



## **Appellate Procedure 101**

**February 11, 2020**

**6:00 p.m. – 8:00 p.m.**

**CT Bar Association**

**New Britain, CT**

**CT Bar Institute, Inc.**

CT: 2.0 CLE Credits (General)

NY: 2.0 CLE Credits (AOP)

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## Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

*--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994*

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# Appellate Procedure 101 (EDU200211)

## Agenda

|                       |                                      |
|-----------------------|--------------------------------------|
| 6:00 p.m. – 6:20 p.m. | Pre-Appeal and Perfecting the Record |
| 6:20 p.m. – 7:00 p.m. | Filing the Appeal: When & How        |
| 7:00 p.m. – 7:20 p.m. | Appellate Motions, Mid-Appeal Events |
| 7:20 p.m. – 7:40 p.m. | Briefing and Oral Argument           |
| 7:40 p.m. – 8:00 p.m. | Post-Appeal & Miscellaneous          |

## Faculty Biography

### [Scott T. Garosshen](#), [Horton Dowd Bartschi & Levesque PC](#)

Attorney Garosshen practices at a boutique appellate firm in Hartford where he spends the majority of his time before the Connecticut Appellate and Supreme Courts. Recent cases include a dispute over frozen embryos in a marital dissolution action and several First Amendment zoning challenges. Prior to joining the firm, he clerked for the Honorable F. Herbert Gruendel of the Connecticut Appellate Court.

## APPELLATE PROCEDURE 101\*

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### **Pre-Appeal – Making the Record:**

The party making the claim on appeal bears the burden of presenting an adequate record for review. P.B. § 61-10.

Appellate courts generally will not review a claim unless “it was distinctly raised at the trial or arose subsequent to the trial.” P.B. § 60-5

Exceptions – Claims you can raise on appeal for first time:

- Claim that the tribunal lacks subject-matter **jurisdiction**, sometimes personal jurisdiction
  - *Foote v. Commissioner of Correction*, 170 Conn. App. 747, 751-52 (2017) (“subject matter jurisdiction requirements may not be waived by any party, and may also be raised by a party, or the court sua sponte, at any stage of the proceedings, including on appeal”)
  - *Barr v. Barr*, 334 Conn. App. 479, 482 (2020) (“a party did not waive its challenge to personal jurisdiction . . . [where] the party was not served with process and did not appear in the action”)
- **Constitutional** claims pursuant to *State v. Golding*, 213 Conn. 233, 234-40 (1989), modified, *In re Yasiel R.*, 317 Conn. 773, 779, 781 (2015)
  - Record is adequate for review
  - Constitutional claim alleging violation of fundamental right
  - Alleged constitutional claim exists
  - If subject to harmless error analysis, state has failed to show harmlessness beyond a reasonable doubt
- **Plain error**
  - *State v. Ruocco*, 322 Conn. 796, 803 (2016) (rule of reversibility, not reviewability, reserved for extraordinary situations calling into question confidence of judicial proceedings)
- Where important issue warrants exercise of court’s **supervisory powers**
  - *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut*, 311 Conn. 123 (2014)

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\* These materials are presented as a guide for the convenience of seminar attendees. Practitioners should consult appropriate statutes, rules of practice, and decisional law when prosecuting or defending an appeal.

## **Pre-Appeal – Making the Record (cont.)**

### **Before the Decision**

#### *Pleading Issues:*

- Repleading a stricken complaint likely waives the error
  - *Ed Lally & Associates, Inc. v. DSBNC, LLC*, 145 Conn. App. 718, 746, cert. denied, 310 Conn. 958 (2013)
  - Careful repleading may preserve claim in stricken complaint, see *Suf-field Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, 260 Conn. 766, 768 n.2 (2002)
  - *HSBC Bank USA, Nat'l Ass'n v. Nathan*, 195 Conn. App. 179, 185, 89 (2020) (walkthrough of when repleading does and does not waive claim)
- Don't appeal from a ruling on a motion to strike, as there is no final judgment
  - Move for judgment on the complaint, and appeal from that ruling

#### *Evidentiary Issues:*

- Need to articulate specific grounds for object: hearsay, relevance, etc.
  - *State v. Jorge P.*, 308 Conn. 740, 753-54, 758-59 (2013)
- Mark exhibits for ID if not admitted to ensure review
  - *Quaranta v. King*, 133 Conn. App. 565, 569-71 (2012)
- Make a proffer if harm of evidentiary exclusion otherwise unclear
  - See, e.g., *State v. Collymore*, 334 Conn. 431 (2020) (unclear what additional evidence was barred by State granting witnesses immunity for their testimony in prosecution case but denying them immunity for their testimony in defense case, causing them to invoke Fifth Amendment right in response to questions)

#### *Overruling Precedent:*

- Must raise claim in trial court that appellate case should be overruled
  - *Ulbrich v. Groth*, 310 Conn. 375, 429 (2013)

#### *Jury Instructions:*

- To preserve claims of instructional error, file a request to charge or except to the charge, P.B. §§ 16-20 through 16-24
- Be aware of waiving instructional error, *State v. Kitchens*, 299 Conn. 447, 475-82 (2011); but see *State v. McClain*, 324 Conn. 802 (2017) (noting that *Kitchens* waiver rule applies to *Golding* review but not plain error)

