2004 Update on Evidence
(and sundry cases of interest to the trial bar)

By Bob Adelman and Neil W. Sutton
Adelman Hirsch & Newman, Bridgeport

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INTRODUCTION

The Update on Evidence covers civil cases and (insofar as the rules therein are useful in civil cases) criminal cases published from September 2, 2003 through August 31, 2004.

The Table of Contents and section headings appear out of sequence because they follow the format of the Connecticut Code of Evidence ("C.C.E."), with four additional headings. The C.C.E. became effective on January 1, 2000.

Because the C.C.E. does not cover every evidentiary issue (see, commentary to C.C.E. §1-2(b)), in addition to the ten articles outlined in the Code, this Update includes four additional headings.

IV. Relevancy

§ 4-1 EXPERT'S PERSONAL PREFERENCE NOT RELEVANT ON STANDARD OF CARE - FISHER VS. ZBOROWSKI, 83 Conn. App. 42 (2004); Bishop, J.; Trial Judge - Budney, J.

RULE: If an expert concedes a method used by the defendant was within the standard of care, his preference for a different method is irrelevant.

FACTS: Dental malpractice case in which it was alleged that the defendant placed a dental implant too deep and struck a nerve, causing permanent numbness. Plaintiff's expert Gelb described five alternative preoperative methods of measurement that could be used to prevent an implant from striking the nerve. Defendant had used one of these methods. The expert was not permitted to testify as to which of these preoperative methods of measurement he preferred since all of the described methods were within the standard of care.

REASONING:

> "The record reveals that the plaintiff was precluded from questioning Gelb only about the preoperative methods of measurement he preferred to use in his practice in 1995. Because such testimony would not have aided the trier of fact in its determination of whether the defendant's use of panoramic X rays violated the standard of care, the court did not improperly exclude it on the ground of irrelevance."

Fisher at 49.

COMMENT: In cross-examination of an opponent's expert, testimony regarding the expert's preference is admissible on credibility. Raybeck v. Danbury Orthopedic Associates, P.C., et al., 72 Conn. App. 359, 379 (2002).

§ 4-3 EFFECT OF HEPATITIS ON GENERAL HEALTH MORE PROBATIVE THAN PREJUDICIAL - RAMO V. RAMOS, 80 Conn. App. 276 (2003), *cert. denied*, 267 Conn. 913 (2004); Cretella, J; Trial Judge - Wolven, J.

RULE: Plaintiff's hepatitis was so highly probative of his future life and health that the trial court's determination – that its probative value was outweighed by the danger of unfair prejudice – was an abuse of discretion.

FACTS: Rear-end collision, connective tissue case resulting in a verdict of $23,475.45. Blood tests showed the presence of hepatitis antibodies, although the plaintiff did not have active disease.

Plaintiff filed a motion in limine to preclude mention of his hepatitis. The trial court held that in the absence of expert testimony that the plaintiff's hepatitis would significantly affect his health or life expectancy, the probative value of the evidence was slight. On the other hand, jurors might unfairly conclude that the hepatitis was transmitted sexually or by intravenous drug use. After carefully considering the issue, the trial

court precluded the evidence as more potentially prejudicial than probative. The Appellate Court reversed.

REASONING:

> "The evidence at issue here, namely, that the plaintiff at some time had been infected with hepatitis B, was relevant to a fair determination of his damages. The plaintiff put his state of health into issue by seeking compensation for being unable to partake in his 'usual activities.'
>
> "When the evidence is relevant and the likelihood of prejudice is not great, deviation from the general rule of admissibility is not warranted and discretion has been abused if the evidence is excluded." Martins v. Connecticut Light & Power Co., 35 Conn. App. 212, 221, 645 A.2d 557, *cert. denied*, 231 Conn. 915, 648 A.2d 154 9 (1994).
>
> "Although the court essentially placed a burden on the defendant to show that the hepatitis evidence was probative, the defendant was afforded no opportunity to establish that because he had learned of the plaintiff's hepatitis diagnosis only the day before trial. Moreover, the burden properly should have been placed on the plaintiff to show that the evidence was prejudicial rather than on the defendant to evince its probative value."

Ramos at 282-83.

Regarding the fact that the defendant had failed to produce any evidence that the hepatitis would probably affect the plaintiff's health or life expectancy, the court held that the plaintiff should have disclosed the hepatitis earlier, and that therefore it was also error not to grant the defendant a continuance to marshal such evidence.

> "The [trial] court also noted that there was no duty on the plaintiff's part to disclose his hepatitis infection because it was not related to the injuries he claimed to have sustained in the accident. When a plaintiff makes a claim for damages on the basis of his inability to participate in his usual activities, *any medical condition that has any potential bearing on his health prior to the accident* should be disclosed. That is especially true in the present case, where the

> defendant conceded negligence, leaving only the issue of damages before the jury. The court did not have a reasonable basis to deny the defendant's request for a continuance. We conclude, therefore, that the court acted arbitrarily and abused its discretion in denying the motion for a continuance."

Ramos at 285 (emphasis added).

COMMENT: Despite paying lip service to the trial court's broad discretion in employing the balancing test set forth in C.C.E. §4-3, the Appellate Court substitutes its judgment for the trial court's. As for the plaintiff's duty to disclose prior to trial "any medical condition that has any potential bearing on his health", it is difficult to understand whence this duty arises. The standard interrogatories are not this broad.

§ 4-8 (b)(2) SETTLEMENT OFFER CONNECTED TO ADMISSION OF LIABILITY IS ADMISSIBLE - STATE V. ANKERMAN, 81 Conn. App. 503, *cert. denied*, 270 Conn. 901) (2004); Stoughton, J.; Trial Judge - Lager, J.

RULE: The rule prohibiting evidence of an offer to compromise or settle will not protect an offer that is connected to an admission of liability.

FACTS: Defendant attorney was accused of stealing money from his client's trust fund. At one point, he wrote a letter to the client's new attorney proposing a plan to pay back the stolen money plus interest. The letter also contained statements admitting that he had taken the money. The trial court admitted the letter in the defendant's criminal trial. The Appellate Court affirmed.

REASONING: C.C.E. §4-8, Offers to Compromise, provides as follows:

> (a) General rule. Evidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim.

> (b) Exceptions**.** This rules does not require the exclusion of: ...
> (2) statements of fact or admissions of liability made by a party.

PRACTICE NOTE: Consider adding language to the effect of the following to pretrial memos, mediations position statements, and the like: "This document is submitted as part of settlement negotiations and for no other purpose. Any admission of fact made herein is intended to concede such fact only hypothetically, for the purpose of effecting a compromise and to promote the negotiation of a settlement and should not be construed as admissions."

§ 4-8 OFFER TO SETTLE TO THIRD PARTY ADMISSIBLE – PSE CONSULTING, INC. V. MERCEDE, 267 Conn. 279, (2004); Katz, J.; Trial Judge - Tierney, J.

RULE: C.C.E. §4-8 only protects settlement offers made between the parties opposing each other at trial. It does not protect settlement offers between one of the parties and a third party.

FACTS: Construction suit brought by subcontractor PSE Consulting. The general contractor, Mercede, failed to pay PSE. PSE sued Mercede and Mercede's bonding company, National Fire Insurance Company of Hartford (National). National filed a cross-complaint against Mercede, claiming indemnification for bond payments to PSE, and Mercede cross-claimed against National, claiming breach of contract and breach of the implied covenant of good faith and fair dealing.

PSE settled its case first with National and then with Mercede. The case continued to jury verdict on the cross-claims between National and Mercede.

Mercede inadvertently obtained an email from National's counsel to the adjustor at National handling the case. The e-mail discussed settlement negotiations with PSE: "I again asked what it would take to avoid the bad faith counts, in exchange for payment of totally uncontested funds. Rosengren again had no number in mind, but understood the concept of the question and will be getting back to me. The entire [conversation] was 'off the record.'" PSE Consulting at 326-27.

National claimed that the e-mail was inadmissible pursuant to C.C.E. § 4-8. The trial court admitted the e-mail. The Supreme Court affirmed.

REASONING:

> "National claims that the trial court should have excluded this e-mail because it was evidence of an offer of settlement, which is inadmissible under §4-8 of the Connecticut Code of Evidence. The purpose of §4-8, however, is to preclude the admission of settlement offers between the parties who are opposing parties at the trial in which the evidence of the settlement is sought to be introduced. See generally Tomasso Bros., Inc. v. October Twenty-Four, Inc., 221 Conn. 194, 198 602 A.2d 1011 (1992) (explaining that policy behind exclusion of such evidence is to promote settlement of disputes between parties). Section 4-8 does not apply here because the e-mail pertains solely to settlement discussions between National and PSE, and not to the possibility of settlement between National and Mercede. Indeed, National and Mercede were codefendants in the underlying action. Accordingly, §4-8 does not preclude the admission of the e-mail into evidence.

PSE Consulting at 332-333.

§ 4-10(b) EXAMINING EXPERT'S CONNECTION TO DEFENDANT'S MALPRACTICE INSURER: "SUBSTANTIAL CONNECTION" TEST – VASQUEZ V. ROCCO, 267 Conn. 59, (2003); Palmer, J.; Trial Judge - Quinn, J.

RULE: If defendant's expert has a "substantial connection" to the insurer for the defendant physician, expert is subject to cross-examination on this point.

FACTS: Medical malpractice case in which it was alleged that the defendant negligently severed the plaintiff's common bile duct during a laparoscopic cholecystectomy.

