

**Probate Practice Book Advisory Committee
Subcommittee II**

Meeting Minutes
Wednesday, January 11, 2012

Office of the Probate Court Administrator

Judge Brian Mahon, Subcommittee Chair, convened the meeting at 2:00 p.m..

Other members in attendance: Professor Jeffrey Cooper, Attorney Thomas Gaffey, Judge John McGrath, Attorney Carmine Perri, Mr. Arthur Teal, and Judge Claire Twerdy.

Also in attendance: Committee Reporter David Biklen.

Members not in attendance: Attorney Christopher Hug.

Approval of Minutes

Approval of the minutes of the meeting of December 7, 2011, was moved and seconded. All members voted to approve.

Finalize Concepts for Rules

Review Feedback From Full Committee

Ex parte communications. The subcommittee discussed the comments of the full committee re item #2 under “ex parte communications”. This concerns whether or not parties would be required to provide copies of filings to all other parties.

There was considerable discussion of this issue and consensus was not reached. One suggestion was that the issue be addressed as part of the case management conference, i.e. that a court could order that all filings in a particular contested proceeding must certify that copies were sent to other parties.

Judge Mahon indicated he would speak to Judge Zelman, Chair of Subcommittee I and report back to Subcommittee II.

Recording hearings. The full committee suggested that in light of the statutory right of a party to require that a hearing be recorded, the rule should preclude individuals from recording hearings on their own. It also recommended that

recordings should be required to be maintained by the court only if required by statute or requested under §45a-136.

The subcommittee agreed to make these changes. The only remaining question was how long such recordings should be maintained. It was suggested that rule indicate one year or such longer period as the court directs or the Probate Court Administrator may determine by regulation.

Telephone participation. The full committee recommended that the rule clarify that the court in its discretion could refuse to allow telephone participation even if all parties consent to it. The subcommittee agreed, and noted that this concept is included in Attorney Biklen's draft rule.

Interpreters. The full committee suggested that the rule contain more detailed factors to be considered in determining whether to allow the use of a nonprofessional interpreter. The subcommittee noted that Attorney Biklen's draft rule includes such factors.

Contempt. The subcommittee agreed with the recommendation of the full committee that contempt proceedings should be recorded, and Attorney Biklen's draft rule incorporates this concept.

Review concept for rule re broadcasting and photographing hearings

At the request of Judge Knierim, the subcommittee revisited its recommendation that the rule in this regard simply incorporate by reference the provisions of the Code of Probate Judicial Conduct. Judge Knierim pointed out that the Code of Judicial Conduct applicable to Superior Court judges no longer contains such provisions. Instead they are now embodied in rules in the Connecticut Practice Book. He also noted that there has not been a comprehensive revision of the Code of Probate Judicial Conduct in some time. He asked that the subcommittee give further consideration to the issue.

Attorney Gaffey reported that the Ethics Committee of the Probate Assembly has been alerted to the issue and has indicated that they would consider amending the Code to delete these provisions if the proposed rules adopt this approach.

After discussion the subcommittee agreed that this approach makes sense. It was further agreed that the subcommittee will compare the existing provisions of the Code of Probate Judicial Conduct with the parallel provisions of the Connecticut Practice Book, and adapt them as necessary.

Review Drafts of Proposed Rules.

Attorney Biklen provided copies of draft rules concerning all of the concepts addressed by Subcommittee II to date. The subcommittee began its review of a draft designated "1-5-12 draft Biklen."

Sec. 2001. Rules of evidence. Discussion focused on the second sentence indicating that the court should not require strict adherence to the rules of evidence when there is an unrepresented party. After considerable discussion, the subcommittee agreed to remove this sentence. It was noted that Subcommittee I will propose a general provision indicating that the rules should be liberally applied in the interests of justice, similar to C.P.B. §1-8. It was felt that such proposed rule and the applicable case law would adequately address the issue.

Section 2103. Exhibits of matter appealed. The draft rule calls for exhibits to be transmitted to the Superior Court as a matter of course in the event of an appeal. The subcommittee noted that since this rule refers specifically to de novo appeals, the exhibits may not be required. The subcommittee agreed to amend the draft rule to indicate that the exhibits be so transmitted upon the written request of a party.

Section 2104. Disposition of exhibits. The subcommittee discussed the issue of how long exhibits should be retained. It was noted that while the appeals period is generally thirty days, there are some instances in which a longer period is prescribed, in a few instances as long as one year. It was agreed to request that Probate Administration look into this issue and advise.

