

6-7

Del Ciampo, Joseph

To: RC 2018/2019 Members
Subject: Item 6-7 Research

Dear Judges,

On January 22, 2019, the Rules Committee considered a proposal by Hon. James W. Abrams, Chief Administrative Judge, Civil Matters, to amend Section 23-68 regarding interactive audiovisual devices to permit any person to appear by such device upon motion and at the discretion of the judicial authority. After discussion, the Committee tabled the matter to the its February meeting to allow my office to conduct general research on the matter. Attached is a memorandum that points out various items that you may wish to consider in connection with this proposal.

Joseph J. Del Ciampo
Director of Legal Services
Connecticut Judicial Branch
100 Washington Street, 3rd Floor
Hartford, CT 06106

e-mail: Joseph.DelCiampo@jud.ct.gov

Tel: (860) 706-5120
Fax: (860) 566-3449

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LEGAL SERVICES

Shanna O'Donnell, *Administrative Trainee*

100 Washington Street
Hartford, CT 06106
T: 860-706-5120 F: 860-566-3449
jud.ct.gov

Memo

To: Director Joseph Del Ciampo
From: Shanna O'Donnell
Date: February 6, 2019
Re: Proposed revisions to Practice Book section 23-68, item 5-11 on the 1/22/19 Rules Committee agenda.

You asked me to review the proposed amendments to Practice Book section 23-68. These amendments were proposed by Judge Abrams and Court Operations and expand the existing rule regarding appearances by interactive audiovisual device (IAD) by parties and counsel in civil (including small claims) and family (including family support magistrate) matters to permit such appearances by any person upon motion and at the discretion of the judicial authority.

Analysis of Language of Proposed Revisions

Replacing "any party or counsel" with "any person" in subsections (a) and (c) of Practice Book section 23-68 creates some ambiguity in the rule, which may have unintended consequences. Careful amendment to the language of this section should resolve those ambiguities, as outlined below.

Section 23-68 (a)

"Upon motion of any party, and at the discretion of the judicial authority, any [party or counsel] person may appear by means of an interactive audiovisual device at any proceeding in any civil matter, including all proceedings within the jurisdiction of the small claims section, or any family matter, including all proceedings within the jurisdiction of the family support magistrate division."

As proposed, this revision does not limit the "person" appearing by IAD to someone who is already legally involved in the underlying case. It would theoretically allow a party to file motions asking to have the judge, a juror, a friend, or an individual otherwise not involved in the case to appear by IAD. While the granting of this motion is left to the discretion of the judge and will prevent such events from occurring, there is no check on the number and frequency of such motions that a party could file.

If intent of this revision, as explained in the Commentary, is limited to allowing parties, witnesses, or counsel to appear by IAD, then the proposed rule could be amended to innumerate those three categories as follows:

“Upon motion of any party, and at the discretion of the judicial authority, any party, counsel, or witness may appear by means of an interactive audiovisual device at any proceeding in any civil matter, including all proceedings within the jurisdiction of the small claims section, or any family matter, including all proceedings within the jurisdiction of the family support magistrate division.”

If the intent is to provide for the judges or jurors or other individuals to attend hearings by IAD in the future without listing them directly, perhaps it could be reworded as “any person who has a legal right or obligation to participate in the proceeding”.

Section 23-68 (c)

“For purposes of this section, an interactive audiovisual device must operate so that any party and his or her counsel, if any, any person and the judicial authority can see and communicate with each other simultaneously. In addition, a procedure by which an incarcerated individual and his or her counsel can confer in private must be provided.”

As proposed, this revision does not limit “any person” to the specific individual that the motion contemplated in section 23-68 (a) concerns. Read literally, this paragraph could be read to allow any individual (i.e. a member of the public otherwise uninvolved in the case) to claim a right to be able to see and communicate with the court, the parties, and counsel in any case involving an IAD. The proposal could be amended to address this issue. Suggested language:

“An interactive audiovisual device must operate so that the judicial authority; any party and his or her counsel, if any; and any person appearing by means of an interactive audiovisual device pursuant to a court order under this section can see and communicate with each other simultaneously. In addition, a procedure by which an incarcerated individual appearing pursuant to this section and his or her counsel can confer in private must be provided.”

Impact on Other Rules or Procedures

Oaths

Under Practice Book section 5-3, oaths shall be administered to witnesses as they take the stand at trial. If witnesses are allowed to testify by IAD, this section would need to be amended and a means to take an oath by IAD specified. Currently, Practice Book section 5-11 allows for appearance by IAD in cases involving orders of protection. In those instances, the specific language is “The court shall provide for the administration of an oath to such party or child prior to the taking of such testimony as required by law.” Similar language could be used with the revised section 23-68.

Section 1-22 of the Connecticut General Statutes provides for the ceremony to be used when administering an oath and does not specifically address the physical presence of the person taking the oath. In practice, incarcerated parties appearing by IAD in family support magistrate matters are placed under oath by the courtroom clerk using the IAD.

Witness Fees

Currently, section 52-260 of the Connecticut General Statutes sets compensation for witnesses, based on a daily rate for attendance and a fee for mileage for travel to the place of trial. This statute would likely need to be amended to state that any witness appearing by IAD will not

receive mileage. Otherwise, as written, an individual appearing by IAD would still be paid a fee for travel, even if the witness need not travel at all.