Plaintiff sought to cross-examine defendant's expert regarding his connection to Connecticut Medical Insurance Company (CMIC). Its policyholders own CMIC, as a mutual insurance company,, so any increased profit from not paying out on cases is returned to those policyholders – who are physicians.

Plaintiff sought to establish that the expert was himself insured by CMIC; that he served on CMIC's Business Development Committee; and he had recently been appointed to serve on CMIC's Board of Directors. The trial court refused to allow the examination. The Supreme Court found error, but that the plaintiff had not established harmfulness sufficiently for appellate review.

REASONING: C.C.E. §4-10(a) generally prohibits the introduction of the fact that the defendant is carrying liability insurance. Subsection (b), however, provides that such evidence may be admitted when offered to prove bias or prejudice.

In weighing the potential prejudice to the defendant created by evidence that he is insured against the plaintiff's right to expose any bias or interest of the testifying expert, the court noted the fact that physicians licensed to practice in Connecticut are statutorily required to obtain malpractice insurance and observed that "today's jurors probably assume that all physicians carry malpractice insurance." Vasquez at 66.

To give guidance to trial courts in balancing these interests, the court adopted the "substantial connection" test.

On one hand, "when the witness is merely a policyholder of the defendant's insurer, the witness is unlikely to be influenced by that relationship," and the examination should not be allowed. Vasquez at 68. Even when the insurer is a mutual company, being a policyholder is still probably not enough of a connection, unless the plaintiff establishes that a plaintiff's verdict in the particular case may be so significant that it will have a significant effect on the company's profits.

The court held that, in the case before it, the witness' connections to CMIC – membership on its Business Development Committee and appointment to its Board of Directors – were substantial enough that the plaintiff should have been allowed to inquire.

Other factors that the court indicated would be relevant in establishing a substantial connection would be the witness receiving signification remuneration from the defendant's insurer or any employment relationship with the insurer.

At trial, two experts testified for the plaintiff and two for the defendant. The Supreme Court held that in the absence of a transcript allowing it to evaluate the importance of this particular expert's testimony in the context of the entire trial, the plaintiff had failed to prove harmfulness, despite the fact that the jury had been deadlocked for three days and received a "Chip Smith" charge twice.

Article V - Privileges

§ 5-1 COMMON LAW MARITAL COMMUNICATION PRIVILEGE RECOGNIZED - STATE V. CHRISTIAN, 267 Conn. 710 (2004); Katz, J.; Trial Judge - Maloney, J.

RULE: An individual may prevent a spouse or former spouse from testifying as to a confidential communication made by the individual to the spouse during their marriage. Objective test (reasonable expectation of confidentiality) adopted.

FACTS: Drunken driving prosecution. The defendant was out drinking with the victim. They were driving in the victim's car. At about midnight the car went off the side of the road, down a 6½-foot embankment and into a creek. The victim was killed. The issue in the case was who was driving the car.

The defendant's wife, Joan Christian, was finishing her shift as a waitress when she received a telephone call informing her of the accident. She went to the hospital. The defendant "quietly told her that he had been driving the vehicle, and then he made motions with his hands as though he were operating the steering wheel. Joan Christian quickly covered the defendant's hands with her own and 'hushed' him, ostensibly to prevent him from making any further incriminating statements." Christian at 722.

When the State offered Joan Christian as a witness, she testified that at the time of the trial she and the defendant were separated and in the process of getting divorced.

The defendant filed a motion in limine seeking to prevent Joan Christian from testifying about the hospital conversation on the ground that it was a privileged confidential marital communication.

No Connecticut Supreme Court case had ever explicitly recognized such a privilege. The trial judge ruled that although the privilege may exist in some circumstances, it did not exist here where the marriage had broken down irretrievably at the time of trial.

The Supreme Court held this to be error, although harmless.

REASONING: The opinion embarks on an exhaustive analysis of the competing interests before deciding to recognize the privilege and hold it applicable in this case. "Our conclusion, recognizing the existence of a privilege for confidential marital communications, aligns us with every other jurisdiction in the country." Christian at 730.

Since it is rarely disputed whether or not the communication was made during the marriage, litigation on the application of this privilege generally revolves around whether or not the communication was intended to be confidential.

Marital communications are presumed to be confidential, but that presumption may be overcome. Some jurisdictions employ a subjective test and ask whether or not the spouse subjectively intended that the content of the communication not be disclosed. Others apply an objective test asking whether or not the communicator, "could have had a reasonable expectation of confidentiality." Christian at 738. Connecticut adopted the objective test.

§ 5-1 COMMUNICATION FROM ATTORNEY TO CLIENT OF INFORMATION THAT IS NOT CONFIDENTIAL NOT PROTECTED BY PRIVILEGE - PSE CONSULTING, INC. V. MERCEDE, 267 Conn. 279 (2004); Katz, J.; Trial Judge - Tierney, J.

RULE: Not every attorney-client communication is protected. A communication about a conversation with a third party who is not within the privilege is not protected.

FACTS: See §4-8 above. The email in question stated: "I again asked what it would take to avoid the bad faith counts, in exchange for payment of totally uncontested funds. Rosengren again had no number in mind, but understood the concept of the question and will be getting back to me. The entire [conversation] was 'off the record.'" PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., at pp. 326-27.

National claimed that this email was protected by the attorney-client privilege. The Supreme Court affirmed the trial court's holding that it was not.

REASONING:

> "Not every communication between client and attorney, however, is protected by the attorney-client privilege. 'As a general rule [c]ommunications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice.' 'A communication from attorney to client solely regarding a matter of fact would not ordinarily be privileged, unless it were shown to be inextricably linked to the giving of legal advice.' The burden of proving each element of the privilege, by a fair preponderance of the evidence, rests with National, as it is the party seeking to assert the privilege.
>
> "The August 6, 1999 e-mail resembles a progress report from Wolfe to his client, and it merely paraphrases the discussion that had transpired between Wolfe and counsel for PSE. 'One of the essential elements of the claim of privilege between attorney and client is that the communication be confidential.' 'Statements made in the presence of a third party, on the other hand, are usually not privileged because there is then no reasonable expectation of confidentiality.' In the e-mail, Wolfe merely reported back to his client what he had said to a third party and how that third party had responded. As the trial court described it, '[i]t is a reconstitution of an event that occurred with third parties involved.' Such a communication is not confidential. Moreover, 'statements that are meant to be transmitted to another are not confidential.' National's claim that the e-mail was privileged because its contents were 'inextricably linked' to the giving of legal advice overlooks the funda-

> mental requirement that the communication be confidential in order to qualify for the privilege in the first instance."

PSE Consulting at 330-31 (internal citations omitted).

Article VI - Witnesses

§ 6-5 EXTRINSIC EVIDENCE ALLOWED TO IMPEACH - STATE V. CHRISTIAN, 267 Conn. 710 (2004); Katz, J.; Trial Judge - Maloney, J.

RULE: Evidence tending to show motive, bias, or interest of an important witness is never collateral.

FACTS: See § 5-1 above. After the defendant's former wife had testified as to the conversation in the hospital in which the defendant admitted that he was the driver of the vehicle, the defendant sought to impeach her testimony on cross-examination by eliciting testimony regarding her bitter divorce with the defendant, which included a fight over child custody. Joan Christian had also been charged with drunken driving in a separate incident. Defense counsel asked her whether she had made a statement to her attorney in the vestibule of the courthouse in which she had stated that if the defendant were convicted in his case and received a prison sentence, "there would be no further question about him getting custody of their child." Christian at 746. Joan Christian testified that she did not recall any such conversation.

Defense counsel then called as a witness a legal intern from his office who had gone to the courthouse at the attorney's direction to observe the proceedings at Joan Christian's drunken driving prosecution. The intern was prepared to testify as to the overheard conversation described above. The State objected on the ground that the evidence was impeachment on a collateral matter. The trial judge sustained the objection for

that reason and because he felt that the legal intern eavesdropping on an attorney-client conversation was improper. The Supreme Court found error.

REASONING: Regarding impeachment on a collateral matter, the Supreme Court recognized that the intern's testimony would have been powerful evidence indicating Joan Christian's direct interest in the outcome of her husband's criminal trial. The information was not protected by the attorney-client privilege because the communication occurred in the presence of a third party (the intern).

The court found the error to be harmless, because Joan Christian had been effectively impeached in a number of other ways.

§ 6-7a EVIDENCE OF PRIOR CONVICTION MORE THAN TEN YEARS OLD ALLOWED - LABEL SYSTEMS CORP. V. GHAMOHAMMADI, 270 Conn. 291 (2004); Norcott, J.; Trial Judge - Sheldon, J.

RULE: While the fact that a conviction is more than ten years old is a significant factor, it does not make the conviction inadmissible.

FACTS: Litigation between former employees and their employer involving claims of conversion and counter-claims of vexatious litigation, intentional infliction of emotional distress, wrongful discharge, and slander.

In 1986 the President of the plaintiff corporation, Kenneth Felis, was convicted of 41 felonies in federal court including mail fraud, wire fraud, conspiracy, and securities fraud. In 1988, he completed his sentence of confinement on weekends for six months. The plaintiff filed a motion in limine to preclude this evidence being used to impeach Mr. Felis principally on the ground that it was too remote in time. The trial court admitted the evidence. The Supreme Court found this to be the correct ruling.

