MINUTES OF THE FEBRUARY 1, 2008 NYSBA CPLR COMMITTEE MEETING held at the New York Marriott Marquis, Carnegie Suite, 1535 Broadway, New York, NY.

In attendance: David Ferstendig, Jim Gacioch, Ron Kennedy, Sharon Stern Gerstman, Steven Sonkin, Rob Knapp, Stuart Lawrence, Ken Jewell, Steve Critelli, Jim Blair, David Hamm, Tom Bivona, Oscar Chase, John T. Cofresi, Raymond Bragar, Harold Obstfeld, Hon. Michael Stallman, David Paul Horowitz, Paul Aloe, Paul Feigenbaum, Philip Pinsky, Ellen B. Fishman, Sanford Konstadt, Allan Young. Guest: Hon. Gary F. Knobel.

The meeting was called to order by the Chair, David Ferstendig, at 12:40 p.m.

I. Approval of Minutes

Motion to approve the minutes of the October 12, 2007 CPLR Committee meeting was unanimously passed, subject to amendment of the attendance sheet.

II. Off-Agenda Item – Pen Certificates

Commenting that our Committee has been among the most successful of various groups that propose affirmative legislation, NYSBA Staff Liaison/Director of Governmental Relations, Ron Kennedy, presented Sharon Gerstman with a framed pen certificate from the New York State Legislature acknowledging her efforts in getting the *Mendon Ponds* bill passed. David L. Ferstendig was also presented with a pen certificate as Chair of the Committee..

III. Agenda

a. CPLR 4533-a: Proof of Damages (Chayt)
CPLR 3101(a)(4): "Special Circumstances (Hamm)

Ron Kennedy reported that there has been some movement in the Assembly of the CPLR 4533-a bill (increasing *prima facie* proof of damages from $2,000 to $10,000). One insurance industry lobbyist expressed some "concern" about the bill. Mr. Kennedy's goal is to push this bill, as well as our 3101(a)(4) bill (clarifying that "special circumstances" need not be shown to obtain non-party discovery). David Hamm volunteered to join Mr. Kennedy and David L. Ferstendig in meeting with the New York State Trial Lawyers to discuss this bill.

b. Reports on Pending Bills

(i) David Ferstendig solicited volunteers to write reports on two pending bills:

(1) S.6676, the proposed "critical incident stress management" testimonial privilege, and
(2) S.6687, the "Libel Terrorism Prevention Act".

David Hamm volunteered to write a report on S.6676. A volunteer is still being sought for the latter. (Ken Jewel has since agreed to write a report.)

(ii) The DJ action / no-prejudice bill (S.6306) was vetoed by Gov. Spitzer last summer on the ground that it was introduced without ample time for debate, but it has not been re-introduced yet.

(iii) S 6398-A / A9356-A – This bill amends Section 2 of chapter 606 of the laws of 2007 (which amended the Court of Claims Act § 11(b), in relation to the contents of a claim and notice of intention to file a claim) to provide that it applies to (a) any claim commenced on or after the effective date of this act; (b) any claim pending on or after the effective date of this act; and (c) any claim which was dismissed for failure to state the total dollar amount of the claim, provided that such dismissal is being appealed or can be appealed as of the effective date of this act. The bill has passed both houses, but it continues to wait in limbo to be delivered to the Governor for his signature.

c. Managing E-Mail Exchanges.

Concern was expressed about the proliferation of e-mails among members of the Committee which, at times, seem to overwhelm our inboxes. Various technological options were suggested (*e.g.*, bulletin boards; creation of e-mail program rules), but in the end, there was general consensus that self-control should be exercised in creating and responding to e-mails. A proposal was made to change the system so that replies can be sent, as necessary, only to the original sender rather than to all members of the Committee. (Follow-up: Within a few days of the meeting, the change was implemented.)

d. OCA Annual Report

David Ferstending said that the OCA Advisory Committee Report is coming out shortly and we have expressed our interest to the OCA Advisory Committee to work together with them when they have suggested legislation (instead of "reacting" to bills when we see them). In this way, if we have some disagreements that we might be able to work out, it will be a more efficient process.

e. Subcommittee on Conflict Between Uniform Rules and CPLR

Rob Knapp reported that this subcommittee (consisting of R. Knapp, J. Gacioch, P. Aloe, S. Gerstman, K. Jewell, and P. Feigenbaum) has been working on issuing a report by March 3, 2008. The subcommittee contemplates that the report would include analysis of the development of rules and statutes concerning civil procedure, constitutional and statutory bases for judicial and administrative rulemaking, the promulgation of the Uniform Rules in 1986, conflicts between the Uniform Rules and the CPLR, and comparison with the federal system and possibly other states. The planned report will also suggest a proposed legislative response.