Under section 52-143 (d) of the Connecticut General Statutes, witnesses summoned by the state are to be paid by the clerk at the court on the day they appear and must give the subpoena to the clerk. This statute would need to be amended to address the payment of fees to individuals appearing by IAD.

Subpoenas

Currently, the form of the subpoena specified by section 52-144 of the Connecticut General Statutes commands someone to appear at a specific date and time at a specific location. If the proposed revision to Practice Book section 23-68 is intended to allow for the appearance by IAD of subpoenaed witnesses, the subpoena form and process would need to be amended.

Section 7-19 of the Practice Book allows for subpoenas to "compel the attendance of necessary witnesses." If subpoenas are to be used for the appearance of a witness by IAD, this section may need to be amended, or section 23-68 could specify that appearing by IAD is equivalent to physical presence where rules and statutes describe "attending", "attendance", "presence" or "appearing before." There are already provisions that IAD can take the place of a physical appearance that is required by the rules. For example, section 23-40 of the Practice Book, regarding court appearance in habeas corpus matters, states "[...] the physical appearance in court of the petitioner or the subject of the petition may, in the discretion of the judicial authority, be made by means of an interactive audiovisual device [...]"

There may also need to be procedures or rules put in place regarding the timing of the issuance of subpoenas related to the filing of a motion for IAD appearance. It is unclear if the party intending to call a witness should subpoena the witness first and then file the IAD motion, which might necessitate another subpoena, or to do the reverse and file the IAD motion before the subpoena.

At this time, there is no requirement that the potential witness be notified that a party has moved to have that witness appear by video. Some individuals might have reason to object to appearing via IAD, whether technical, cultural, or personal. As they are not parties, they may not receive notice that a motion has been filed, and may not know of the case at all unless they already received a subpoena. Section 23-68 may need to include a provision for notice to the witness and some path to attempt to quash or object to being called to testify by IAD.

~~5-11~~ (6-7)

Proposal by Judge Abrams/Court Operations to amend Section 23-68 regarding interactive audio visual devices to permit any person to appear by such device upon motion and at the discretion of the judicial authority.

STATE OF CONNECTICUT
SUPERIOR COURT



CHAMBERS OF
JAMES W. ABRAMS
CHIEF ADMINISTRATIVE JUDGE -
CIVIL MATTERS/
ADMINISTRATIVE JUDGE -
NEW HAVEN JUDICIAL DISTRICT

JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN
235 CHURCH STREET NEW HAVEN, CONNECTICUT 06510
TELEPHONE: (203) 503-6830 FAX: (203) 789-6826

Via Regular Mail and Email

January 16, 2018

Hon. Andrew J. McDonald, Chair
Rules Committee of the Superior Court
231 Capitol Avenue
Hartford, CT 06106

Re: Proposed Revisions to Practice Book § 23-68

Dear Justice McDonald:

I write in my role as Chief Administrative Judge for Civil Matters. Enclosed is a proposed revision to Practice Book § 23-68 which would allow judges the discretion to permit witnesses to testify via audiovisual device. It comes with my strong recommendation.

Please feel free to contact me if I can answer any questions or be of further assistance.

Sincerely,

James W. Abrams

cc: Joseph Del Ciampo, Esq.

Sec. 23-68. Where Presence of Person May Be by Means of an Interactive Audiovisual Device

(a) Upon motion of any party, and at the discretion of the judicial authority, any [party or counsel] person may appear by means of an interactive audiovisual device at any proceeding in any civil matter, including all proceedings within the jurisdiction of the small claims section, or any family matter, including all proceedings within the jurisdiction of the family support magistrate division.

(b) Upon order of the judicial authority, an incarcerated individual may be required to appear by means of an interactive audiovisual device in any civil or family matter.

(c) For purposes of this section, an interactive audiovisual device must operate so that any party and his or her counsel, if any, any person, and the judicial authority can see and communicate with each other simultaneously. In addition, a procedure by which an incarcerated individual and his or her counsel can confer in private must be provided.

(d) Unless otherwise required by law or unless otherwise ordered by the judicial authority, prior to any proceeding in which a person appears by means of an interactive audiovisual device, copies of all documents which may be offered at the proceeding shall be provided to all counsel and self-represented parties in advance of the proceeding.

(e) Nothing contained in this section shall be construed to limit the discretion of the judicial authority to deny a request to appear by means of an interactive audiovisual device where, in the judicial authority's judgment, the interest of justice or the presentation of the case require that the party or counsel appear in person.

(f) For purposes of this section, judicial authority includes family support magistrates and magistrates appointed by the chief court administrator pursuant to General Statutes § 51-193f.

Commentary: The rule has been amended to permit any person to appear by means of an interactive audiovisual device upon motion and at the discretion of the judicial authority. This revision broadens the application of the rule to include appearances by means of an interactive audiovisual device by expert witnesses or other witnesses, which will increase the court's flexibility in scheduling matters, minimize the inconvenience to witnesses, and reduce the costs of litigation.