REASONING: Section 6-7(a) of the C.C.E. provides:

> "(a) General rule. For the purpose of impeaching the credibility of a witness, evidence that a witness has been convicted of a crime is admissible if the crime was punishable by imprisonment for more than one year. In determining whether to admit evidence of a conviction, the court shall consider:
> (1) The extent of the prejudice likely to arise,
> (2) the significance of the particular crime in indicating untruthfulness, and
> (3) the remoteness in time of the conviction."

§ 6-7(a) does not contain a specific time limitation. However, the commentary to § 6-7(a) notes that the supreme court "has suggested a ten year limit on admissibility" except as to convictions relating to the issue of veracity.

Many people had read the prior case law on this issue as indicating that our Supreme Court had adopted a rule, based upon the Federal Rules of Evidence, that if the prior conviction was more than ten years old, the party seeking to admit the evidence was required to prove that its probative value "substantially outweighed" its prejudicial effect. In Label Systems, the court expressly disavowed this interpretation:

> "In so doing, however, we reaffirm… the fact that 'the ten year benchmark... is not an absolute bar to the use of a conviction that is more than ten years old, but, rather, serves merely as a guide to assist the trial judge in evaluating the conviction's remoteness....'
>
> "Put another way, the fact that a prior conviction is more than ten years old should greatly increase the weight carried by the third prong in the balancing test set forth in § 6-7 of the Connecticut Code of Evidence, unless that prior conviction relates to the witness' veracity."

Id. at 313-314.

In the case under consideration, the Supreme Court held that the trial court had struck the proper balance in admitting the evidence.

§ 6-10(c) IF WITNESS ADMITS PRIOR INCONSISTENT STATEMENT, EXTRINSIC EVIDENCE GENERALLY INADMISSIBLE - STATE V. CHRISTIAN, 267 Conn. 710 (2004); Katz, J.; Trial Judge - Maloney, J.

RULE: "If a prior inconsistent statement made by a witness is shown to or if the contents of the statement are disclosed to the witness at the time the witness testifies, and if the witness admits to making the statement, extrinsic evidence of the statement is inadmissible, except in the discretion of the court." C.C.E. §6-10(c).

FACTS: See Sections 5-1 and 6-5 above. In addition to the statement the defendant made to his wife that he was driving the car, the defendant made statements to the ambulance personnel that he was driving. Defendant sought to explain these statements by the fact that he was injured and disoriented. The ambulance personnel testified that he was lucid. However, on the ambulance run sheet emergency medical technician Nicole Ruggiero had checked the box labeled "confused." The box labeled "oriented" was not checked.

On cross-examination, Ruggiero admitted she checked the box for confused as opposed to the box oriented, but said that in fact Christian was oriented and she checked confused because he did not remember the actual impact of the collision. The defendant offered the ambulance run sheet in evidence as a prior inconsistent statement or a business record. The trial court did not allow the statement in evidence. The Supreme Court affirmed.

REASONING: Since Ruggiero acknowledged checking the confused box, the prior "statement" was not inconsistent with her testimony at trial.

§ 6-10c PRIOR INCONSISTENT STATEMENT – FAILURE TO CONFRONT WITNESS RENDERS STATEMENT GENERALLY INADMISSIBLE - STATE V. DANIELS, 83 Conn. App. 210, *cert. denied*, 270 Conn. 913 (2004); Flynn, J.; Trial Judge - Miano, J.

RULE: "If a prior inconsistent statement made by a witness is not shown to or if the contents of the statement are not disclosed to the witness at the time the witness testifies, extrinsic evidence of the statement is inadmissible, except in the discretion of the court." C.C.E. §6-10(c).

FACTS: Robbery prosecution in which the key issue was the victim's identification of the defendant, whom the victim knew.

Defendant sought to offer evidence of a telephone call between the victim and the defendant's father during which the victim allegedly said that he was not sure of his identification. The defendant had not asked the victim when he was on the witness stand whether he made this statement. The trial court acknowledged that C.C.E. §6-10(c), quoted above, gave him discretion to admit the statement, but decided not to. The Appellant Court affirmed.

REASONING: As the commentary to §6-10(c) indicates, there is a clear "preference" for confronting the witness with the statement before attempting to introduce extrinsic evidence. This is due in part to the simple fact that if the witness admits making the statement there is no need for extrinsic evidence, and in part to a sense of fairness – the witness may have an explanation for the statement.

APPELLANT MUST SHOW HARMFULNESS OF RESTRICTION OF CROSS-EXAMINATION - FISHER V. ZBOROWSKI, 83 Conn. App. 42 (2004); Bishop, J.; Trial Judge - Budney, J.

RULE: Failure to demonstrate harmfulness of ruling regarding undue restriction on cross-examination bars appellate review of the issue.

FACTS: See § 4-1 above. A classic defense point in a surgical mishap case is that the mishap is "a known risk of the procedure." However, the fact that the mishap – in this case, striking the nerve – is a risk of the procedure does not reflect whether or not negligence was the cause. The implication of the phrase, absent a comprehensive explanation and examination of the issue, is that the cause of the mishap is not negligence.

Plaintiff sought to cross-examine defendant's expert Nemerich on this issue and was denied that opportunity. The Appellate Court did not address whether or not this was error.

REASONING: The Appellate Court did not address the propriety of the trial court's ruling. Instead, the Appellate Court focused on harmfulness:

> "In the present case, even if we assume arguendo that the testimony at issue was relevant to the plaintiff's claim that the defendant deviated from the applicable standard of care, it did not bear on the question of causation. Regarding causation, we note that the jury was presented with conflicting evidence. Although the jury heard testimony that, if credited, would have been sufficient to establish the required causal connection, the jury also had ample evidence that rebutted that connection.... Thus, even if the plaintiff had been able to erode the defendant's claim that her alleged injury did not arise from his negligence, the jury still reasonably could have returned a verdict in favor of the defendant on the basis of a lack of causation. We conclude, therefore that the court's ruling regarding the plaintiff's cross-examination of Nemerich was not likely to affect the trial's outcome. As such, that claim too, must fail...."

Fisher at 51-52.

Article VII - Opinions and Expert Testimony

§ 7-1 OFFICERS' IDENTIFICATION OF DEFENDANT ON SURVEILLANCE VIDEOTAPE ALLOWED AS LAY OPINION - STATE V. FINAN, 82 Conn. App. 222, *cert. granted*, 269 Conn. 901 (2004); Bishop, J.; Trial Judge - Miano, J.

RULE: "To be admissible, lay opinion testimony must meet two criteria: it must rationally be based on perception, and it must be helpful." State v. Finan, at 228.

FACTS: Robbery in which the surveillance videotape showed a man with a green hooded sweatshirt. Four police officers testified that the man in the videotape was the defendant. The defendant objected to this testimony. The trial court allowed it. The Appellate Court affirmed.

REASONING: The Appellate Court concluded that the testimony constituted a permissible lay opinion.

Because the police officers in question had known the defendant for between eight and 16 years, their identification, which rested on the defendant's particular "mannerisms, gait, and profile," fulfilled the first criterion, that it be based on perception.

As to the second criterion, that it be helpful, the defendant argued that since the jury had the opportunity to observe the defendant in the courtroom themselves and view the videotape, the testimony would not be helpful.

> "We disagree. We believe that testimony by individuals who knew the defendant for a number of years and in a variety of circumstances offered to the jury a perspective it could not have acquired in its limited exposure to the defendant during the trial."

Finan at 229.

§ 7-2 EXPERT TESTIMONY MAY BE REQUIRED TO PROVE REASONABLENESS OF LEGAL FEES - ST. ONGE V. MEDIA GROUP, INC., 84 Conn. App. 88, *cert. denied*, 271 Conn. 918 (2004); Peters, J.; Trial Judge - Karazin, J.

RULE: In recovering legal fees pursuant to an implied contract, the plaintiff must provide an evidentiary foundation of reasonableness. In some cases, this requires expert testimony.

FACTS: The plaintiff law firm performed patent and trademark work for the defendant. The plaintiff brought suit seeking $169,678.27 in legal fees, alleging breach of express contract, breach of implied contract, and unjust enrichment. The plaintiff did not present expert testimony on the reasonableness of its fees. At the conclusion of the plaintiff's case, the defendant filed a motion for a directed verdict, which was denied. The jury rejected the express contract count, but found for the plaintiff on the implied contract and awarded $152,710.44.

On appeal, the defendant claimed that the plaintiff was required to present expert testimony to make out a *prima facie* case. The Appellate Court agreed, reversed, and entered judgment for the defendant.

REASONING: On appeal, the defendant's first position was that expert testimony is required in all cases seeking to recover legal fees on an implied contract theory. The Appellate Court rejected that position.

> "We see no need to foreclose the possibility that some cases involving fee disputes can be decided on the basis of evidence that is sufficiently transparent to obviate the need for the testimony of experts."

St. Onge at 96.

The court then examined the facts of the case at issue and decided that in this case, considering the nature and the complexity of the work, and the fact that there were fee disputes from the beginning, expert testimony was required.

§ 7-2 EXPERT LIABILITY TESTIMONY NOT ALWAYS REQUIRED IN LEGAL MALPRACTICE CASE TRIED TO THE COURT - DUBREUIL V. WITT, 80 Conn. App. 410, *aff'd*, 271 Conn. 782 (2004); Dranginis, J.; Trial Judge - Hurley, J.

