Meeting of the Advisory Committee on Appellate Rules

Thursday, October 27, 2022

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 Richard Emanuel
Attorney Susan Hamilton
Attorney Paul Hartan
Attorney James Healey
Attorney Wesley Horton
Hon. Sheila Huddleston
Attorney Daniel J. Krisch
Attorney Eric Levine
Attorney Jessie Opinion
Attorney Joshua Perry
Attorney René Robertson
Attorney Giovanna Weller

Members not in attendance:
Attorney Charles Ray

Additional Attendees:
Attorney David Goshdigian
Attorney Andrew Redman
Attorney Timothy Sugrue

This meeting was held in the Attorney Conference Room at the Connecticut Supreme Court. Justice D'Auria welcomed Attorney Joshua Perry, solicitor general, and Attorney Tim Sugrue, acting supervisory assistant state's attorney, to the meeting.

I. **OLD BUSINESS**

A. Approval of minutes of the April 7, 2022 meeting.

Attorney Horton moved to approve the minutes. Attorney Krisch seconded. Attorney Babbin noted a typographical correction. The motion passed unanimously.

B. Whether to add § 66-9 regarding disqualification of appellate jurists and propose an amendment to Rule 2.11 of the Code of Judicial Conduct regarding judicial disqualification.

Judge Prescott updated the committee on the progress of this proposal before the Rules Committee of the Superior Court. It is expected that this proposal will move forward. This matter was marked over to the Spring, 2023 meeting. If adopted, it is anticipated that the changes would be effective January 1, 2024.

C. Whether to amend § 67-8 regarding the party appendix.

The committee revisited whether § 67-8 could be amended to require that parties provide the text of an unpublished opinion only when the opinion is "not available in either the LEXIS or Westlaw databases." It is unclear that either the LEXIS or Westlaw databases would be consistently accessible to the Court. The proposal was voted down.

II. NEW BUSINESS

A. Whether to amend § 62-8 regarding appearances after a case is ready

Attorneys Cicchetti and Robertson explained this proposal, which added the following sentence to the end of the rule: "Permission is not required to file an appearance with a different court." For recusal screening purposes, permission of the court is required to file an appearance after the matter is "ready." The proposal is intended to make it clear that permission is *not* required when the matter is no longer pending before the first court, even though there may be additional proceedings before the second court. Examples: permission is not required to file an appearance for the purpose of filing a motion for an extension of time to file a petition for certification to the Supreme Court; permission is not required to file an appearance in the Appellate Court when a matter is remanded from the Supreme Court for further proceedings. Several members thought the phrase "a different court" was confusing, and alternative word choices were discussed. The matter was tabled for the work group to revisit the proposal.

B. Whether to amend § 78b-1 regarding the ordering and payment of transcripts

Judge Prescott explained that this rule was recently adopted to allow indigent persons to obtain appellate review of an order denying their fee waiver application to commence a civil or habeas corpus action. Attorney Cicchetti explained that this proposal was to eliminate the requirement that the moving party provide either a transcript or a transcript order confirmation when filing such a petition for review.

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

C. Whether to repeal § 61-15 regarding the stay of execution in death penalty cases

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

D. Whether to amend § 66-6 regarding the time to file a motion for review

Attorney Barnett explained that there was ambiguity in this rule as to when the ten days for filing a motion for review begins when the order is issued in connection with a motion that is filed in the trial court. Attorney Bourn expressed concern that the ten day time for

filing a motion for review would begin on a denied fee waiver application if "notice . . . is given in open court with the party seeking review present . . . ." The Office of the Public Defender may not necessarily be present, but the defendant would be, and the ten days may run before the OPD receives written notice from the trial court clerk. The "good cause for late filing" provision of § 66-3 was discussed to address this concern. Ultimately, the matter was tabled for further consideration by the work group with input from Attorney Bourn.

E. Whether to amend §§ 66-6, 76-1, 76-2, 76-3, 76-4, 76-6 and 84-4 to replace "workers' compensation commissioner" with "administrative law judge"

Judge Prescott explained that the Rules Committee of the Superior Court was handling this matter as a technical change consistent with amendments to the workers' compensation statutes. The committee offered no objection to proceeding in the same manner with the appellate rules.

F. Whether to amend § 76-3 regarding Compensation Review Board files

Attorney Cicchetti explained the additional proposal concerning § 76-3. Files in workers' compensation matters are transmitted to the appellate clerk electronically, so the phrase beginning ", if possible . . ." following "electronic copy of the file" was no longer needed.

