

**Probate Practice Book Advisory Committee
Subcommittee II**

Meeting Minutes
Wednesday April 4, 2012

Office of the Probate Court Administrator
186 Newington Road
West Hartford, CT

Judge Brian Mahon, Subcommittee Chair, convened the meeting at 3:00 p.m.

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

Also in attendance: Committee Reporter David Biklen

Members not in attendance: Mr. Arthur Teal

Approval of minutes

The members unanimously approved the minutes of the meeting of March 7, 2012.

Feedback from full committee

Rule 19, Discovery. Per the discussion at the full committee meeting on March 15, it was agreed to remove the word "contested" from section 19.2. The word is unnecessary, as the court would simply deny such a request in an uncontested matter.

It was agreed that some clarifying language is necessary in section 19.2, to reinforce the role of the court as gatekeeper. The intent is that court approval be required for any discovery other than depositions. If the parties agree, they can present their agreement to the court in seeking approval. In most cases the court would have no reason to reject a request based on the agreement of the parties.

Rule 24, Case conferences. It was agreed to add referral to a probate magistrate or to medication to the list of items that may be considered at a case conference.

Rule 28, News media coverage. The subcommittee agreed to add language to section 28.2 that would enable the court to permit coverage in otherwise prohibited matters if the parties and the court agree.

It was agreed that internet streaming should be covered, and probably is under the existing language. Some additional consideration should be given to this. It was also agreed to amend section 25.1 to make sure that the prohibition of recording by individuals also extends to streaming or other means of electronic transmission.

Feedback from judges

Discussion of the discovery rules is addressed above.

Rule 26, Participation in hearing by electronic means. The judges expressed concern that the rule might be seen as creating a right to participate electronically. The subcommittee agreed to clarify that it is discretionary with the court, and the rule provides the standard for the exercise of that discretion.

Oath of witnesses. The judges raised the question whether the rules should require that witnesses be sworn. The subcommittee questioned the need, feeling that this is such a basic requirement as to go without saying. Nonetheless it was agreed that such a rule would be appropriate.

Review of revised drafts of proposed rules

The subcommittee conducted a second review of draft rules 21 through 25, from the draft designated "Sub II Rules 19-27 2-22-12draft DDB."

Rule 21, Exhibits. There was discussion as to the interaction of section 21.3, requiring that exhibits be retained until the "final determination" of the matter, and section 21.3, which provides for them to be transmitted to the Superior Court in connection with appeals. It was agreed that section 21.2 should begin "Subject to the provision of section 21.3, the court shall retain...". Similarly, section 21.4 should begin, "Subject to the provisions of section 21.2...".

It was also agreed that the word "shall" in the second line of section 21.4, be replaced by "may". The concern was to avoid placing any burden on the clerk if the parties fail to remove their exhibits.

Rule 22, Ex parte communications. There was considerable discussion concerning this rule. Section 22.1 (a) recognizes the existing limitations on judges provided by of the Code of Probate Judicial Conduct. No effort is made to

alter them. The heart of the rule is section 22.1 (b), which cautions parties not to engage in ex parte communications with a judge.

The discussion focused on section 22.2 (a)(1) and (2). These provisions, it was noted, are directed at judges, not the parties, and are therefore inconsistent with what the proposed rule is trying to do. Further, they were taken from the Code of Judicial Conduct applicable to judges of the Superior Court, which differs from the Code of Probate Judicial Conduct. The question was raised whether a rule can properly alter, in effect, the provisions of the Code.

It was agreed that subsection (1) and (2) of section 22.2 (a) be deleted. Further, the opening language of section 22.2 (a), (“When circumstances require...”), be moved to form a new section 22.1 (c). The words “in the proceeding is not prohibited if:” will be deleted and replaced by “shall be directed to the clerk.”

Finally, subsection 22.2 (b) will Also be deleted. It was agreed that this provision is unnecessary as the listed items fall within the “except as otherwise provided by law” provision of section 22.1 (b).

In view of the fact that section 22.2 is being deleted in its entirety, the words “provided in section 22.2 or as” will be deleted from section 22.1 (b).

Rule 23, Orders without notice and hearing. The subcommittee renewed its discussion about the distinction between subsections (1) and (2) of section 23.1 (a). While recognizing that there is a distinction, it was felt that the distinction may not be readily recognized by the reader. Therefore it was concluded that the subcommittee should try to clarify these provisions. .

Rule 24, Case conferences. It was agreed that section 24.1 (a) and 24.3 (a) should read “The court may at any time...”, direct that a conference be held.