#### *Verdict Form:*

- Draft jury interrogatories that set up your legal claim. Compare *Snell v. Norwalk Yellow Cab*, 332 Conn. 720 (2019) (reversing because interrogatories revealed inconsistent verdict), with *Sutera v. Natiello*, 189 Conn. App. 631, 637 (2019) (affirming under general verdict rule because no relevant interrogatories)

#### *Motion for Directed Verdict*

- In jury trials, move for directed verdict to preserve right to directed judgment if error found on appeal. P.B. §§ 16-35 & 16-37

## **Pre-Appeal – Making the Record (cont.)**

### **After the Decision**

#### *Verdict*

- Consider filing a motion to set aside verdict, motion for new trial, or other appropriate motion, though failure to do so no longer will limit you to plain error review. *Santopietro v. New Haven*, 239 Conn. 207, 221 (1996)

#### *Bench trial*

- Consider filing a motion to reargue, motion for reconsideration, or motion to open
  - If discretionary issue, easier than abuse of discretion review on appeal. But also allows court to correct error without achieving a better result.
  - May be necessary in specific circumstances, e.g., failure of court to articulate burden of proof when standard is higher than preponderance, *Kaczynski v. Kaczynski*, 294 Conn. 121, 131 (2009)

### **Filing the Appeal:**

#### *Actions Appealable:*

- Final judgments of the Superior Court, Conn. Gen. Stat. § 52-263; P.B. § 61-1
  - But not small claims actions, which are not appealable
  - Zoning appeals if Appellate Court grants certification, P.B. § 81-1
  - Habeas appeals if trial court grants certification or the denial of certification by trial court, Conn. Gen. Stat. § 52-470; P.B. § 80-1
    - *Goguen v. Comm'r of Correction*, 334 Conn. App. 502 (2020) (if cert. denied, must brief why abuse of discretion to do so)
  - Statutory appeals
    - Mechanic's liens, Conn. Gen. Stat. § 49-35c
    - Prejudgment remedies, Conn. Gen. Stat. § 52-278/
    - Lis pendens, Conn. Gen. Stat. § 52-325c
    - Summary process decisions, Conn. Gen. Stat. § 47a-35
    - Temporary injunction in labor dispute, Conn. Gen. Stat. § 31-118
    - Order for accounting, Conn. Gen. Stat. § 52-405
    - Election disputes, Conn. Gen. Stat. § 9-325
    - Evidentiary nonsuit, Conn. Gen. Stat. § 52-211
    - Workers' Compensation Commissioner on wrongful discharge, Conn. Gen. Stat. § 31-290a
    - Order granting class certification in CUTPA cases, Conn. Gen. Stat. § 42-110h
    - Granting of motion to set aside verdict, but not granting a new trial, Conn. Gen. Stat. § 52-263
    - Public interest appeal, Conn. Gen. Stat. § 52-265a, on certification by Chief Justice
    - Appeals by state in criminal cases, with court permission, Conn. Gen. Stat. § 54-96
- Civil contempts and criminal contempts occurring outside the courtroom
  - *Hardy v. Superior Court*, 305 Conn. 824 (2012); *In re Leah S.*, 284 Conn. 685, 690-91 (2007)

## **Filing the Appeal cont.):**

### *Where to Appeal:*

- Generally, most appeals are to the Appellate Court
- To the Supreme Court if:
  - Original jurisdiction
  - Decision declares state statute unconstitutional
  - Capitol felonies and class A felonies-
  - Election disputes
  - Cases involve censure or discipline of judges
  - Writs of error

### *Need for Final Judgment:*

- If the order or judgment from which the appeal is taken is not final, the appellate tribunal lacks subject-matter jurisdiction
  - *State v. Fielding*, 296 Conn. 26, 35-36 (2010)

### *Appealable Interlocutory Orders:*

- *State v. Curcio*, 191 Conn. 27, 31 (1983): A party may appeal an interlocutory “order or action that terminates a separate and distinct proceeding . . . or so concludes the rights of the parties that further proceedings cannot affect them.”
  - Examples:
    - Colorable claim that a party is immune from suit:
      - Double jeopardy, *State v. Moeller*, 178 Conn. 67, 70 (1979)
      - Sovereign immunity, *Miller v. Egan*, 265 Conn. 301 (2003)
        - But not governmental immunity, *Vejsi v. Rasha*, 282 Conn. 561, 572, 574 (2007)
      - Res judicata or collateral estoppel claims, *Lighthouse Landings, Inc. v. Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3 (2011).
      - Absolute immunity (i.e., litigation privilege), *Hopkins v. O'Connor*, 282 Conn. 821, 828 (2007)
      - Ministerial (i.e., clergy) immunity
    - Order to proceed to arbitration, *Dewart v. Northeastern Gas Transmission Co.*, 139 Conn. 512, 514-14 (1953)
      - But not an order refusing to stay arbitration, *Travelers Ins. Co. v. General Electric Co.*, 230 Conn. 106, 107-08 (1994), or an order staying court proceedings pending arbitration, *Gores v. Rosenthal*, 148 Conn. 218, 221-22 (1961)
    - Pendente lite alimony or child support orders, *Angle v. Angle*, 100 Conn. App. 763, 768-69 (2007)
    - Custody and visitation orders of minor children, *Madigan v. Madigan*, 224 Conn. 749, 759-55 (1993); *Taft v. Bettcher*, 243 Conn. 380, 386-87 (1997)
    - Denial of a motion to intervene as of right, *Kerrigan v. Commissioner of Public Health*, 279 Conn. 447, 449 n.3 (2006)
    - Order opening a judgment where the claim is that the court lacked authority to do so, *Connecticut Light & Power Co. Costle*, 179 Conn. 415, 423-24 (1980)



