APPENDIX A

Sec. 1-1. Short Title; Application

(a) Short title. These rules shall be known and may be cited as the Code of Evidence. The Code of Evidence is hereinafter referred to as the "Code."

(b) Application of the Code. The Code and the commentary apply to all proceedings in the Superior Court in which facts in dispute are found, except as otherwise provided by the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

(c) Rules of privilege. Privileges shall apply at all stages of all proceedings in the court.

(d) The Code inapplicable. The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to, the following:

(1) Proceedings before investigatory grand juries, as provided for in General Statutes §§ 54-47b through 54-47f.

(2) Proceedings involving questions of fact preliminary to the determination of the admissibility of evidence as provided in **[**pursuant to**]** Section 1-3 (a) of the Code.

(3) Proceedings involving sentencing.

(4) Proceedings involving probation.

(5) Proceedings involving small claims matters.

(6) Proceedings involving summary contempt.

(7) Certain pretrial criminal proceedings in which it has been determined as a matter of statute or decisional law that the rules of evidence do not apply.

COMMENTARY

(b) Application of the Code.

When the Code was initially adopted by the judges of the Superior Court in 1999 and then readopted by the Supreme Court in 2014, the adoption included both the rules and the commentary, thereby making both equally applicable. See *State* v. *Pierre*, 277 Conn. 42, 60, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

The Code is broadly applicable. The Code applies to all civil and criminal bench or jury trials in the Superior Court. The Probate Assembly adopted Probate Rule 62.1, effective July 1, 2013, making the Code applicable to all issues in which facts are in dispute. The Code applies, for example, to the following proceedings:

(1) court-ordered fact-finding proceedings conducted pursuant to General Statutes § 52-549n and Practice Book § 23-53; see General Statutes § 52-549r;

(2) probable cause hearings conducted pursuant to General Statutes § 54-46a, excepting certain matters exempted under General Statutes § 54-46a (b); see *State* v. *Conn*, 234 Conn. 97, 110, 662 A.2d 68 (1995); *In re Ralph M.*, 211 Conn. 289, 305–306, 559 A.2d 179 (1989);

(3) juvenile transfer hearings conducted pursuant to General Statutes § 46b-127 as provided in subsection (b) of that provision*; In re Michael B.*, 36 Conn. App. 364, 381, 650 A.2d 1251 (1994*); In re Jose M.*, 30 Conn. App. 381, 384–85, 620 A.2d 804, cert. denied, 225 Conn. 921, 625 A.2d 821 (1993);

(4) juvenile proceedings; however, adoption of subsection (b) is not intended to abrogate the well established rule that the court may relax its strict application of the

formal rules of evidence to reflect the informal nature of juvenile proceedings provided the fundamental rights of the parties are preserved; *In re Juvenile Appeal (85-2),* 3 Conn. App. 184, 190, 485 A.2d 1362 (1986); see *Anonymous* v. *Norton*, 168 Conn. 421, 425, 362 A.2d 532, cert. denied, 423 U.S. 925, 96 S. Ct. 294, 46 L. Ed. 2d 268 (1975); Practice Book § 32a-2 (a); and

(5) proceedings involving family relations matters enumerated under General Statutes § 46b-1.

The Code is not intended to apply to matters to which the technical rules of evidence traditionally have not applied. Thus, for example, the Code would be inapplicable to hearings on the issuance of bench warrants of arrest or search warrants conducted pursuant to General Statutes §§ 54-2a and 54-33a, respectively; see *State* v. *DeNegris*, 153 Conn. 5, 9, 212 A.2d 894 (1965); *State* v. *Caponigro*, 4 Conn. Cir. Ct. 603, 609, 238 A.2d 434 (1967).

Matters to which the Code specifically is inapplicable are set forth in subsection (d).

(c) Rules of privilege.

Subsection (c) addresses the recognition of evidentiary privileges only with respect to proceedings in the court. See Article V—Privileges. It does not address the recognition of evidentiary privileges in any other proceedings outside the court, whether legislative, administrative or quasi-judicial, in which testimony may be compelled.

(d) The Code inapplicable.