The subcommittee had previously agreed that a form should be developed for use in connection with case or trial management conferences. The members felt that the rule itself could be somewhat more general, with greater detail being provided in the form. The form could be revised as required without the procedural steps required for rule changes.

At the same time there was discussion about making the enumerated items under section 24.1 (a) somewhat more specific. Item (1) should read “the extent to which written discovery should be permitted”. A new item should provide for “deadlines for completion of discovery and depositions.” Item (3) should be “articulation of issues.” Item (4) should be “scheduling for motions and discovery.” A new item should address “whether the matter should be referred to a probate magistrate for hearing.”

There was further discussion as to section 24.3, as to whether it should refer to “trial” management or “hearing management. “ The discussion was inconclusive.

It was agreed that there be a new section 24.2, indicating that modification of any orders issued by the court under section 24 be sought by motion filed with the court.

Rule 25, Recording of hearings. The subcommittee determined to modify section 25.1 (d) as follows: “except as authorized under section 25.3, 25.4 and 28, no person shall record, transmit or broadcast any court proceeding.”

The next meeting will be held on Wednesday, May 9, at 2:30 p.m. at the Law Offices of Mahon, Quinn & Mahon, in Meriden.

The meeting was adjourned at 4:45 p.m.

Approved May 9, 2012

The following revised drafts of the rules concerning exhibits, ex parte communications, orders issued without notice and hearing, case conferences, recording of hearings, participation in hearings by electronic means, news media coverage and witnesses, incorporate the changes referred to in the foregoing minutes.

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. Subject to the provisions of section 21.3, 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. Subject to the provisions of section 21.2, and unless otherwise ordered by the *court*, the attorney representing a *party* or a *party* unrepresented by an attorney may 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 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*.

(c) 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 shall be directed to the clerk.

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

Rule 23 Orders without Notice and Hearing.

Sec. 23.1 When order without notice and hearing permitted.

(a) The *court* may issue an order without notice and hearing if:

- (1) the governing statute specifically authorizes the issuance of orders without prior notice and hearing;
- (2) the governing statute contains no provision for notice and a hearing; or
- (3) each necessary *party* has waived notice of a hearing.

(b) The *court* may require notice and a hearing before issuing an order permitted under section 23.1(a).

Rule 24 Case Conference.

Sec. 24.1 Case management conference.

(a) The *court* may, at any time, on its own motion or at the request of a *party* to a contested proceeding, may order a case management conference to address matters related to the proper and expeditious progress of the proceeding, including:

- (1) depositions;
- (2) the extent to which written discovery should be permitted;
- (3) scheduling for motions and discovery;
- (4) deadline for discovery and depositions;
- (5) articulation of issues;
- (6) disclosure of persons with factual knowledge of the matter in dispute;
- (7) scheduling of trial;
- (8) whether the matter should be referred to alternative dispute resolution;
- (9) whether the matter should be referred to a probate magistrate for hearing; and
- (8) any other matter the *court* considers appropriate to assist in management of the proceeding.

(b) At the conclusion of a case management conference, the *court* may issue a case management order with respect to a matter addressed at the conference.

Sec. 24.2 Status conference.

(a) The *court*, on its own motion or at the request of a *party* to a contested proceeding, may, at any time, order a status conference to consider any matter sufficiently related to the proceeding.

(b) The *court* may not issue any order in connection with a status conference unless the order is permitted under section 23.1.

Sec. 24.3 Trial management conference.

(a) The *court* may, at any time, on its own motion or at the request of a *party* to a contested proceeding, may order a trial management conference to consider matters related to the conduct of the hearing, including:

- (1) identification of issues;
- (2) procedure for issuance of trial subpoenas;
- (3) need for motions and scheduling;
- (4) prehearing brief;
- (5) stipulation of facts;
- (6) exchange and marking of documents the parties believe may be offered in evidence at the hearing;
- (7) whether sworn statements or depositions may be introduced;
- (8) whether a stenographic or other official record of the proceeding will be maintained;
- (9) identity of witnesses;
- (10) anticipated length of trial;
- (11) scheduling of trial;
- (12) whether the matter should be referred to alternative dispute resolution; and
- (13) any other matter the *court* considers appropriate to assist in management of the proceeding.

(b) At the conclusion of a trial management conference, the *court* may issue a trial management order with respect to a matter addressed at the conference.

Sec. 24.4 Modification of orders. Requests to modify any order issued by the court under section 24 shall be made by motion filed with the court.

Rule 25 Recording of Hearings.

Sec. 25.1 Making and maintaining recordings.