## **Filing the Appeal cont.):**

### *Ancillary Proceedings:*

- An appeal may be final even though there are further proceedings, such as:
  - Determination of counsel fees, including punitive damages, *Hylton v. Gunther*, 313 Conn. 472, 481, 483-84 (2014)
  - Calculation of contractually required interest, *Doyle Group v. Alaskans for Cuddy*, 164 Conn. App. 209, 222, cert. denied, 321 Conn. 924 (2016)

### *De Facto Extraordinary Circumstances Exception:*

- *U.S. Bank Nat'l Ass'n v. Crawford*, 333 Conn. 731 (2019)

**When in doubt, it is better to appeal and risk dismissal of a premature appeal, than not to appeal and have an appeal dismissed for lateness.**

### *Public Interest Appeals:*

- Chief Justice (or most senior justice available) may certify an expedited appeal pursuant to Conn. Gen. Stat. § 52-265a
  - Issue must be a question of law involving substantial public interest in which delay would work substantial injustice

### *Special Circumstances, see P.B. §§ 61-2 through 61-5*

- If decision resolves an entire complaint, counterclaim, or cross complaint, but remainder of case continues, the judgment is final, P.B. § 61-2
  - Appeal or file a notice of intent to appeal if a party is eliminated
  - Appeal may be deferred until conclusion of case unless an eliminated party objects to the notice of intent to appeal
- If a decision does not resolve an entire complaint, counterclaim, or cross complaint, but eliminates a party, the judgment is final as to that decision, P.B. § 61-3
  - Appeal or file notice of intent to appeal
- If decision disposes of a cause of action but not complaint, counterclaim, or cross complaint, and all parties remain, may seek written determination of final judgment from trial judge and Chief Judge of Appellate Court

### *When to Appeal:*

- Days are calendar, not working days
  - If deadline falls on day court is closed, next day court is open is the deadline, P.B. § 63-2
- Generally, 20 days after court issues notice of decision, P.B. § 63-1
  - Notice means announcement in open court or distributing written order or decision to parties
- Certain statutory appeals have shorter periods
  - E.g., summary process = 5 days
  - Mechanic's liens, PJRs, and lis pendens cases = 7 days
  - Court closures = 72 hours
  - Public interest appeal pursuant to Conn. Gen. Stat. § 52-265a = 14 days
  - Temporary injunction in labor dispute = 14 days

### *Extending the Appeal Period:*

- Motion for extension of time, P.B. § 66-1, filed with trial court
  - Court can extend appeal period for up to 20 days
  - No extensions for appeal period set by statute that is intended to be jurisdictional

### **Filing the Appeal cont.):**

- If filed at least 10 days before expiration of appeal period, appellant gets at least 10 days from notice of denial of motion for extension
- P.B. § 11-11 motion
  - If a motion filed within appeal period would render judgment ineffective, then new appeal period created from notice of ruling
    - E.g., motion to reargue, motion for reconsideration, motion to open (if filed within appeal period)
    - Does not include motion to reconsider ruling on a § 11-12 motion, motion for clarification, or issuance of transcription of oral decision
  - When § 11-11 motion filed, original appeal period continues to run, so appeal may be taken in original period or new period by either party
- P.B. § 63-6 or 63-7 motion for waiver of fees, costs, security, or appointment of counsel
  - New 20 day or statutory period to appeal
  - Only party seeking waiver or counsel may appeal during new appeal period
- **NB:** Can seek motion for extension of time on original appeal period or new appeal period created by P.B. § 11-11 motion, but not both
- **NB: A motion to open filed pursuant to P.B. § 17-4 after the expiration of the appeal period does not preserve the right to appeal the underlying decision, but instead limits issues to resolution of the motion to open only.**
  - *Farren v. Farren*, 142 Conn. App. 145, 152, cert. denied, 309 Conn. 903 (2013)

### *If the Appeal Is Late:*

- If the appeal period is jurisdictional, appellate tribunal has no discretion and must dismiss, see *Stec v. Raymark Industries, Inc.*, 299 Conn. 346, 351 (2010)
- Otherwise:
  - File appeal and hope the other side doesn't notice lateness in time
  - File a motion for permission to late file an appeal for good cause shown
    - It helps if the cause is something the court did and not the negligence of the party or counsel. See *Meribear Productions, Inc. v. Frank*, 193 Conn. App. 598 (2019)