Subsection (d) specifically states the proceedings to which the Code, other than with respect to evidentiary privileges, is inapplicable. The list is intended to be illustrative

rather than exhaustive, and subsection (d) should be read in conjunction with subsection (b) in determining the applicability or inapplicability of the Code. The removal of these matters from the purview of the Code generally is supported by case law, the General Statutes or the Practice Book. They include:

(1) proceedings before investigatory grand juries; e.g., *State* v. *Avcollie*, 188 Conn. 626, 630–31, 453 A.2d 418 (1982), cert. denied, 461 U.S. 928, 103 S. Ct. 2088, 77 L. Ed. 2d 299 (1983);

(2) preliminary determinations of questions of fact by the court made pursuant to Section 1-3 (a); although there is no Connecticut authority specifically stating this inapplicability, it is generally the prevailing view. E.g., Fed. R. Evid. 104 (a); Unif. R. Evid. 104 (a), 13A U.L.A. 16–17 (1999);

(3) sentencing proceedings following trial; e.g., *State* v. *Huey*, 199 Conn. 121, 126, 505 A.2d 1242 (1986); see also *State* v. *Pena*, 301 Conn. 669, 680–83, 22 A.3d 611 (2011) (in sentencing, trial court may rely on evidence bearing on crimes of which defendant was acquitted). The Code, however, does apply to sentencing proceedings that constitutionally require that a certain fact be found by the trier of fact beyond a reasonable doubt before the defendant is deemed eligible for a particular sentence. See, e.g., *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); *Bullington* v. *Missouri*, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981) ("many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing . . . in a capital case");

(4) hearings involving the violation of probation conducted pursuant to General Statutes § 53a-32 (a); *State* v. *White*, 169 Conn. 223, 239–40, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975); *In re Marius M.*, 34 Conn. App. 535, 536, 642 A.2d 733 (1994);

(5) proceedings involving small claims matters; General Statutes § 52-549c (a); see Practice Book § 24-23;

(6) summary contempt proceedings; see generally Practice Book § 1-16; and

(7) certain criminal pretrial proceedings; see, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 26–30, 981 A.2d 427 (2009); see also General Statutes § 54-64f (b) (hearing on revocation of release).

Nothing in subsection (d) (2) abrogates the common-law rule that in determining preliminary questions of fact upon which the application of certain exceptions to the hearsay rule depends, the court may not consider the declarant's out-of-court statements themselves in determining those preliminary questions. E.g., *State* v. *Vessichio*, 197 Conn. 644, 655, 500 A.2d 1311 (1985) (court may not consider coconspirator statements in determining preliminary questions of fact relating to admissibility of those statements under coconspirator statement exception to hearsay rule; see Section 8-3 [1] [E]), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986); *Robles* v. *Lavin*, 176 Conn. 281, 284, 407 A.2d 958 (1978) (in determining whether authorized admissions against party opponent exception to hearsay rule applies, authority to speak must be established before alleged agent's declarations can be introduced; see Section 8-3 [1] [C]); *Ferguson* v. *Smazer*, 151 Conn. 226, 231, 196 A.2d 432 (1963) (in determining whether hearsay exception for statements of pedigree and family relationships applies,

declarant's relationship to person to whom statement relates must be established without reference to declarant's statements; see Section 8-6 [7]).

Sec. 1-3. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification **[**and**]** or competence of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court.

(b) [Admissibility] Relevance conditioned on fact. [When the admissibility of evidence depends upon connecting facts,**]** If the relevance of evidence depends upon whether a fact exists, evidence must be admitted sufficient to support a finding that the fact does exist. **[**t**]**The court may admit the proffered evidence **[**upon proof of**]** on the condition that the connecting **[**facts or subject to later proof of the connecting facts**]** evidence be introduced subsequently.

COMMENTARY

(a) Questions of admissibility generally.

The admissibility of evidence, qualification of a witness, **[**authentication of evidence**]** or **[**assertion**]** applicability of a privilege **[**often is conditioned on a disputed fact**]** are preliminary questions to be determined by the court. Often, such a determination is dependent upon the existence of foundational facts. Was the declarant's statement made under the stress of excitement? Is the alleged expert a qualified social worker? Was a third party present during a conversation between husband and wife? In each of these examples, the **[**admissibility of evidence, qualification of the witness or assertion of a privilege**]** court's determination will turn upon the answer to these foundational questions of fact. In most instances, **[**S**]**subsection (a) makes it the responsibility of the court to **[**determine**]** find these **[**types of**]** preliminary **[**questions of**]** facts. E.g., *State* v. *Stange*, 212 Conn. 612, 617, 563 A.2d 681 (1989); *Manning* v. *Michael*, 188 Conn. 607, 610, 453 A.2d 1157 (1982); *D'Amato* v. *Johnston*, 140 Conn. 54, 61–62, 97 A.2d 893 (1953).