RULE: Expert testimony is not required to establish the standard of care in a legal malpractice case where there is "such an obvious and gross want of care and skill that the neglect would be clear even to a lay person." Dubreuil at 418.

FACTS: Defendant attorney was representing the plaintiffs in a collection action brought against them. The defendant failed to attend a pretrial conference, and a default was entered against his clients on June 22, 1994. On August 1, 1994, the plaintiff in the collection action moved for judgment, which was entered against the defendant's clients on August 23, 1994. The defendant filed a motion to set aside that judgment on September 16, 1994, and the motion was scheduled for argument on February 6, 1995. Again, the defendant failed to appear, and the motion was denied. The defendant made no further efforts to have the judgment set aside.

The plaintiff in the collection action then brought a foreclosure action against the defendant's clients, who ultimately paid the collection plaintiff $32,500 to satisfy the judgment.

This legal malpractice case was tried to the court. Plaintiffs did not present expert testimony to establish malpractice. The trial judge felt he did not need expert testimony to assist him and entered judgment against the defendant. The Appellate Court affirmed.

REASONING: Judges of the Superior Court are uniquely qualified to decide what the standard of care is in regard to failing to attend pretrial conferences and not taking effective steps to re-open defaults and judgments entered as a result.

> "In fact, there may be no expert who knows more about the practice of law before the Superior Court than a judge of that court. Judges routinely rule on motions, preside at pretrial settlement conferences, conduct jury trials or sit as the trier of fact, among other things.... .A judge, therefore, is aware of the standard of care that applies to attorneys practicing in the Superior Court."

Dubreuil at 421-422.

CAVEAT: The Appellate Court went out of its way not to recommend reliance on this case in the future. "Our holding is limited to the circumstances of this case." Dubreuil at 422 n. 7. Even in an obvious case, counsel should hire a qualified expert.

§ 7-2 QUALIFICATIONS OF EXPERTS IN LEGAL MALPRACTICE CASES: SPECIALIZATION ADDRESSED – YOUNG V. RUTKIN, 79 Conn. App. 355, *cert. denied*, 266 Conn. 920 (2003); West, J.; Trial Judge - Mcweeny, J.

RULE: In a case involving a claim of malpractice in a divorce action, plaintiff's expert must have sufficient experience in the practice of family law.

FACTS: Arnold Rutkin was representing the plaintiff in a motion to modify his financial obligations to his former wife. One of the modifications being discussed was the removal of a cohabitation clause regarding the former wife's use of the house. The plaintiff questioned whether his former wife was about to have someone move in with her. Rutkin discussed it with the wife's attorney. According to Rutkin, the attorney representing the former wife told him she had no such plans. There was no writing memorializing this representation. The modification regarding cohabitation was agreed to.

Three weeks after the modification, the former wife's boyfriend moved in. The plaintiff filed a motion to set aside the modification agreement on the basis of fraud and misrepresentation. At the hearing on that motion, the wife's attorney testified that he had not made the representation Rutkin claimed. In the absence of written evidence, the plaintiff settled the fraud action on terms that the he considered unfavorable.

Plaintiff then brought a legal malpractice action based on the claim that Rutkin's failure to document the representation of opposing counsel regarding the plans of the plaintiff's former wife was a departure from the standard of care.

Plaintiff called as his expert Scully, the lawyer who represented him in the fraud case. When the plaintiff sought to examine Scully regarding the standard of care in the divorce proceeding applicable to Rutkin, the defendant objected on the basis that the expert was not qualified.

On voir dire Scully testified that family matters constituted between one and five percent of his total work. He had no experience dealing with contested cases involving cohabitation clauses. He did not subscribe to particular family law journals. The court concluded that he was an experienced civil litigator who had handled some family matters and that this was not enough to qualify him to testify on the standard of care. The trial judge precluded the testimony and the plaintiff was nonsuited. The Appellate Court affirmed.

REASONING:

> "On the basis of the evidence presented, the court properly could have concluded that notwithstanding his alleged expertise in contract law, Scully's sparse academic and practical experience in the area of family law did not establish any more than casual familiarity with the relevant professional standard of care."

Young at 363.

§ 7-2 PORTER/DAUBERT APPLIED TO DOUBLING TIME - MAHER V. QUEST DIAGNOSTICS, INC., 269 Conn. 154 (2004); Norcott, J.; Trial Judge - Wiese, J.

RULE: Testimony regarding the growth rate of cancer is subject to a Porter/Daubert inquiry.

FACTS: Medical malpractice action alleging failure to diagnose cervical cancer. On January 6, 1995 during the plaintiff's annual exam, a Pap smear was done and the plaintiff's gynecologist described the plaintiff's cervix as "friable." No colposcopic examination was done. The Pap smear was forwarded to Quest Diagnostics, which misread the slide and reported it as normal.

A year later, during plaintiff's annual exam on January 16, 1996, the defendant discovered a polyp that turned out to be cervical cancer. The case settled as to Quest Diagnostics and proceeded to trial against the gynecologist. The plaintiff alleged that despite Quest's failure to properly interpret the Pap smear, based upon the finding of a "friable" cervix the defendant should have performed a colposcopic examination, which would have diagnosed the cancer. The plaintiff claimed that as a result of the one-year delay in the diagnosis of her cancer she required more severe treatment, and her prognosis was made worse.

The expert in question was a gynecologic oncologist, who testified that, based upon the characteristics of the plaintiff's cancer, as it existed in January of 1996, and its "doubling time," he could formulate an opinion as to the likely stage of the cancer a year earlier when it should have been diagnosed.

The defendant objected to the testimony on the basis of Porter/Daubert. The trial court agreed that the testimony was subject to a Porter analysis, but after holding a hearing admitted the testimony. The Supreme Court reversed.

REASONING:

> "[O]ur exclusion of scientific evidence from the ambit of Porter when such evidence, and its underlying methodology, is 'well established' is reserved for those scientific principles that are considered so reliable within the relevant medical community that there is little or no real debate as to their validity and it may be presumed as a matter of judicial notice. As we stated in State v. Porter, supra, 241 Conn. 85 n.30, "[w]e ... acknowledge ... that a very few scientific principles 'are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, [and that such principles] properly are subject to judicial notice ....'"
>
> "With this background in mind, we conclude that the concept of doubling time, within the context of cervical cancer, has not been so well accepted within the relevant scientific communities that reliability may be presumed. Our conclusion does not mean that cervical cancer doubling time evidence is unreliable per se; it simply means that the reliability of cervical cancer doubling time evidence must be assessed on a case-by-case basis in accordance with our Porter standard."

Maher at 172-173.

In respect to passing the Porter/Daubert test, the court seemed particularly concerned that the expert had not performed a literature search in regard to this particular case, and did not offer any scientific literature supporting his opinion. Although "dou-

bling time" has been the subject of thousands of articles, no particular article applying the concept to cervical cancer was produced. The defendant's expert testified that he had never seen any article or study that provided a doubling time period for cervical cancer. The plaintiff's expert indicated that breast cancer's growth statistics could be used as a reliable indicator for cervical cancer. However, he supplied no literature to support this proposition. In the Supreme Court's view, this proved fatal.

§ 7-2 PORTER/DAUBERT ALLOWS USE OF A "MULTI-FACTORIAL" DIAGNOSTIC METHOD ON CAUSE OF DEATH - CARRANO V. YALE-NEW HAVEN HOSPITAL, 84 Conn. App. 656, *cert. granted*, 271 Conn. 934 (2004); Mclachlan, J.; Trial Judge - Melville, J.

RULE: Attacks on the underlying factual bases for an expert's opinions, as opposed to the methodology utilized by the expert, is not a proper objection under Porter/Daubert.

FACTS: Phillip Carrano was admitted to Yale-New Haven Hospital on March 12, 1992 for treatment of a necrotic finger and for a colonoscopy to evaluate his Crohn's disease. He was discharged on March 21, 1992 and died at home early the next morning from pulmonary edema. The issue was the cause of the pulmonary edema.

Plaintiff's expert Pieroni, board certified in internal medicine, gave the opinion that the cause of the pulmonary edema was a massive fluid overload, caused by anemia, sepsis, fever, pneumonitis, high salt diet, anti-inflammatory drugs, and hospital-administered fluids including saline, intravenous antibiotics and "Go-Lightly," a gallon of which Carrano drank to cleanse his colon for the colonoscopy. The trial court allowed the testimony and the Appellate Court found this to be the correct ruling.

REASONING:

> "Despite the court's considerable and active role in screening out unreliable expert testimony, '[a] judge frequently should find an expert's methodology helpful [and thus admissible] even when the judge thinks that the expert's technique has flaws sufficient to render the [expert's] conclusions inaccurate. He or she will often still believe that hearing the expert's testimony and assessing its flaws was an important part of assessing what conclusion was correct and may certainly still believe that a jury attempting to reach an accurate result should consider the evidence.' State v. Porter, supra, 241 Conn. 89.
>
> "We find that this was precisely the case here. Although the court recognized a number of possible flaws in Pieroni's factual assumptions and interpretations, it found no fault with the "multi-factorial" diagnostic method. The defendants have offered no justification for rejecting the court's conclusion that 'analysis of multiple signs and symptoms to arrive at a cause is a well recognized diagnostic methodology in the field of medicine and needs no explication.' See Maher v. Quest Diagnostics, Inc., supra 269 Conn. 170 (some scientific principles are so well established that they require no threshold admissibility inquiry).
>
> "The court properly allowed the jury to be the arbiter of fact. 'Once the methodology underlying an expert conclusion has been sufficiently established, the mere fact that controversy, or even substantial controversy, surrounds that conclusion goes only to the weight, and not the admissibility, of such testimony.' State v. Porter, supra 241, Conn. 83. The defendants assail the 'multi-factorial' approach only insofar as it was applied using facts they disputed and led to a conclusion with which they disagreed. They offer nothing to suggest that the method itself is unreliable or that Pieroni's review of the records was inadequate. More importantly, the defendants did not do so at trial. We accordingly conclude that the court did not abuse its discretion in admitting Pieroni's testimony."