(a) The *court* shall make a recording of a *court* proceeding when required by statute.

(b) If not otherwise required by statute, the *court* shall make a recording of a *court* proceeding on the request of a *party* pursuant to statute.

(c) If not required under subsections (a) and (b), the *court* may, in its discretion, make a recording of any matter before it.

(d) Except as authorized under section 25.3, 25.4 and 28, no person shall record, transmit or broadcast any *court* proceeding.

(e) Except in confidential matters, the *court* shall provide a copy of a recording of a *court* proceeding to any person on request and payment any applicable statutory fee.

(f) In confidential proceedings, the *court* shall, unless otherwise provided by statute, provide a copy of a recording of a *court* proceeding to any *party* on request and payment of any applicable statutory fee.

(g) The *court* shall maintain a recording of a *court* proceeding made under sections 25.1(a) and (b) for one year, or such longer period as may be directed by the *court* or regulations promulgated by the *probate court administrator*. A recording made under section 25.1(c) may be maintained for a period that the *court* determines.

(C.G.S. Secs. 45a-136, 45a-645a, 17a-498, 17a-685, Probate Court Regulations Sec. 27)

Sec. 25.2 Transcript of recorded hearing. Except as required by law, the *court* is not required to cause a recording of a *court* proceeding to be transcribed.

(C.G.S. Sec.45a-186a.)

Sec. 25.3. Court may call official stenographer by agreement of parties. If each *party* agrees in writing, the *court* may call an official stenographer to make a stenographic record of a *court* proceeding. The stenographic record shall which shall, under C.G.S. sections 51-72 and 51-73, be part of the official record of the proceeding.

(C.G.S. Secs. 51-72 and 51-73.)

Sec. 25.4. Stenographic record made without call of court.

(a) Absent an agreement of the parties under section 25.3, a *party* may provide a stenographer to make a stenographic record of a *court* proceeding if the *party* provides a copy of the stenographic record to:

- (1) the *court*; and
- (2) any other *party* on payment of the cost of the copy to the reporter.

(b) A stenographic record under this section is not part of the official record of the *court* proceeding and shall have no effect on the nature of an appeal taken from a decision in the matter.

Rule 26 Participation in Hearing by Electronic Means.

Sec. 26.1 When participation by electronic means permitted.

(a) The court may, in its discretion, allow a *party* or witness to participate in a proceeding by telephonic or other electronic means if:

- (1) participation by electronic means is permitted by law;
- (2) the parties to the proceeding agree to participation by electronic means and the *court* approves; or
- (3) the *court* allows participation by electronic means.

(b) In determining whether to allow participation in a proceeding by electronic means, the *court* shall consider:

- (1) the extent to which surprise or prejudice would result from electronic participation by a witness or *party*;
- (2) the extent to which a *party* is unable to procure the physical presence of the witness;
- (3) the convenience of the parties and the cost of producing the *party* or witness in *court*;
- (4) the extent to which participation by electronic means will allow full and effective examination and cross examination;
- (5) the importance of testimony being presented in person; and

(6) other factors the *court* considers relevant.

Rule 28 News Media Coverage.

Sec. 28.1 News media coverage permitted. Except as provided in sections 27.2 through 27.4, the *court* shall permit *news media coverage*.

(C.P.B. §1-10B and 1-11B)

Sec. 28.2 News media coverage not permitted.

(a) *News media coverage* of hearings in the following matters is prohibited:

- (1) removal of parent as guardian;
- (2) temporary guardianship;
- (3) termination of parental rights;
- (4) adoption;
- (5) emancipation of minor;
- (6) commitment of an adult or child for the treatment of psychiatric disability;
- (7) application for administration of shock therapy;
- (8) involuntary administration of medication for the treatment of psychiatric disability;
- (9) commitment of an individual for treatment of drug or alcohol abuse;
- (10) special limited conservator;

- (11) guardian of person with intellectual disability;
- (12) involuntary placement of a person with intellectual disability;
- (13) proceedings concerning sterilization; and
- (14) any proceeding that must be closed to the public to comply with the law.

(b) Notwithstanding the provisions of subsection (a), the court may, in its discretion, allow media coverage of proceedings listed in subsection (a) if all parties consent.

(c) News media may not operate broadcasting, television, recording, or photographic equipment in the *court* during a recess in a hearing.

(d) *News media coverage* of a conference between an attorney for a party and the judge or between an attorney and the attorney's client is prohibited.

(e) Except as provided by these rules, *news media coverage* is prohibited in areas immediately adjacent to a courtroom during a hearing or during a recess of a hearing.