### *Filing the Appeal:*

- Appeal must be efiled
- Have payment ready if no fee waiver
- If more than one party appealing jointly, choose joint appeal
  - Parties to the joint appeal represented by separate counsel must file consent form within 10 days. P.B. § 61-7(a)(3)
- Most appeals will be to Appellate Court
- Have list of all judges and the major/minor code involved with the matter handy
- In jurisdictional statement indicate the order or judgment appealed from that constitutes the final judgment
  - Don't just say "memorandum of decision"
- **When the appeal is filed, print or download the appeal so that you can serve it on counsel of record**
- The confirmation will indicate the docket number of the appeal

## **Filing the Appeal cont.):**

### *Papers to be Filed Within 10 Days of Appeal:*

- Preliminary Statement of Issues, P.B. § 63-4(a)(1)
  - Can be amended as of right until brief is filed
- Statement re: transcript, P.B. § 63-4(a)(2)
  - Make sure to order all trial transcripts and electronic copies of transcripts already produced
- Docketing statement, P.B. § 63-4(a)(3)
  - N.B., now can designate non-participating appellees
- Preargument conference statement, P.B. § 63-4(a)(4)
  - Complete court form JD-SC-028A
  - Does not apply to criminal, habeas, or juvenile matters, or motor vehicle appeals for DUI
- Constitutionality notice in non-criminal cases where statute has been challenged, P.B. § 63-4(a)(5)
- Any sealing notices and a copy of sealing order form (JD-CL-76)

### *Judgment file:*

- Will be required for appendix except for habeas matters involving criminal convictions, pre- and –post-judgment orders in dissolution of marriage cases, PJRs, and foreclosure cases
- Commentary to 2016 amendments to P.B. § 63-4 say appellants should submit draft judgment file to trial court clerk
- Make sure Superior Court clerk signs it!

### *Appellee's Duties:*

- If appeal is late, file a motion to dismiss within 10 days, P.B. § 63-8
  - If not timely challenged, lateness of appeal is waived
- Decide whether to file a cross appeal
  - Necessary if appellee wants to change the judgment
  - File within 10 days of appeal; no fee required
  - Proceeds from there on like an appeal
- File responsive § 63-4 papers within 20 days of appellant's papers
  - Preliminary statement of issues setting out alternate basis to affirm, rulings to be reviewed in the event of a new trial, claim that new trial rather than directed judgment should be remedy if reversed
  - Order any transcripts needed for alternate basis that appellant has not ordered
  - Augment docketing statement, if necessary

## **After the Appeal Is Filed:**

### *Preargument Conference*

- In most cases the Court will assign the case to a judge trial referee (often a retired appellate jurist) for a preargument conference
  - Generally the purpose is to settle
  - If no settlement, the PAC judge will recommend whether to transfer the case to the Supreme Court
  - PAC judge can extend the briefing schedule

## **After the Appeal Is Filed (cont.):**

### *Perfecting the Record:*

- File a motion for articulation or rectification if necessary, P.B. § 66-5
  - Rectification necessary when something is missing from the record, such as document that was filed or an exhibit or if there is an issue with transcribing evidence
  - Articulation is necessary where court does not adequately explain its reasoning
    - Appellate tribunal will read an ambiguous record to support rather than undermine judgment
  - Appellees should file either motion if necessary to resolve an alternate basis to affirm
    - Can also be effective in getting court to explain reasoning in a way that supports the judgment
    - But be careful what you wish for. *See Puff v. Puff*, 334 Conn. 341 (2020)
- Motion for articulation or rectification due 35 days after transcripts delivered or 10 days prior to brief if court sua sponte sets a different deadline for briefing.
- Motion is filed with appellate clerk and referred to trial court for decision
- If trial court denies motion or inadequately articulates, file a motion for review within 10 days, P.B. § 66-7
- If the court has not issued a written decision, file a notice pursuant to P.B. § 64-1

### *Stays:*

- Most decisions subject to automatic stay, P.B. § 61-11
- Orders not subject to automatic stay, P.B. § 61-11(b):
  - Disciplinary actions against attorneys
  - Juvenile matters
  - Administrative appeals
  - Certain orders in family cases, P.B. § 61-11(c)
    - Relief from abuse
    - Exclusive possession of residence
    - Periodic alimony and child support
    - Parenting orders
    - Automatic orders set forth in P.B. § 25-5(b) (1), (2), (3), (5), & (7)
  - Injunctions, but see Conn. Gen. Stat. §§ 52-476 & 52-477
- Court may order discretionary stay if no automatic stay, § 61-12
  - File motion with trial court
  - If trial court denies or refuses to rule, file a motion for stay with appellate tribunal for order pending motion for review
- Court may terminate automatic stay, P.B. § 61-11(e) on motion or sua sponte after hearing
  - Pre-appeal motions filed with trial court
  - Post-appeal motions filed with appellate clerk
  - Family matters and foreclosures have special rules, P.B. § 61-11(c), (g) & (h)
- Party aggrieved by a stay ruling may file a motion for review pursuant to P.B. § 66-6. See P.B. § 61-14
  - Stay rulings subject to P.B. § 64-1
  - Order transcript of hearing