Carrano at 665-666.

§ 7-2 HORIZONTAL GAZE NYSTAGMUS TEST PASSES PORTER/DAUBERT - STATE V. COMMINS, 83 Conn. App. 496, *cert. granted on other issue,* 271 Conn. 905 (2004); Mclachlan, J.; Trial Judge - White, J.

RULE: The horizontal gaze nystagmus test and its underlying methodology are generally accepted in the scientific community.

FACTS: Drunken driving prosecution in which the officer administered the horizontal gaze nystagmus test. The defendant filed a motion for a hearing under Porter/Daubert. The trial court conducted the Porter hearing and the State called a behavioral optometrist as a witness. He testified that the horizontal gaze nystagmus test is generally accepted in the scientific community, has been comprehensively tested and subjected to peer review, and was not developed solely for the purpose of use in court. The court concluded that the horizontal gaze nystagmus test satisfies the Porter/Daubert criteria because it is generally accepted by the scientific community. The Appellate Court affirmed.

REASONING:

> "Our review of the relevant transcript reveals that Forkiotis' testimony at the *Porter* hearing, as set forth previously, provided a factual basis for the court to find that (1) the methodology has been tested and subjected to peer review, (2) there is a known or potential rate of error, (3) Forkiotis was credible and (4) the methodology is explainable to the jury in a manner from which it reasonably could draw its own conclusions."

Commins at 505.

§ 7-2 TREATING PHYSICIAN'S USE OF DIFFERENTIAL DIAGNOSIS TO CONCLUDE DEFENDANT'S SURGICAL TACKS CAUSED PATIENT'S CHRONIC PAIN ALLOWED UNDER DAUBERT - PERKINS V. ORIGIN MEDSYSTEMS, INC., Civ. Action No. 3:99 CV 1405 (SRU), U.S. District Court, D. Conn., January 14, 2004; Underhill, J. Available online: http://www.ctd.uscourts.gov/Opinions/011404.SRU.Perkins.pdf

RULE: A treating physician's use of differential diagnosis, eliminating potential sources of chronic pain to conclude that the most probable source is the defendant's surgical tack, is permissible expert opinion under Daubert.

FACTS: Product liability action in which the plaintiff alleged that the use of the defendant's surgical tacker in her 1996 laparoscopic hernia operation was causing chronic pain at the site of the implanted tacks. Plaintiff treated with Dr. Deborah Metzger (who did not perform the surgery) both before and after the hernia operation. After careful examination, eliminating other potential sources for this particular pain and being able to reproduce the pain by palpating the tacks, Dr. Metzger concluded that the most probable cause of the pain was the tacks. Dr. Metzger recommended removing the tacks, which was done in a series of operations between November 1996 and February 2000. The pain then went away.

Defendant filed a motion to preclude Dr. Metzger from testifying that the tacks were the cause of the pain claiming her reasoning and methodologies were unreliable. Trial court disagreed and ruled that the testimony will be allowed.

REASONING: Dr. Metzger had extensive experience treating chronic pelvic pain. "Her methodology, differential diagnosis, is a standard scientific technique of identifying a

cause of a medical problem." Perkins at 16. As to the defendant's argument that no medical literature supported Dr. Metzger's opinion, the court ruled:

> "[T]he 'lack of textual authority' on the issue of general causation 'go[es] to the weight, not the admissibility' of an expert opinion, when the expert has performed a reliable differential diagnosis." McCullock [v. H.B. Fuller Co.], 61 F.3d [1038] at 1044 [(2d Cir. 1995)].
>
> "'In the actual practice of medicine, physicians do not wait for conclusive, or even published and peer-reviewed, studies to make diagnoses to a reasonable degree of medical certainty. Such studies of course help them to make various diagnoses or to rule out prior diagnoses that the studies call into question. However, experience with hundreds of patients, discussions with peers, attendance at conferences and seminars, detailed review of a patient's family, personal, and medical histories, and thorough physical examinations are the tools of the trade, and should suffice for the making of a differential diagnosis even in those cases in which peer-reviewed studies do not exist to confirm the diagnosis of the physician.' Heller [v. Shaw Industries, Inc.], 167 F.3d [146] at 155 [3d Cir. 1999]."

Perkins at 19.

§ 7-3(a) IDENTIFICATION OF DEFENDANT AS ROBBER NOT THE ULTIMATE ISSUE - STATE V. FINAN, 82 Conn. App. 222, *cert. granted*, 269 Conn. 901 (2004); Bishop, J.; Trial Judge - Miano, J.

RULE: Fact that defendant accompanied a man with a shotgun into a convenience store does not necessarily mean he participated in a crime.

FACTS: See §7-1 above.

REASONING: In addition to the objection discussed in §7-1, the defendant objected to the officers' identification testimony on the basis that §7-3(a) of the C.C.E. prohibits testimony by a lay witness on the ultimate issue. The Appellate Court's reasoning on this issue was as follows:

> "[W]e do not believe that every fact that is material to guilt is, for that reason alone, an ultimate issue. Identification is often such an issue. Here, the identity of the individual on the videotape, while clearly material, was not so interwoven with the state's charge that the positive identification of the defendant as the unarmed man on the videotape proved his participation in the crime. As noted, the videotape depicted two men entering the convenience store, one before the other. One individual, identified by the police witnesses as the defendant, could be seen entering the store and then leaving the video camera's view. The second person, who appeared to be carrying a rifle or shotgun, then appeared to aim the weapon at the store clerk in the checkout area. We next were able to see the individual identified as the defendant walking out of the store behind the unidentified individual. Although the identification of the unarmed person as the defendant was material to his participation in the robbery, his presence in the store simultaneously with the armed person was not, alone, sufficient evidence of his guilt."

Finan at 232.

The Supreme Court has granted *certiorari* on this point.

Article VIII - Hearsay

§ 8-31 WORKERS' COMPENSATION NOTICE OF CLAIM ADMITTED IN DECLARATORY JUDGMENT ACTION - NATIONWIDE V. ALLEN, 83 Conn. App. 526, *cert. denied*, 271 Conn. 907 (2004); Lavery, C. J.; Trial Judge - R. Robinson, J.

RULE: Statement by a party's attorney in a notice of claim filed in a workers' compensation case stating that the party was in the course of employment at the time of the accident is admissible in a separate action arising out of the same incident.

FACTS: Nationwide issued a commercial insurance policy to James Allen doing business as Allen's Landscaping. William Shaw was working with Allen. The issue was whether Shaw was an independent contractor or temporary worker, or an employee.

Shaw filed a workers' compensation claim on June 16, 1999 stating that his injuries occurred while in the course of his employment by Allen. He subsequently brought a negligence action against Allen alleging that he was a temporary worker or independent contractor.

Nationwide's policy provided an exclusion of coverage for claims by Allen's employees against him. Nationwide brought a declaratory judgment action to establish that it had no duty to defend or indemnify Shaw's negligence claim against Allen. The declaratory judgment action was tried to the court.

The court admitted the statements by Allen in the workers' compensation case in the declaratory judgment action. The Appellate Court affirmed.

REASONING: The court properly held that the statement by Shaw in the workers' compensation case was an evidentiary admission by Shaw. However, the admission is not admissible against Allen. It is unclear from this opinion whether this distinction was made at the trial level.

§ 8-4 BUSINESS RECORD FOUNDATION - STATE V. CHRISTIAN, 267 Conn. 710, (2004); Katz, J.; Trial Judge - Maloney, J.

LESSON: If a document is admissible as a business record, don't confuse the issue by trying to establish a different basis for admissibility.

FACTS: See §§5-1, 6-5, and 6-10(c) above. The defendant offered the ambulance run sheets showing that the EMT had checked the box indicating the defendant was "confused" as both a prior inconsistent statement and a business record.

> "The [trial] court did not make a determination concerning whether the run sheets were business records; during oral argument, however, in response to the defendant's assertion

> that the run sheets were admissible as 'business record[s] of ... prior statement[s],' the trial court stated that '[i]f the witness admits to making the statement, extrinsic evidence of the statement is inadmissible.'"

Christian at 755.

The Supreme Court affirmed.

REASONING: It does not appear that the defendant clearly established the foundation for a business record: that the record was made in the regular course of business; that it was the regular course of business to make such a record; and that it was made at the time of the act described in the report, or within a reasonable time thereafter. In the absence of a clear-cut offer of this foundation evidence it appears that the trial court focused exclusively on the issue of whether it was a prior inconsistent statement. The Supreme Court did not fully analyze this issue, but merely held the potential error to be harmless.

§ 8-4 BUSINESS RECORD - POLICE REPORT - STATEMENT OF PARTY - DEMARKEY V. FRATTURO, 80 Conn. App. 650, (2003); Bishop J.; Trial Judge - D'Andrea, J.