(C.P.B. §1-10B and 1-11B)

Sec. 28.3 Objection to news media coverage of probate proceeding. The *court* shall hold a hearing under section 27.3 to consider whether to limit or prohibit *news media coverage* if:

(1) a party, attorney, witness, or other interested person in a proceeding objects in advance of the proceeding to *coverage* claiming there is substantial reason to believe that the *coverage* will undermine the legal rights of a party or will significantly compromise the safety of a witness or other interested person or impact significant privacy concerns;

(2) the *court* has a substantial reason to believe that *coverage* will undermine the legal rights of a party or will significantly compromise the safety or significant privacy

concerns of a party, witness, or other interested person and if no party, attorney, witness, or other interested person has objected to the coverage; or

(3) objection is made during a proceeding to *coverage* of specific aspects of the proceeding or of specific individuals or exhibits

(C.P.B. §1-10B and 1-11B)

Sec. 28.4 Hearing on objection to news media coverage.

(a) Any person, including the news media, whose rights are at issue in considering whether to allow *news media coverage* may participate in a hearing held under this section to determine whether to limit or prohibit coverage. The burden of proving that coverage should be limited or prohibited shall be on the person who filed the objection.

(b) Subject to section 27.4(c), in deciding whether to limit or prohibit *news media coverage*, the *court* shall consider the rights at issue and shall limit or prohibit coverage only if it finds that:

(1) a compelling reason exists to limit or prohibit coverage;

(2) no reasonable alternative exists to the limitation or prohibition; and

(3) the limitation or prohibition is no broader than necessary to protect the compelling reason at issue.

(c) If an objection to *news media coverage* seeks to protect the identity of a person such as a victim of a crime, police informant, undercover agent, relocated witness, juvenile or individual in a comparable situation, the *court*, in reaching a decision under section 27.4(b), shall give great weight to the objection.

(d) The *court* shall articulate the reasons for its decision whether to limit or prohibit news media coverage.

(C.P.B. §1-10B and 1-11B)

Sec. 28.5 Broadcasting, television, recording, and photographic equipment.

(a) No broadcasting, television, recording, or photographic equipment shall be placed in or removed from a courtroom while a hearing is being held. Lenses and recording magazines, film, tape, and similar recording devices shall not be changed in the courtroom except during a recess in the hearing or other appropriate time during the hearing.

(b) Only camera, television, audio, or other recording equipment that does not produce distracting sound or light may be used to cover a proceeding. Unless otherwise approved by the *court*, the operator of the equipment shall not use artificial lighting to supplement existing light.

(C.P.B. §1-10B and 1-11B)

Sec. 28.6. Pooling arrangement for news media.

(a) The *court* may require a pooling arrangement for *news media coverage*. A single news media pool representative shall be used for each video, still camera, and radio media in the courtroom. Each media type shall make pooling arrangement for that media type, including establishment of necessary procedures and selection of pool representatives, without calling on the *court* to mediate a dispute as to an appropriate media representative or equipment for a particular proceeding. If a media group does not agree on equipment, procedures, and personnel, the *court* shall not permit the pooled coverage at the proceeding.

(b) Unless good cause is shown, a news media or pool representative seeking to broadcast, televise, record, or photograph a proceeding, at least three days before commencement of the proceeding, shall submit written notice of *news media coverage* to the *court* in which the proceeding is to be heard. Notice of *news media coverage* submitted on behalf of a pool shall contain the name of each news organization seeking to participate in the pool. The *court* shall allow coverage except as otherwise provided in this section. A news organization seeking permission to participate in a pool whose name

was not submitted with the original notice of media coverage may, at any time, submit a written notice to the *court* and shall be allowed to participate in the pool arrangement.

(C.P.B. §1-10B and 1-11B)

Sec. 28.7 Conference to establish conditions of news media coverage.

(a) The *court* may require the attendance of attorneys and media personnel at a conference to establish conditions of *news media coverage*. At the conference, the *court* shall establish any conditions.

(b) The conduct of all attorneys with respect to trial publicity is governed by Rule 3.6 of the Rules of Professional Conduct.

(C.P.B. §1-10B and 1-11B)

**Rule 29
Witnesses**

Sec. 29.1. Administration of oath. The judge or clerk shall administer an oath or affirmation to each person who is to testify as to facts in any matter before the court.

Sec. 29.2. When sequestration of witness permitted. On a finding of good cause, a court, on motion of a party or on its own motion, may order a witness in the proceeding, other than a party, to be sequestered so the witness is not able to hear the testimony of another witness.