Sections 2201 – 2206. Ex parte communications. The subcommittee noted that the purpose of these provisions is to dissuade parties from engaging in ex parte communications and that Judges are already bound in this regard by the Code of Probate Judicial Conduct.

It was agreed that §2201 should indicate that "a party shall not initiate and a judge shall discourage" such communications, to coincide with the language of the Code of Probate Judicial Conduct.

For the above reasons it was agreed that §2205 should indicate that a party may, with consent, confer separately with a judge in mediation. Section 2206 should indicate that a party may engage in such communications when authorized by law.

Revised drafts of the rules concerning discovery, evidence, exhibits and ex parte communications that incorporate the above-referenced changes are attached to these minutes.

The meeting was adjourned at 4:05 p.m. The next meeting of the subcommittee will be on February 8, 2012, at 3:00 p.m. at the offices of Mahon, Quinn & Mahon in Meriden.

Approved February 8, 2012

Rule 19 Discovery.

Sec. 19.1 Taking of deposition.

A *party* may, after the commencement of a proceeding, take testimony of any person by deposition pursuant to C.G.S. sections 52-148b through 52-159a.

(C.G.S. Sections 52-148a to 52-159)

Sec. 19.2 When discovery other than deposition permitted. A *party* in a contested proceeding may request permission to seek discovery of information other than by deposition. The *court* may, after notice and hearing, grant the request in whole or in part on a finding that the information sought appears reasonably calculated to lead to discovery of admissible evidence and that the requested discovery would not be unduly burdensome or expensive.

(C.G.S. Secs. 45a-98b, 45a-129, and 45a-132a)

Sec. 19.3 Discovery requests and disputes.

A request for discovery and a dispute concerning discovery may be determined by the *court* at a case management conference under section 24.1 or a trial management conference under section 24.3.

Rule 20 Evidence.

Sec. 20.1 Rules of evidence. The rules of evidence established by law shall apply in all proceedings in which facts in dispute are found by the *court*.

Rule 21 Exhibits.

Sec. 21.1 Clerk or judge to mark exhibits. Unless otherwise ordered by the *court*, the clerk or, in the clerk's absence the judge, shall mark each exhibit not marked in advance of the proceeding. The marking shall clearly identify the item as an exhibit and shall identify the *party* offering it. The *court* shall keep a list of all exhibits marked for identification or received in evidence during the proceeding, which shall be part of the record of the *court* in the matter.

Sec. 21.2 Retention of exhibits. The *court* shall retain all exhibits in a matter until final determination of the matter.

Sec. 21.3 Exhibits of matter appealed.

(a) If a de novo appeal is taken to the superior court from a determination of a matter in the *court*, exhibits shall be transmitted to the superior court on written request of a *party*.

(b) If an appeal on the record is taken to the superior court under C.G.S. section 45a-186(a) from a determination of a matter in the *court*, exhibits shall be transmitted to the superior court as part of the record of the proceeding in accordance with §45a-186a.

(C.G.S. §45a-186a)

Sec. 21.4 Disposition of exhibits. Unless otherwise ordered by the *court*, the attorney representing a *party* or a *party* unrepresented by an attorney shall remove from the *court* all exhibits that have been entered into evidence in a matter. Not earlier than four months after the final determination of the matter, exhibits that have not been removed may be destroyed by the clerk without notice.

Rule 22 Ex Parte Communication.

Sec. 22.1 Ex parte communication prohibited.

(a) A probate judge is bound by the provisions of the Code of Probate Judicial Conduct regarding ex parte communication.

(b) Except as provided in section 22.2 or as otherwise permitted by law, a *party* shall not initiate an ex parte communication with a probate judge concerning a pending or impending proceeding in a *court*.

(Code of Probate Judicial Conduct, Canon 3, Sec. B)

Sec. 22.2 Exceptions to ex parte communication.

(a) When circumstances require, an ex parte communication for scheduling, administrative purposes, or emergency that does not deal with substantive matters or issues on the merits in the proceeding is not prohibited if:

(1) the probate judge reasonably believes that no *party* in the proceeding will gain a procedural or tactical advantage as a result of the communication; and

(2) the judge makes provision promptly to notify each other *party* of the substance of the communication and allows an opportunity for each *party* to respond.

(b) A written filing with the *court* that is authorized or required by law or by order of the *court* shall not be construed to be an ex parte communication. The written filing includes, but is not limited to an:

- (1) application, motion, or petition;
- (2) inventory;
- (3) account;
- (4) report of a representative for an interested *party*;
- (5) memorandum of law; and
- (6) objection;