RULE: The **s**tatement of party contained in police report must be clearly attributable to be admissible**.**

FACTS: Plaintiff was a 15-year-old boy who was being chased by three other boys, ran into the street and was struck by the defendant's car. A key issue in the case was whether he had run directly into the street from a school driveway or turned and ran up a sidewalk before entering the street.

Police Officer Mann, interviewed three witnesses, two of whom had been defendants in the case (they were chasing the plaintiff). He wrote in his report, "Christopher DeMarkey had run along the side of the school, continuing to run straight out onto Hope

Street, and was struck at the entrance of the lot's southern entrance." DeMarkey at 654. Plaintiff objected to this statement as hearsay. The court overruled the objection, and admitted the statement into evidence. The Appellate Court found this to be error, but harmless.

REASONING:

> "Statements of witnesses repeated in [police] reports, however, are not generally admissible. Nevertheless, such statements may still avoid prohibition by falling within the admissions exception to the hearsay rule. Pursuant to that exception, the words of a party opponent are generally admissible against him or her.
>
> "In the present case, the record does not support the defendant's contention that the hearsay statement was admissible as an admission. The declaration does not fall within that exception because the declarant was unidentifiable. To fall within that exception, one must be able to identify the declarant clearly as a party to the litigation.
>
> "Here, the record reflects Mann's inability to identify the source of the declaration. Thus, it is unclear whether the statement was made by one or both of the defendants who were interviewed by Mann or by the third party who was not a defendant."

DeMarkey at 655-656 (internal citation omitted).

It should be noted that even if Officer Mann had been able to identify the source of the declaration, the statement would only be admissible against that party, not against the plaintiff.

The court's ruling that the testimony was harmless was based primarily on the fact that diagrams, which indicated that the plaintiff ran directly into the street rather than up the sidewalk, had been admitted without objection.

§ 8-4 MEDICAL REPORT SUMMARIZING TREATMENT AND RENDERING OPINIONS NOT INADMISSIBLE BECAUSE CREATED FOR LITIGATION - BRUNEAU V.SEABROOK, 84 Conn. App. 667, *cert. denied*, 271 Conn. 930 (2004); Lavery, C. J.; Trial Judge - Lager, J.

RULE: Under C.G.S. §52-174(b), a medical report from a treating physician is admissible, notwithstanding the argument that it is not properly a business record because it was prepared for the lawsuit.

FACTS: Plaintiff's physician prepared a letter that summarized his impression of the plaintiff's injury, opining that "at some point she would require surgical reconstruction of her left shoulder" and estimating the cost of the reconstruction surgery. The letter also addressed causation.

The defendant objected on the basis that the letter was not a signed report and had been created for the purposes of litigation.

REASONING: In an opinion endorsed by the Appellate Court, the trial judge disposed of these arguments by noting that even though the letter itself was designed for the litigation, it reflected underlying treatment and opinions not created for the purpose of litigation. Therefore, it was reliable and admissible under the statute.

§ 8-4 C.G.S. §52-174(b) DOES NOT REQUIRED SUBMISSION OF A BILL OR SEPARATE QUALIFICATION FOUNDATION - DOE V. RAPOPORT, 80 Conn. App. 111, (2003); Lavery, C. J.; Trial Judge - Skolnick, J.

RULES: Language in C.G.S. §52-174(b) allowing a party to offer in evidence "a signed report and bill" does not require submission of a bill.

The fact that the doctor's qualifications are not described in the report does not affect admissibility.

Whether the doctor is a "treating" physician can be proved through other evidence.

FACTS: Prejudgment remedy proceeding in which the plaintiff sought an attachment to secure his recovery. Defendant had pleaded guilty to child molestation.

At the hearing on the motion for attachment, a report was submitted from the plaintiff's treating psychologist. The defendant objected on the bases that the report could not be admitted without a corresponding bill; that it failed to disclose the psychologist's qualifications; and that it failed to state that he had treated the plaintiff. The trial court admitted the report. The Appellate Court affirmed.

REASONING: Regarding submission of a bill: although one section of 52-174(b) uses the word *and*, another section uses the word *or*. The legislative history, custom, and practice all show there is no requirement that a bill be submitted with the report.

As to the defendant's arguments that the qualifications of the psychologist had not been sufficiently proved and that there was no evidence in the report that he had actually treated the plaintiff, the Appellate Court held that the mother's testimony as to those facts was sufficient.

§ 8-5(1) PERSONAL KNOWLEDGE REQUIREMENT OF *WHELAN* EXAMINED - STATE V. PIERRE, 83 Conn. App. 28, *cert. denied*, 270 Conn. 916 (2004); West, J.; Trial Judge - Schimelman, J.

RULE: When a prior inconsistent statement is admitted for substantive purposes pursuant to C.C.E. § 8-5(1) and the rule of Whelan, one of the requirements is that "the witness has personal knowledge of the contents of the statement." When offered to prove

only that the defendant made a statement, not the truth of the underlying facts, the witness need not have personal knowledge of the underlying facts.

FACTS: Murder prosecution in which a witness, Norman Carr, gave a seven-page written statement describing incriminating statements made by the defendant about the murder. The witness did not have personal knowledge of these facts.

At trial, Carr insisted that he had never heard the defendant discuss the killing of the victim, and that any assertion to the contrary in his statement was false. The trial court admitted the statement for substantive purposes pursuant to Whelan. The Appellate Court affirmed.

REASONING: The Appellate Court held that:

> "The 'personal knowledge' requirement of Whelan does not necessitate an eyewitness account of the facts or events recited in the prior statement. Instead, the Supreme Court emphasized that 'a prior inconsistent statement ha[s] to be given under circumstances ensuring its reliability and trustworthiness in order to be admissible.'
>
> We find no case law to support the defendant's contention that a third party statement, by itself, precludes satisfaction of the "personal knowledge" requirement of Whelan.

Pierre at 35 (internal citation omitted).

§ 8-6(2) DYING DECLARATION - IMPEACHMENT OF DECLARANT WITH PRIOR CONVICTIONS ALLOWED - STATE V. MILLS, 80 Conn. App. 662 (2003), *cert. denied*, 268 Conn. 914 (2004); Mclachlan, J.; Trial Judge - O'Keefe, J.

RULE: When hearsay is admitted, a party can impeach the declarant as though the declarant were on the witness stand, including with prior convictions.

FACTS: Defendant was accused of stabbing the victim in the course of a fight. A police officer who talked with the victim (who later died) related that he had said he'd been in an altercation with the defendant over a dog, and that the defendant had stabbed him. The statement was admitted as a dying declaration.

The defendant sought to admit evidence of the victim's felony convictions to impeach his credibility. The court did not allow the evidence. Because the error had not been preserved, the Appellate Court affirmed.

REASONING: The Appellate Court agreed with the defendant that the fact that the victim was dead should have no effect on whether or not the prior convictions were admissible for impeachment purposes. It therefore turned to C.C.E. §6-7(a) to determine whether, under its three-part test, these convictions should have been admitted. Because the defendant failed to mark the record of convictions for identification or make an offer of proof, the Appellate Court was unable to make that determination, and affirmed.

Article IX - Authentication

§ 9-1(a) TEST FOR AUTHENTICATION OF COMPUTER "ENHANCED" PHOTOGRAPHS AND COMPUTER-GENERATED IMAGES - STATE V. SWINTON, 268 Conn. 781, (2004); Katz, J.; Trial Judge - Maloney, J.

RULE: A foundation for the admission of computer-enhanced photographs or computer-generated images requires live testimony by someone with enough computer expertise to be examined and cross-examined about the function of the computer, the reliability of the evidence, and the processes used to generate it.

FACTS: Defendant was accused of murdering Carla Terry. It was alleged that the defendant inflicted bite marks on the victim's breast.

The defendant challenged two interrelated pieces of evidence: photographs of a bite mark, enhanced with a computer program called Lucis; and computer-generated images of the defendant's teeth which were then overlaid, or superimposed, upon the bite mark photographs. The computer-generated overlays were created with Adobe Photoshop software. The trial court admitted the exhibits.

The Supreme Court found that the foundation laid for the computer-enhanced photographs was sufficient, but that the foundation for the computer-generated images was not. However, the court found the admission of the overlays harmless.

REASONING: "What exactly is required in the context of computer enhanced and computer generated evidence, other than business records, presents an issue of first impression in Connecticut." Swinton at 797.

In an 82-page opinion, the court set forth guidelines as to how the reliability of such evidence should be evaluated.

> "In addition to the reliability of the evidence itself, what must be established is the reliability of the procedures involved, as defense counsel must have the opportunity to cross-examine the witness as to the methods used. We note that '[r]eliability problems may arise through or in: (1) the underlying information itself; (2) entering the information into the computer; (3) the computer hardware; (4) the computer software (the programs or instructions that tell the computer what to do); (5) the execution of the instructions, which transforms the information in some way -- for example, by calculating numbers, sorting names, or storing information and retrieving it later; (6) the output (the information as produced by the computer in a useful form, such as a printout of tax return information, a transcript of a recorded conversation, or an animated graphics simulation); (7) the security system that is used to control access to the computer; and (8) user errors, which may arise at any stage.'"

Swinton at 813 (internal citations omitted).

Addressing these factors in relationship to the specific evidence in question, the court held that the witness for the computer-enhanced photographs had sufficient expertise to address all of these issues, while the witness for the computer-generated overlays did not. Therefore, admission of the first was proper and admission of the second was error.