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

G. Whether to amend § 63-8 and § 63-8A regarding ordering and filing of transcripts

Attorney Robertson explained the proposal, which was to remove the requirement that parties file paper copies of transcripts with the appellate clerk. As a result, § 63-8A would be repealed, and several subsections of § 63-8 concerning delivery and filing of paper transcripts would be eliminated. Members of the committee inquired regarding the format of the official transcript delivered to the court by the official court reporter, and specifically suggested that it be in a searchable PDF format. Attorney Hartan indicated that he would follow-up with transcript services and report back to the committee at the next meeting. Attorney Babbin noted that a change to these rules would also affect the briefing deadline rules. Attorney Robertson noted that this point was well taken, and an additional proposal would be prepared for the committee to consider at the Spring meeting.

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

H. Discussion regarding the difference between joining in the brief of another and adopting the brief of another

Justice D'Auria and Judge Prescott presented this as a discussion item. Under §§ 70-4 and 79a-9, only one who has filed a brief or "joined" the brief of another party may

argue. However, in child protection matters and other matters involving minor children, counsel for the minor child and/or counsel for the GAL may file a "statement adopting the position" of one of the parties. See §§ 67-13, 79a-6, 84-6A. Under the e-filing system, however, any party can file a "statement adopting the position" of another party. Query whether that is the same as "joining" the brief and whether such a statement entitles one to argument. Attorney Krisch inquired whether "adopting" the position of another party implicated Rule 3.3 of the Rules of Professional Conduct.

This item will be on the agenda for the Spring, 2023 meeting.

I. Whether to amend § 71-4 regarding the time for release of opinions

Attorney Krisch presented this proposal, which required the Supreme and Appellate Courts to release an opinion in a case no later than 180 days after oral argument or submission on the briefs, barring exceptional circumstances. He discussed one example of a case that was argued twenty months ago in the Appellate Court and remains pending as of the date of this meeting. He argued that delay of this kind undermines public confidence in the judicial process and gives the appearance of delay for no good reason. Although he could not find an example of a state appellate court that had such a rule, there are states that impose consequences, including withholding judge's pay, for cases pending too long.

There was support on the committee for the animating principles behind the proposal, but not necessarily for the solution proposed. Attorney Weller discussed an alternative proposal, requiring the court to send notice to the parties at the 180-day mark indicating that the matter was still under consideration. Attorney Krisch indicated that this alternative would be better than nothing.

Judge Huddleston indicated that the rule as proposed would be unenforceable. The 120-day rule in the Superior Court has a consequence attached; a matter pending too long in the Supreme Court cannot be assigned to another panel. Attorney Sugrue indicated that the Division of Criminal Justice would not support this proposal.

Judge Prescott indicated that the appellate courts take procedural justice seriously. Parties before the court deserve to be heard and have a timely decision rendered so that they can order their lives. Some have argued that the Appellate Court should do away with "memorandum decisions" and write on every case. This might make litigants feel heard, but perhaps at the expense of timeliness. This is a challenging balance. Judge Prescott also discussed the Appellate Court's internal policy; the Chief Judge meets with an authoring judge when an opinion, including a concurrence or dissent, is outstanding for more than a certain number of days.

Justice D'Auria stated that collective decision making is very difficult, not as a defense, but by way of a partial explanation for the time that it takes to issue an opinion. He noted that, unlike in other states, no parties wait for a matter to be assigned for argument in our appellate system: once a case is briefed and ready, it is assigned. He was interested to learn why this concern was being raised now because it was his

impression that the appellate courts had decreased the average time between argued and released dates. He would be interested in seeing statistics on the issue.

Attorney Sugrue moved for a vote on the proposal. Attorney Krisch voted in favor, the remaining members opposed, with Attorneys Babbin and Robertson abstaining.

J. Whether to amend §§ 67-3A, 67-5A and 67-7a regarding the word count for briefs

Justice D'Auria indicated that this proposal would not be put to a vote today, but that it was the impression of the judges and justices that they were reading a lot more under the word count rules than they were under the page limit rules. Attorney Cicchetti explained that his staff had converted several recent briefs into the old format and discovered that they are coming in at five to seven pages over the thirty-five page limit. Attorney Emanuel shared with the committee the chart that he prepared of word limits for appellate briefs in various state courts. Attorneys Bourn and Healey noted that practitioners write very differently when adhering to word count versus page limits. Several practitioners mentioned that they would be reassured if it were easier to obtain additional words for complex cases Justice D'Auria invited practitioners to share with Attorney Cicchetti examples of briefs that were accepted under the page limit rules so that he may convert them to the word count rules, so that the courts may have more data.

III. ANY OTHER BUSINESS THAT MAY COME BEFORE THE COMMITTEE

None.

IV. NEXT MEETING

Anticipated to be sometime in April, 2023.

The meeting adjourned at 3:55 p.m.

Respectfully submitted,

Colleen Barnett