## **After the Appeal Is Filed (cont.):**

### *Extensions of Time:*

- Any step of appellate process may be extended upon motion for good cause, P.B. § 66-1
- All motions filed with appellate clerk, except motion to extend time to appeal
- Motions should be filed 10 days before deadline or when cause arises
- Obtain opposing counsel's position and note on front of motion

### *Amending Appeal and Papers:*

- Appeal form may be corrected as of right within appeal period, and with leave of court after
- Appeal may be amended to challenge ruling subsequent to appeal, P.B. § 61-9
  - If amended appeal is from a final judgment, it may cure jurisdictional defect from lack of final judgment for original appeal
  - Order any additional transcripts
    - Extension of time for brief may be necessary if additional transcripts aren't completed
- Preliminary papers, P.B. § 63-4(b)
  - Preliminary statement of issues can be amended as of right until brief is filed
  - Transcript statement can only be amended with leave of court
  - Rocketing Statement can be amended at any time
  - PAC statement can be amended at PAC

## **Brief & Appendix:**

### *Brief:*

- Appellant's brief due 45 days after delivery of paper transcripts or 45 days after appeal is filed if no transcripts or appellant already has all designated transcripts, P.B. § 67-3
  - Court usually extends sua sponte to 45 days after first PAC
- Appellee's brief due 30 days after Appellant's is filed
- Reply brief due 20 days after appellee's brief filed
- See P.B. § 67-3 where cross appeal has been filed
- See P.B. § 67-2 for formatting requirements

### *Appellant's Brief Contents see P.B. § 67-4:*

- Table of Contents
- Statement of issues
  - Limit issues where possible (3-5 at most; 1 is just fine)
  - Consider standard of review when selecting issues
    - Legal issues reviewed de novo
    - Factual issues reviewed for clear error
    - Discretionary issues reviewed for abuse of discretion
    - Court will not review credibility determinations
- Table of Authorities
  - See P.B. § 67-11 for citation of authorities
- Statement of Facts and Proceedings
  - Should not be argumentative
  - Should include references to the record
- Argument
  - Issue must be briefed adequately to receive review, *Connecticut Coalition Against Millstone v. Connecticut Siting Council*, 286 Conn. 57 (2008)

### **Brief & Appendix (cont.):**

- State standard of review for each issue
- Include required content for specific claims in brief or appendix, P.B. § 67-4(d)
  - o Instructional error, evidentiary rulings, other rulings
- Conclusion stating relief sought (directed judgment, new trial, other)
- Pertinent constitutional provisions, statutes, and regulations in brief or appendix, and statement of version of land use regs (if applicable) filed with clerk

### ***Appendix***

- Part 1 is required for appellants and cross appellants, P.B. § 67-8
  - Includes content of old yellow-covered records
- Part 1 Contents
  - Table of Contents
  - Index of testimony
  - Docket sheets/case detail
  - Relevant pleadings, motions, requests, findings, opinions
  - Signed judgment file
  - Appeal form
  - Docketing Statement
  - Relevant appellate motions pertaining to perfection of record
  - Appellate Court decision (if applicable)
  - Order granting certification (if applicable)
  - Administrative appeals must comply with P.B. § 67-8A
- Part 2 is optional
  - Use to comply with content requirements of brief
  - Pertinent transcript excerpts, exhibits, or other documents that will aid the Court in preparing for argument
  - Include opinions cited in brief that are not officially published

**NB:** Court will have trial court file available to consult, so any inadvertent omissions should not preclude review.

**NB: Personally identifying information must be redacted. See P.B. § 4-7 for definition of personally identifying information**

### ***Appellee's Brief Contents*, P.B. § 67-5**

- Generally responsive in form and content to appellant's brief
- Include alternate bases to affirm or adverse rulings for review in the event of a new trial
- If appellee has cross appeal, see P.B. § 67-5(j)

### ***Appellee's Appendix:***

- Part 1
  - Include any relevant pleadings, etc., omitted from Part 1 of appellant's appendix that are pertinent
  - If cross appellant, include same pleadings is required for appellants
  - If not cross appellant, do not duplicate content of appellant's appendix
- Part 2
  - Generally the same as Part 2 of appellant's appendix

## **Brief & Appendix (cont.):**

### *Reply Brief*

- Optional, but do it.
- Cannot raise issue for the first time in a reply brief or cure inadequate briefing in opening brief, *Plante v. Charlotte Hungerford Hospital*, 300 Conn. 33, 58 (2011); *Hurley v. Heart Physicians, P.C.*, 298 Conn. 371, 378 n.6 (2010).