§ 9-1(a) WITNESS' OBSERVATION OF SIGNATURE SUFFICIENT FOR AUTHENTICATION - STATE V. FERRAIUOLO, 80 Conn. App. 521 (2003), *cert. denied*, 267 Conn. 916 (2004); Lavery, C. J.; Trial Judge - Holden, J.

RULE: Direct testimony by a witness that he saw the defendant sign his confession is sufficient to admit a document despite the defendant's denial that it is his signature.

FACTS: A detective took a statement from the defendant, typing what the defendant told him on a computer. He then asked the defendant to read the typed statement, and the defendant signed the statement in the presence of the detective and a sergeant. Both the detective and the sergeant testified that they saw the defendant sign the statement. The defendant claimed did not. A handwriting expert called by the defendant testified that he was unable to verify that the signature belonged to the defendant. The trial court allowed the statement into evidence. The Appellate Court affirmed.

REASONING:

> "'Authentication is... a necessary preliminary to the introduction of most writings in evidence. In general, a writing may be authenticated by a number of methods, including direct testimony. Both courts and commentators have noted that the showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibil-

> ity, such as hearsay exceptions, competency and privilege. Rather, there need only be a prima facie showing of authenticity to the court. Once a prima facie showing of authorship is made to the court, the evidence, as long as it is otherwise admissible, goes to the jury, which will ultimately determine its authenticity. The only requirement is that there have been substantial evidence from which the jury could infer that the document was authentic.' See also Conn. Code Evid. § 9-1; C. Tait, supra, § 9.6.1, p. 761 ('[a] writing can be authenticated merely by proof of the signature of the writer. Such proof can be provided by testimony of... an eyewitness who saw the writing executed.')"

Ferraiuolo at 535 (internal citations omitted).

Peremptory Challenges

> ADDITIONAL CHALLENGES GRANTED TO BOTH SIDES PROBABLY HARMLESS - KALAMS V. GIACCHETTO, 268 Conn. 244 (March 23, 2004); Sullivan, C. J.; Trial Judge - Martin, J.

RULE: Different causes of action do not entitle a party to additional sets of challenges. However, where the additional challenges granted in error are granted to both sides, the error is harmless.

FACTS: Both the plaintiff and the defendant in this action were physicians. The plaintiff brought an case alleging medical malpractice and libel. The defendant had included an observation in the plaintiff's medical history of "dementia." Because of the two distinct causes of action, the defendant argued that he was entitled to an additional four peremptory challenges. The plaintiff disagreed.

The trial judge granted the defendant the four additional preemptory challenges, but also granted the plaintiff four additional preemptory challenges. The Supreme Court held that the granting of additional challenges because of a second distinct cause of action

was error. However, that because the trial judge also granted four additional challenges to the plaintiff, the error was harmless.

REASONING: The Chief Justice's opinion contains a comprehensive analysis of the considerations in deciding whether to grant additional challenges.

> "The plaintiff has made no plausible claim that the granting of four additional challenges to each party prejudiced his case in any way or unduly protracted the jury selection proceedings.... The plaintiff is correct that the application of harmless error analysis to the trial court's mistaken determination that the law requires more peremptory challenges than it actually requires effectively will render all such actions unreviewable, that is only because such actions are highly unlikely to cause harm. Accordingly, we reject the plaintiff's claim.
>
> "Because the issue is likely to be an ongoing source of confusion in the trial courts, and because the following analysis bolsters our conclusion that the trial court's action in this case was harmless, we take this opportunity to clarify the scope of the trial court's authority to grant peremptory challenges not required by law. In State v. Hancich, 200 Conn. 615, 624, 513 A.2d 638 (1986), the trial court, at the outset of jury selection, mistakenly granted each party eight peremptory challenges instead of the four to which they were entitled. After three jurors had been selected and the defendant had exercised four challenges, the trial court discovered its error and informed the parties they would not have eight challenges. The court also offered to allow the defendant an additional challenge. The defendant declined both offers and moved for a mistral. The court denied the motion. On appeal, this court held that the defendant had been harmed by his reliance on the court's action and ordered a new trial. We also stated in dicta that the court could have avoided that result 'by simply allowing the parties more peremptory challenges than provided by law.'"
>
> * * *
>
> "We can perceive no reason, however, categorically to bar the trial court from granting such challenges. To the contrary, the cases convince us that it would be unwise and impracticable for us to do so. It would only undermine ju-

> dicial efficiency, for example, for this court to hold that, in circumstances like those in Hancich, the trial court must declare a mistrial and begin jury selection anew when the granting of additional challenges would be adequate to prevent any potential harm to the parties. As the cases also suggest, there are numerous circumstances under which trial courts may perceive a need to grant additional challenges not required by law. * * * Accordingly, we conclude that the granting of more challenges than provided by law is subject to review for abuse of discretion.

Kalams at 261-263 (internal citations omitted).

> HARMFUL ERROR TO GRANT ADDITIONAL CHALLENGES TO ONE SIDE TO EQUALIZE CHALLENGES - CARRANO V. YALE-NEW HAVEN HOSPITAL, 84 Conn. App. 656, *cert. granted*, 271 Conn. 934 (2004); Mclachlan, J.; Trial Judge - Melville, J.

RULE: Granting of additional preemptory challenges to only one side in order to equalize the challenges of the two sides is error and presumed harmful.

FACTS: See § 7-2 above. Plaintiff sued five defendants. The trial court apparently concluded that the defendants did not have a unity of interest and awarded 20 challenges to the defense. (Jury selection took place before the amendment to the statute defining unity of interest took effect on October 1, 2001.) The trial judge then decided out of fairness to also increase the plaintiff's preemptory challenges to the same number. The Appellate Court found this to harmful error and reversed a verdict of $3.4 million dollars.

REASONING: The Appellate Court interpreted Kalams as granting broad discretion to the trial court to award additional challenges only when *both* sides receive additional challenges, and found error in the trial court's award of additional challenges to the plaintiff. The court went on to hold that the additional challenges "fundamentally altered the composition of the jury that decided the case in [plaintiff's] favor. Prior to the adoption of

the amendments to §§51-241 and 51-243(a) adopting a 'two to one rule,' when only one side in litigation was granted additional peremptory challenges solely to lessen a disparity in challenges, the other side is harmed and a new trial is necessary." Carrano at 662.

Discovery and Depositions

COURT DETERMINES REASONABLE FEE FOR EXPERT'S DEPOSITION - ROSE V. JOLLY, 48 Conn. Sup. 606 (2004); Judge - Bellis, J.

RULE: It is ultimately up to the judges to determine the reasonableness of an expert's fee.

FACTS: Defendant sought to depose plaintiff's orthopedic expert, Martin O'Malley. O'Malley sought to charge $2,500 for two hours of deposition testimony and $500 for every fifteen minutes thereafter, or $2,000 per hour after the second hour. Judge Bellis refused to allow it.

REASONING: The opinion contains a good review of the case law on this issue and awards Dr. O'Malley $400 per hour.

Expert Disclosures

GENERIC INTERROGATORY ANSWER FAILS TO SATISFY EXPERT DISCLOSURE REQUIREMENT - MENNA V. JAIMAN, 80 Conn. App. 131, (2003); Schaller, J.; Trial Judge - Gallagher, J.

RULE: Don't forget your expert disclosures.

FACTS: Motor vehicle accident in which the plaintiff did not file an expert witness disclosure pursuant to Practice Book §13-4. She did answer an equivalent interrogatory identifying her two treating physicians, and stating that they would testify "according to their expertise" on their "diagnosis and treatment of the plaintiff as well as any prognosis for future care and permanent disability." Menna at 135. Defendant filed a motion to preclude plaintiff from calling her experts. The trial court granted the motion. The jury awarded $50.00.

REASONING: Plaintiff did not even supply the defendant with copies of her medical reports until the trial.

EXPERT DISCLOSURE TOO NARROW TO ALLOW ALTERNATIVE THEORY - COUGHLIN V. ANDERSON, 270 Conn. 487, (2004); Norcott, J.; Trial Judge - D'Andrea, J.

RULE: Plaintiff's election to disclose an expert on only one theory of damages precluded plaintiff from eliciting testimony on an alternative theory at trial.

FACTS: Action alleging breach in the conveyance of property. Plaintiff claimed that, because an easement had not been confined to a specific location on his property, it was a "floating easement" that encumbered all of the land outside the footprint of his house, thereby precluding any additional development. Plaintiff disclosed an expert who would testify as to the diminution in the value of the property as a result of this floating

easement. (Plaintiff filed two separate expert disclosures detailing the expert's opinion and included an appraisal report detailing the bases for his opinion as to damages.)

Plaintiff's expert conceded on cross-examination that if his "critical assumption" that there was a floating easement was incorrect, his calculations regarding the diminution in value would not be valid.

On redirect, the plaintiff attempted to elicit an alternative method of calculating damages, which could be applied to a fixed easement. The defendant objected on the basis of the expert's disclosures. The trial court sustained the objection.

Defendant claimed that the easement was confined to the fixed location of three existing conduits and that this was an issue of law to be decided by the court. The trial court agreed with the defendant's claim and ruled that the easement was fixed.

Since plaintiff's expert only testified as to the diminution in value as a result of a "floating easement," defendant moved for a directed verdict for failure to prove damages. The trial court granted the motion. The Supreme Court affirmed.