[As it relates to authentication, this Section operates in conjunction with Section 1-1 (d) (2) and Article IX of the Code. The preliminary issue, decided by the court, is whether the proponent has offered a satisfactory foundation from which the finder of fact could reasonably determine that the evidence is what it purports to be. The court makes this preliminary determination in light of the authentication requirements of Article IX. Once a prima facie showing of authenticity has been made to the court, the evidence, if otherwise admissible, goes to the fact finder, and it is for the fact finder ultimately to resolve whether evidence submitted for its consideration is what the proponent claims it to be. *State* v. *Carpenter*, 275 Conn. 785, 856–57, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); *State* v. *Colon*, 272 Conn. 106, 188–89, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Shah*, 134 Conn. App. 581, 593, 39 A.3d 1165 (2012).**]**

Pursuant to Section 1-1 (d) (2), courts are not bound by the Code in determining most preliminary questions of fact under subsection (a) **[**, except with respect to evidentiary privileges**]**. Accordingly, in finding these facts, the court may consider nonprivileged evidence that would otherwise be inadmissible under the Code. In such instances, the court acts as the fact finder in determining whether the foundational facts exist by a fair preponderance of the evidence. The court may assess the credibility of the foundational evidence, including any testimony offered by the proponent of the evidence.

The Code does apply, however, to factual determinations regarding the existence of an evidentiary privilege, see Section 1-1 (d); and questions of conditional relevance, including whether evidence has been sufficiently authenticated. See Section 1-3 (b).

(b) [Admissibility] Relevance conditioned on fact.

Frequently, the **[**admissibility**]** relevance of a particular fact or item of evidence depends upon **[**proof**]** evidence of another fact or other facts, i.e., connecting facts. For example, the **[**relevancy**]** relevance of a witness' testimony that the witness observed a truck swerving in and out of the designated lane at a given point depends upon other testimony identifying the truck the witness observed as the defendant's. Similarly, the probative value of evidence that *A* warned *B* that the machine *B* was using had a tendency to vibrate depends upon other evidence establishing that *B* actually heard the warning. When the **[**admissibility**]** relevance of evidence depends upon **[**proof**]** evidence of

connecting facts, subsection (b) authorizes the court to admit the evidence upon **[**proof**]** admission of the connecting facts or **[**admit the evidence**]** subject to later **[**proof**]** admission of the connecting facts. See, e.g., *State* v. *Anonymous (83-FG)*, 190 Conn. 715, 724–25, 463 A.2d 533 (1983); *Steiber* v. *Bridgeport*, 145 Conn. 363, 366–67, 143 A.2d 434 (1958) **[**; see also *Finch* v. *Weiner*, 109 Conn. 616, 618, 145 A. 31 (1929) (when admissibility of evidence depends upon connecting facts, order of proof is subject to discretion of court)**]**.

If the proponent fails to introduce evidence sufficient to **[**prove**]** support a finding of the connecting facts, the court may instruct the jury to disregard the evidence or order the earlier testimony stricken. *State* v. *Ferraro*, 160 Conn. 42, 45, 273 A.2d 694 (1970); *State* v. *Johnson*, 160 Conn. 28, 32–33, 273 A.2d 702 (1970).

The authentication of evidence is another example of an instance in which the relevance of evidence to the case depends upon the existence of another fact or facts. Evidence can be relevant for the purpose for which it is being offered only if it is what the proponent claims it to be. As a preliminary matter, the court must decide whether the proponent has offered a satisfactory foundation from which the finder of fact could reasonably determine that the evidence is what it purports to be. The court makes this preliminary determination in light of the authentication requirements of Article IX. In conducting its preliminary inquiry, the court does not assess the credibility of the evidence proffered in support of authentication but simply determines whether the evidence, if credited, is sufficient to support a finding that the proffered evidence is what the proponent claims it to be. *State* v. *Porfil*, 191 Conn. App. 494, 519–21, 215 A.3d 161 (2019), cert. granted on other grounds, 333 Conn. 923, 218 A.3d 67(2019). If the court determines that a prima facie showing of authenticity has been made, the evidence, if otherwise admissible, goes to the fact finder. It is for the fact finder ultimately to decide whether evidence submitted for its consideration is what the proponent claims it to be. *State* v. *Carpenter*, 275 Conn. 785, 856–57, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); *State* v. *Colon*, 272 Conn. 106, 188–89, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Shah*, 134 Conn. App. 581, 593, 39 A.3d 1165 (2012); see also commentary to Section 9-1.

The Code applies in making determinations required by Section 1-3 (b).