### *Filing Brief & Appendices:*

- Must file electronic and paper copies
  - Pdfs should be searchable
  - Considered filed when court has paper copies (must file electronic first)
- File one non-returnable, signed copy of transcripts and signed copy of land use records (if applicable) with cover sheet

### *Subsequent Authority*

- Submit letter pursuant to P.B. § 67-10

## **Oral Argument:**

### *Waiving:*

- Don't waive argument, much lower reversal rate
- Court may send letter saying argument should be waived, but give you a chance to explain why argument matters

### *Scheduling:*

- Case is ready for argument when reply brief filed or deadline passes for doing so
- Dockets no longer mailed out; check Judicial Branch Website for dates when dockets will be available and then follow up on that date
- Be sure to complete and file response to docket form to indicate conflicts or multiple cases exposed for argument

### *Timing:*

- Supreme Court: 30 minutes per side; Appellate Court: 20 minutes per side

### *Considerations for Oral Argument:*

- Know the record inside-out and backwards – questions often seek clarity in the record
- Avoid speeches and welcome questions
- Determine what you can concede
- Do a moot
- Find out panel (which can change) to get a sense of what questions to expect
- Don't go outside the record

## **Appellate Judgments:**

- Counsel receive email notice day before; decision released next day at 11:30 a.m.
- If ruling is adverse, consider whether to file a motion for reconsideration or reconsideration en banc (10 days from official release date) or petition for certification (20 days from release date or ruling on motion for reconsideration)
- Any stay generally remains through period for filing a petition for certification, P.B. § 71-6
- Prevailing party entitled to costs, P.B. § 71-2

### **Petition for Certification:**

- Typical bases, P.B. § 84-2
  - Issue of first impression or decision not in accord with Supreme Court precedent
  - Conflict among Appellate Court decisions
  - So far departed from usual proceedings to warrant supervision
  - Question of public importance
  - Divided panel
- Petition due 20 days after official release date or notice of order finally determining appeal in Appellate Court, P.B. § 84-4
- For content, see P.B. § 84-5
- For statements in opposition (file within 10 days), see P.B. § 84-6
- If cert granted, appellee can present alternate basis to affirm and any party can raise adverse rulings for review, provided claims were raised in Appellate Court
  - File statement of alternate basis or adverse rulings within 14 days of certification
- Stay generally continues, P.B. § 84-3.

### **Remand:**

- New judge per Conn. Gen. Stat. § 51-183c
  - *Lyme Land Conservation Trust, Inc. v. Platner*, 334 Conn. 279 (2019) (new judge required where judgment reversed only as to damages and remanded for new trial limited to that issue)
- If appellate court grants less than full relief, failure to appeal / move to reconsider may waive claim.
  - *In re Egypt E.*, 327 Conn. 506, 528 n.16 (2018) (in first appeal, Supreme Court remanded for new trial without reaching Petitioner's insufficient evidence claim; after retrial, in second appeal, Supreme Court acknowledged there was insufficient evidence at time of first appeal, but new evidence on retrial filled the gap), cert. denied sub nom. *Morsy E. v. Comm'r*, 202 L. Ed. 2d 27 (Oct. 1, 2018)

### **Miscellaneous:**

#### *Writs of Error:*

- Common law proceeding, governed by P.B. §§ 72-1 through 72-4
- Used for:
  - Non-parties
  - Criminal contempt occurring in court
  - Denial of transfer from small claims to regular docket
- See P.B. § 72-3 for procedure

*Amicus Briefs*, P.B. § 67-7

*Certification to Other Courts*, P.B. § 82-8



## **Miscellaneous (cont.):**

### *Format of Papers:*

- Motions, applications, petitions, opposition statements, P.B. § 66-3
- Petition for certification and opposition thereto, P.B. §§ 81-2, 81-3, 84-5, 84-6
- Briefs & Appendices, P.B. § 67-2

### *Appearance of Counsel:*

- Appearances in trial court at time of appeal carry over, P.B. § 62-8
- New counsel must file appearance
- Change in appearance after last brief filed requires leave of court, P.B. § 62-8
- Motion to withdraw appearance governed by P.B. § 62-9
- Self-represented parties are included in the definition of counsel for purposes of the rules, P.B. § 60-4

### *Certification to Counsel:*

- Generally, P.B. § 62-7
- Motions for extension, P.B. § 66-1(b) (certify to client)
- Response to docket (certify to client)
- Briefs, P.B. § 67-2(h) & (i)

### *Fees (a/o 2/1/20):*

- |                              |          |
|------------------------------|----------|
| • Entry fee for appeal:      | \$250.00 |
| • Writ of error:             | \$250.00 |
| • Petition for certification | \$75.00  |
| • Motion for reargument      | \$130.00 |

—Available at: <https://jud.ct.gov/external/super/courtfee.htm>

☐ Brief Accepted

OFFICE OF THE APPELLATE CLERK  
STATE OF CONNECTICUT  
SUPREME AND APPELLATE COURT

☒ Brief Returned

Reviewed By ll

Case Number SC (AC) [REDACTED]