REASONING:

> "Our review of the record reveals nothing to persuade us that the trial court abused its discretion in precluding the plaintiff from questioning Harkins, on redirect examination, as to whether his methodology could be used in order to determine the measure of damages resulting from a partial encumbrance of One Random Road. Prior to the plaintiff's attempt during his redirect examination of Harkins at trial, Harkins' opinion as to damages had been confined solely to those damages resulting from a total encumbrance of One Random Road by a floating easement. This assumption was expressed not only in both expert witness disclosures filed prior to trial, but also in Harkins' appraisal report dated January 31, 2002, and his testimony on direct examination.

> "We note that nothing prohibited the plaintiff and Harkins, prior to trial, from advancing alternative claims of damages--one opinion if the encumbrance of One Random Road was total, and another opinion if the encumbrance was partial. The plaintiff and Harkins did not do so. Instead, the plaintiff elected to pursue a theory of damages that was contingent upon a demonstration that the encumbrance of One Random Road was total and prohibited all future development beyond the footprint of the existing dwelling. Given the plaintiff's election, it was not an abuse of discretion for the trial court to preclude Harkins, on redirect examination, from rendering a new opinion as to the damages resulting from a partial encumbrance of One Random Road."

Coughlin at 515.

UNDISCLOSED EXPERT ALLOWED TO TESTIFY AS TO "FACTS" - ARNONE V. ENFIELD, 79 Conn. App. 501, *cert. denied*, 266 Conn. 932 (2003); Schaller, J.; Trial Judge - Beach, J.

RULE: Despite the requirement in Practice Book §13-4(4) that all experts (even those giving only factual testimony) be disclosed, trial court's decision to allow an undisclosed expert to give factual testimony is not an abuse of discretion in the absence of surprise or bad faith.

FACTS: Wrongful termination case in which the plaintiff alleged that he was disciplined in retaliation for whistle blowing. Plaintiff, employed in Enfield's Water Pollution Control Division, at one point filed a letter with the DEP alleging that Division employees were altering test results.

At trial, the plaintiff called William Hogan, a municipal facilities engineer with the DEP to testify about the standard reporting method in wastewater laboratories and the process involved in correcting a reporting error. Hogan had not been disclosed as an expert pursuant to §13-4(4). The defendant objected to the testimony because he had not

been so disclosed. The court permitted him to testify, but prohibited him from expressing any expert opinions. The Appellate Court affirmed.

REASONING: The Appellate Court recognized that Practice Book §13-4(4) requires disclosure of an expert witness, even if that witness will not be giving expert opinions. That section provides that a party must disclose the name of any expert who will be called to testify, the subject matter of the testimony, and "the substance of the facts... to which the expert is expected to testify."

Nevertheless, the Appellate Court found that it was not an abuse of discretion, in the absence of surprise to the defendant or bad faith by the plaintiff, to allow this expert to testify as to facts only and preclude him from testifying as to expert opinions.

Final Argument and Adverse Inferences

USE OF PROPS NOT MISCONDUCT – STATE V. ANCONA, 270 Conn. 568, (2004); Palmer, J.; Trial Judge - Mullarkey, J.

RULE: State's attorney's use of blue tinted sunglasses not marked in evidence during closing argument to symbolize a "blue code" of silence was not improper.

FACTS: Prosecution of police officer accused of fabricating evidence in connection with the alleged beating of a suspect.

During final argument, the state's attorney held up a pair of blue tinted sunglasses which had not been marked in evidence and talked about a "blue code" of silence pursuant to which police officers who had witnessed the beating of the suspect refused to testify against fellow officers. There was no objection at trial.

On appeal, the defendant argued that this action, linked with a number of others, constituted prosecutorial misconduct that should cause the conviction to be thrown out.

The Appellate Court agreed with the defendant and reversed the conviction. The Supreme Court reversed the Appellate Court.

REASONING:

> "With respect to the defendant's claim regarding the blue tinted sunglasses, we are not persuaded that the state's attorney's use of those sunglasses, standing alone, necessarily was improper. Of course, counsel must refrain from injecting into closing argument extraneous matters unsupported by the record, and counsel's use, during closing argument, of props that are not in evidence creates a risk of diverting the jury's attention to facts or issues not properly before it. Nevertheless, counsel is entitled to considerable leeway in deciding how best to highlight or to underscore the facts, and the reasonable inferences to be drawn therefrom, for which there is adequate support in the record. We therefore never have categorically barred counsel's use of such rhetorical devices, be they linguistic or in the form of visual aids, as long as there is no reasonable likelihood that the particular device employed will confuse the jury or otherwise prejudice the opposing party. Indeed, to our knowledge, no court has erected a per se bar to the use of visual aids by counsel during closing arguments. On the contrary, the use of such aids is a matter entrusted to the sound discretion of the trial court."

Ancona at 597-598.

The court did go on to hold that the "blue code" of silence argument, in the absence of evidence that such a code actually exists, was improper.

> IMPROPER TO ARGUE BELIEVING THE DEFENDANT MEANS WITNESSES ARE LYING - STATE V. RIVERA, 84 Conn. App. 245, *cert. denied*, 271 Conn. 934 (2004); West, J.; Trial Judge - Frazzini, J.

RULE: Consistent with the prohibition on asking one witness to comment on the veracity of another, a final argument to the same effect is improper.

FACTS: Sexual assault trial in which at the conclusion of the case the state's attorney argued that if the jury believed the defendant's version of the events, all the state's witnesses had to be lying. The Appellate Court found this argument improper.

REASONING: It s firmly established that it is improper to ask one witness to comment on another witness' veracity. State v. Sing, 259 Conn. 693 (2002). This case adds to that fact that an argument along the same lines is improper.

RESPONDING TO IMPROPER FINAL ARGUMENT ALLOWED - WALLENTA V. MOSCOWITZ, 81 Conn. App. 213, *cert. denied*, 268 Conn. 909 (2004); Dranginis, J.; Trial Judge - Corradino, J.

RULE: A party who makes an improper argument asking the jury to draw an adverse inference for failure to call a witness cannot complain when his opponent responds with facts not in evidence.

FACTS: Plaintiff buyer alleged that defendant seller misrepresented the boundaries of the house plaintiff brought from defendant. Plaintiff testified during the trial that he found out about the fact that the deck encroached on a neighbor's property when that neighbor, Frank Colombo, informed the plaintiff of that fact and threatened to bring a legal action.

During final argument, without making the showing of availability required by C.G.S. §52-216c, the defendant asked the jury to draw an adverse inference from the fact that the plaintiff had failed to call Colombo to testify. In rebuttal, plaintiff's counsel told the jury that Colombo was not called to testify because he was dead. Defendant moved for a mistrial, which the trial court denied. The trial court instructed the jury to disregard this part of the argument since there was no evidence on this point. After a plaintiff's

verdict, the defendant moved to set aside the verdict. The trial court denied the motion. The Appellate Court affirmed.

REASONING: On appeal, counsel for the defendant argued that plaintiff's counsel informing the jury that Colombo was dead "made the defendant's counsel look bad in the eyes of the jury." He further claimed that at the time of the trial he didn't know for sure that Colombo was dead, even though plaintiff's counsel had told him so.

> "We agree with the court's observation that the defendant did not come to the argument on his motion for a mistrial with the cleanest of hands, having asked the jury to speculate as to why the plaintiff had not called Colombo to testify. Although the plaintiff's counsel did not present him with a death certificate, the defendant's counsel had been informed that Colombo was dead. We expect that the members of the bar, in the presence of the court, will make accurate statements of fact in accordance with the code of professional conduct. See Rules of Professional Conduct 3.3 and 3.4. If the defendant's counsel had doubted Colombo's death, he could have conducted an investigation, which he in fact had undertaken by the time the motion to set aside the verdict was heard by the court."

Wallenta at 233-234.

> REQUIREMENT OF PROVING AVAILABILITY BEFORE DRAWING ADVERSE INFERENCE APPLIES IN BENCH TRIAL - CAPROOD V. ATLANTA CASUALTY CO., 80 Conn. App. 338, (2003); Peters, Jr.; Trial Judge - Leuba, J.

RULE: The requirement in C.G.S. §52-216c that an adverse inference not be drawn unless the absent witness' availability has been proven applies to the trial court.

FACTS: Uninsured motorist case involving a hit-and-run driver. The case was tried to the jury, which returned a verdict in favor of the plaintiff.

Defendant filed a motion to set aside the verdict claiming plaintiff was unable to prove what caused the defendant's vehicle to strike the plaintiff's vehicle. Plaintiff's vehicle was struck when it was three-quarters of the way through an intersection. Plaintiff alleged failure to keep a proper lookout and failure to keep proper control.

In its memorandum of decision, the trial court noted that the plaintiff did not call any of five available eyewitnesses. The trial judge set aside the verdict. However, the defendant had not proved that any of these witnesses were available to the plaintiff at the time of trial. The Appellate Court reversed.

REASONING: The Appellate Court held that the trial court's reliance on the fact that these witnesses were not called was by implication an adverse inference as to what their testimony would have been.

> "Although §52-216c does not refer expressly to judicial fact-finding in response to a motion to set a jury verdict aside, it would be inconsistent with the policy behind the statute to permit a court to ignore its mandate. The court should not have considered possible testimony from the missing witnesses at all. Its recital of evidence that was not properly part of the fact-finding proceedings casts a shadow on its judgment in favor of the defendant."

Caprood at 344-345.