: to remove the phrase "and without argument" from the rule. He explained that the federal rules were amended to similarly include a 350-word limit but removed the restriction on argument. There was discussion in favor of this additional amendment, with some noting the difficulty of writing a reply to a supplemental authority letter to state that the authority cited is inapposite without being argumentative. There were also comments against removing the restriction, as such letters are not meant to be supplemental briefs. Ultimately, this proposal was put to a separate vote and three members of the committee voted to remove the phrase "and without argument" from § 67-10, with several abstaining. The motion failed.

Attorney Horton moved to adopt the proposal as presented by Attorney Cicchetti. Attorney Weller seconded. The motion passed unanimously.

E. Whether to amend § 71-4 to include electronic volumes

Attorney Levine presented this proposal, which made technical changes to subsection (a) and added "or electronic" following "bound" in subsection (b) to describe the publication of the official opinion of the court. Some members expressed dismay at the anticipated demise of bound volumes.

Attorney Horton moved to adopt the proposal. Attorney Levine seconded. The motion passed unanimously.

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

Attorney Barnett presented this proposal, which arose out of discussions in the Appellate Court following the Supreme Court's decision in *Pan*. Petitions for review in which the sole issue is whether the amount of bail is unreasonable often do not have an adequate record and have been denied without prejudice to the petitioner pursuing a motion for modification pursuant to § 38-14. However, Attorneys Perry and Bourn expressed concern that this 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 proposal was tabled for further study.

G. 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 concerns that there is no express language in the rule permitting the Appellate Clerk to reject an appeal where the party

aggrieved by a decision of the Appellate Court has not sought or received certification to appeal to the Supreme Court.

Attorney Levine proposed a technical correction to the second sentence ("file an appeal with the Supreme Court") that was accepted. There were proposals to change the third sentence offered by Attorneys Babbin and Weller and Judge Huddleston and counterproposals offered by Attorneys Robertson and Cicchetti.

The matter was tabled for an email vote on the final language and, ultimately, tabled until the Spring meeting.

The issue of whether petitions for certification to the Appellate Court in land use cases should be similarly amended was referred to the work group. It was noted, however, that the appellate clerk's office is in an excellent position to determine whether certification from a final decision by the Appellate Court is required but the certification requirement is less clear where sometimes zoning boards are parties to lawsuits other than land use appeals in the Superior Court.

H. Whether to amend § 60-7 (c) regarding filing of the electronic access form

Attorney Robertson explained that this proposal is designed to simplify appellate e-filing for self-represented litigants. If a self-represented party already has electronic access to their case at the Superior Court, there is a streamlined process for the party to have their E-Services user identification verified. Instructions will be provided on the Appellate E-filing homepage in E-Services. This rule change does not affect incarcerated self-represented litigants.

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

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

Attorney Lavoie presented this proposal on behalf of Attorney Krisch to address 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. Attorney Krisch had met with the work group in preparing this proposal. The proposal is focused on the appellant before the Supreme Court because there is a clear avenue in the rules for an appellee to raise an alternative ground for affirmance.

There was discussion as to whether the proposal should include the word "adequately" before "briefed"; "briefed" was chosen to replace the word "raised," which is in the

current § 84-11. Others noted that the proposal, as drafted, may permit the appellant to circumvent the Court's limited grant of cert. (For example, an appellant seeks certification on four issues; the court grants certification on two issues; could the appellant file a statement of adverse rulings claiming that the other two issues should be considered in the interest of judicial economy?) It was also noted that perhaps this should be a motion rather than a "statement," although it had been noted during the work group process that a motion closely following certification may not be preferred by the court.

The matter was tabled for additional study.

J. Whether to amend § 66-4 to provide for the addition of a justice or judge in ruling on motions when the justices are equally divided

Attorney Horton presented this proposal to respond to the decision in *State* v. *Malone*, 346 Conn. 1012 (2023), which highlighted the lack of a rule providing for the addition of a judge or justice in ruling on a motion with the panel of jurists is equally divided. Attorney Babbin suggested amending the proposed final sentence to begin "Decisions by the court on both dispositive..." This amendment was incorporated into the proposal.

The proposal provided in part that the court "shall reconsider the motion with an odd number of justices or judges." Attorney Weller wondered whether the proposal should state the next highest odd number, to prevent the subtraction of a member of the panel instead of the contemplated addition. Also discussed was whether this should be embodied in a rule or whether it was a matter of court policy.

Attorney Horton moved to adopt the proposal. Attorney Babbin seconded. There were seven votes in favor, two votes against, and eight abstentions. The motion carried and the proposal will be submitted to the Courts.

III. ANY OTHER BUSINESS THAT MAY COME BEFORE THE COMMITTEE

None.

IV. NEXT MEETING

It is anticipated that the next meeting will be in spring 2024.

The meeting adjourned at 3:35 p.m.

Respectfully submitted,

Colleen Barnett