Date 1-29-19

Case Name: [REDACTED]

| Yes                                 | No                       |  | Yes                                 | No                       |  |
|-------------------------------------|--------------------------|--|-------------------------------------|--------------------------|--|
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Appellant Brief (Blue) w/ attached appendix  | <input checked="" type="checkbox"/> | <input type="checkbox"/> | Cross Appellee/Appellant Reply (White)                                       |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Timely Filed (Previous Return Date _____)  | <input checked="" type="checkbox"/> | <input type="checkbox"/> | Timely Filed (Previous Return Date _____)                                    |
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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Additional ___ pages approved  | <input checked="" type="checkbox"/> | <input type="checkbox"/> | Additional ___ pages approved  |
| <input type="checkbox"/>            | <input type="checkbox"/> | Appellee Brief (Pink) w/ attached appendix   | <input type="checkbox"/>            | <input type="checkbox"/> | Reply Brief (White)  |
| <input type="checkbox"/>            | <input type="checkbox"/> | Timely Filed (Previous Return Date _____)  | <input type="checkbox"/>            | <input type="checkbox"/> | Timely Filed (Previous Return Date _____)                                    |
| <input type="checkbox"/>            | <input type="checkbox"/> | 35 pages or less or  | <input type="checkbox"/>            | <input type="checkbox"/> | 15 pages or less   |
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| <input type="checkbox"/>            | <input type="checkbox"/> | Appellee/Cross Appellant Brief (Pink)  | <input type="checkbox"/>            | <input type="checkbox"/> | Amicus Brief (Green)   |
| <input type="checkbox"/>            | <input type="checkbox"/> | Timely Filed (Previous Return Date _____)  | <input type="checkbox"/>            | <input type="checkbox"/> | Timely Filed (Previous Return Date _____)                                    |
| <input type="checkbox"/>            | <input type="checkbox"/> | 50 pages or less   | <input type="checkbox"/>            | <input type="checkbox"/> | 10 pages or less   |
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| <input type="checkbox"/>            | <input type="checkbox"/> |  | <input type="checkbox"/>            | <input type="checkbox"/> | Required footnote 1 (P.B. §67-7)   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Brief Cover and Contents   | <input type="checkbox"/>            | <input type="checkbox"/> | Supplemental Brief (Same as Original)  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Case Caption   | <input type="checkbox"/>            | <input type="checkbox"/> | Timely Filed (Previous Return Date _____)                                    |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Court Name/Docket Number   | <input type="checkbox"/>            | <input type="checkbox"/> | Compliant number of pages (see order)  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Counsel Information (incl. phone # and e-mail)   | <input type="checkbox"/>            | <input type="checkbox"/> | *Check for distribution*   |
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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Table of Authorities   | <input type="checkbox"/>            | <input type="checkbox"/> | Copies of Briefs and Appendices  |
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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Statement of Proceedings/Facts   | <input type="checkbox"/>            | <input type="checkbox"/> | Appellate Court Original plus 10 copies                                      |
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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Conclusion Stating Precise Relief Sought   | <input checked="" type="checkbox"/> | <input type="checkbox"/> | Electronic confirmation receipt  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Signature  | <input type="checkbox"/>            | <input type="checkbox"/> |  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Brief Format   | <input type="checkbox"/>            | <input type="checkbox"/> | Appendix Part 1 - Number of volumes <u>2</u>                                 |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | 12 point Arial or Univers (body and footnotes)   | <input type="checkbox"/>            | <input type="checkbox"/> | (Required for non-incarcerated Appellants)                                   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Brief pages single sided   | <input type="checkbox"/>            | <input type="checkbox"/> | Table of Contents  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Brief text is double-spaced  | <input type="checkbox"/>            | <input type="checkbox"/> | Trial Court docket entries   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Footnotes 12 point font  | <input type="checkbox"/>            | <input type="checkbox"/> | Complaint, relevant pleadings/motions/orders                                 |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Brief securely fastened along left side  | <input type="checkbox"/>            | <input type="checkbox"/> | Memo of decision/signed transcript   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Pages numbered (bottom, center of page)  | <input type="checkbox"/>            | <input type="checkbox"/> | Jury interrogatories/verdict form  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> |  | <input checked="" type="checkbox"/> | <input type="checkbox"/> | Judgment file signed by trial court  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Transcript   | <input type="checkbox"/>            | <input type="checkbox"/> | Appeal form  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Paper copy of transcript ordered by submitting party is enclosed or was previously filed   | <input type="checkbox"/>            | <input type="checkbox"/> | Appellate Court opinion (if cert granted)                                    |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Appendix Part 2 (optional)   | <input type="checkbox"/>            | <input type="checkbox"/> | Order granting certification (SC only)                                       |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Table of contents  | <input type="checkbox"/>            | <input type="checkbox"/> | Docketing Statement  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Pages numbered (bottom, center of page)  | <input type="checkbox"/>            | <input type="checkbox"/> | Pages numbered (bottom, center of page)                                      |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> |  | <input type="checkbox"/>            | <input type="checkbox"/> | *If administrative appeal, see P.B. § 67-8A (a) for additional requirements. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Certifications   | <input type="checkbox"/>            | <input type="checkbox"/> |  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | The electronically submitted brief and appendix was delivered electronically to the last known e mail address of each counsel of record from whom an e-mail address was provided; and  | <input type="checkbox"/>            | <input type="checkbox"/> |  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | The electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; and | <input type="checkbox"/>            | <input type="checkbox"/> |  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | A copy of the brief and appendix was sent to each counsel of record in compliance with § 62-7 (incl. names & contact info); and  | <input type="checkbox"/>            | <input type="checkbox"/> |  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | The brief and appendix filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and  | <input type="checkbox"/>            | <input type="checkbox"/> |  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | The brief and appendix comply with all provisions of this rule (P.B § 67-2).   | <input type="checkbox"/>            | <input type="checkbox"/> |  |

# BLUMBERG ASSOCIATES DECISION TREE

| QUESTION   | ANSWER  |
|--|---|
| I. Does issue involve subject matter jurisdiction?   | If yes, <b>reviewable</b> (mandatory).<br>If no, go to II   |
| II. Is issue raised on appeal by a party?  | If yes, go to II.A.<br>If no, go to III.  |
| II.A. Was issue distinctly raised in trial court?  | If yes, go to II.C.<br>If no, go to II.B.   |
| II.B. Was issue decided by trial court anyway?   | If yes, go to II.C.<br>If no, go to IV.   |
| II.C. Is the record adequate to decide the issue?  | If yes, <b>reviewable</b> .<br>If no, move for articulation or rectification and if necessary move for review; then <b>reviewable</b> . |
| III. Is the appellate court considering whether to raise issue <i>suo motu</i> ?   | If yes, go to III.A.<br>If no, <b>not reviewable</b> .  |
| III.A. Does <i>suo motu</i> issue concern an alternate basis to affirm?  | If yes, go to III.B.<br>If no, go to III.E.   |
| III.B. Would appellant be entitled to judgment directed but for the alternate basis to affirm?                           | If yes, go to III.C.<br>If no, go to III.G.   |
| III.C. Did appellee raise issue in trial court but not on appeal?  | If yes, go to III.D.<br>If no, go to III.G.   |
| III.D. Did trial court rule in appellee's favor on the alternate basis?  | If yes, <b>appeal dismissed</b> as moot.<br>If no, go to III.G.   |
| III.E. Does <i>suo motu</i> issue involve an issue to be considered if the appellant is entitled to further proceedings? | If yes, go to III.F.<br>If no, go to III.G.   |
| III.F. Is it likely that the issue will arise on remand?   | If yes, <b>reviewable</b> .<br>If no, go to III.G.  |
| III.G. If you arrive on this square the answer is:   | Go to IV, but the appellate court has discretion whether or not to review issue after both sides are given a chance to brief issue.     |
| IV. For all unpreserved issues, the following questions must be asked:   |   |
| IV.A. Is the record adequate to decide the issue?  | If yes, go to IV.B.<br>If no, <b>not reviewable</b> .   |
| IV.B. Is the issue a constitutional one?   | If yes, go to IV.C.<br>If no, go to IV.F.   |
| IV.C. Does the constitutional issue involve violation of a fundamental right?  | If yes, go to IV.D.<br>If no, go to IV.F.   |

|   |  |
|---|--|
| IV.D. Does the constitutional violation exist and did it deprive the appellant of a fair trial?   | If yes, go to IV.E.<br>If no, go to IV.F.  |
| IV.E. Is the constitutional violation not harmless beyond a reasonable doubt?   | If yes, <b>reviewable</b> under <i>Golding</i> doctrine.<br>If no, go to IV.F.                           |
| IV.F. Is the error so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings?  | If yes, <b>reviewable</b> under plain error doctrine.<br>If no, go to IV.G.                              |
| IV.G. Has opposing party made a colorable claim of prejudice if issue is considered because that party would have proceeded differently in the trial court had the issue been raised? | If yes, go to IV.H.<br>If no, go to IV.I.  |
| IV.H. Has party favoring review of issue established lack of prejudice to other party?  | If yes, go to IV.I.<br>If no, go to IV.N.  |
| IV.I. Does the opposing party object to review of issue?  | If yes, go to IV.J.<br>If no, go to IV.K.  |
| IV.J. Is issue hopeless for party favoring review?  | If yes, go to IV.K.<br>If no, go to IV.N.  |
| IV.K. Are there special reasons favoring review?  | If yes, go to IV.L.<br>If no, go to IV.N.  |
| IV.L. Is review possible without an extremely complex, time-consuming analysis?   | If yes, go to IV.M.<br>If no, go to IV.N.  |
| IV.M. Is the issue well briefed?  | If yes, <b>reviewable</b> at court's discretion under supervisory powers doctrine.<br>If no, go to IV.N. |
| IV.N. Is the issue of public character?   | If yes, <b>reviewable</b> at court's discretion under supervisory powers doctrine.<br>If no, go to IV.O. |
| IV.O. Is there an intervening change in the law?  | If yes, <b>reviewable</b> as above.<br>If no, go to IV.P.  |
| IV.P. Is there a newly established undisputed fact on which both parties relied?  | If yes, <b>reviewable</b> as above.<br>If no, go to IV.Q.  |
| IV.Q. Would review obviate need to address a constitutional question?   | If yes, <b>reviewable</b> as above.<br>If no, go to IV.R.  |
| IV.R. Was evidentiary ruling correct but for the wrong reason?  | If yes, <b>reviewable</b> as above.<br>If no, go to IV.S.  |
| IV.S. Does claim involve judicial bias?   | If yes, <b>reviewable</b> as above.<br>If no, see below.   |

**If you reach the end of the decision tree and the answer is no, it is time to give up.**