f. Invitation to Amici Curiae

The Chair advised that counsel for the defendants-appellants in *Craig Crawford v. Liz Claiborne, Inc.* are soliciting *amici curiae* briefs for submission to the Court of Appeals. (In *Crawford*, the First Department reversed the trial judge's grant of summary

judgment in favor of the defendants, overruling the trial judge's finding of "good cause" to allow the motion to be made beyond the court's arguably-ambiguous 60-day deadline. The Appellate Division also reassigned the case to a different trial judge on remand even though there was no evidence of judicial bias and the issue was not raised below.) It was agreed that our Committee is not authorized to submit *amicus* briefs.

g. S.5256 – Prohibition on *Ex Parte* Interviews of Treating Physicians

This bill would add a new subdivision "c-1" to CPLR 3102, having the effect of overruling *Arons v. Jutkowitz,* 9 NY3d 393 (2007). Allan Young and Paul Aloe presented their respective reports on this bill. Both reports disapprove the bill, but with differences. Allan's report disapproves the bill on the ground that *Arons* was properly decided and should not be legislatively overruled, and on the additional ground that the bill goes too far by imposing a blanket prohibition against *ex parte* physician interviews even in circumstances where the plaintiff voluntarily authorizes the interview. Paul's report disapproves the bill only for the latter reason and summarizes the differing views within the Committee of those in favor of the ruling in *Arons* and those opposed.

A spirited debate ensued over *Arons*. Sharon Gerstman pointed out that this bill would, for example, prohibit hallway conversations with treating physicians during trial. Ellen Fishman stated that the bill would prevent change-of-venue motions based on the convenience of material witnesses if those witnesses are doctors whose affidavits must be obtained by defense counsel to support such motions. Paul Aloe and Sanford Konstadt argued that consent given under judicial compulsion is fundamentally wrong, especially when the plaintiff is required to allow an adversary to have a private conversation with his or her own physician. Others responded that compelled consents are a large part of civil litigation, and HIPAA does not prohibit them. David Hamm suggested the creation of an OCA regulation requiring Preliminary Conference orders to contain language consistent with *Arons*. Jim Blair advised that Chief Judge Kaye has asked OCA to devise a form of authorization for an "Arons Interview." Many members contributed to the debate. Ultimately the Committee voted 17 – 6 against any legislative response to *Arons* and 18-4 in favor of submitting Allan's report to the Executive Committee.

h. Proposed change to CPLR 1008 in response to *Charles v. Long*

The Committee voted unanimously to submit a proposal to add the following language to the end of the second sentence in CPLR 1008, as suggested by David Ferstendig: "... except an objection or defense that the summons and complaint, summons with notice or notice of petition and petition was not properly served."

The proposal is designed to eliminate the harsh consequences of *Charles v. Long,* 2008 NY Slip Op 218 (2nd Dept. 2008) for third-party plaintiffs. The *Charles* case held that dismissal of a third-party complaint was warranted because, under CPLR 1008, a third-party defendant can assert against a plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim, including a defense that the plaintiff failed to properly serve the summons and complaint upon the defendant/third-party plaintiff. The Committee acknowledged that there are many reasons why a defendant might not raise or

move on such a 3211(a)(8) defense, not the least of which is that in many cases it is a waste of time because improper service can be corrected.

i. Proposed legislative response to *Okun v. Tanners*

In *Okun v. Tanners,* 2008 NY Slip Op. 332 (1st Dept. 2008), the Appellate Division affirmed restoration of a case where the Note of Issue was vacated after plaintiff's attorney missed 4 pretrial conferences, and then cross-moved (against defendant's dismissal motion) to restore the case 21 months after the Note of Issue was vacated, claiming that the case just "fell through the cracks."

Sharon Gerstman commented that, in practice, CPLR 3404 and Article 34 generally are pretty much "thrown out," illustrating the point by citing *Basetti v. Nour* [287 AD2d 126 (2nd Dept. 2001)]. Uniform Rule, 22 NYCRR 202.21(f) was also discussed. Paul Feigenbaum commented that sections 28 and 30 of Article 6 of the State Constitution render Article 34 irrelevant. David Horowitz commented on the upstate/downstate difference in calendar control practices. Ray Bragar suggested eliminating the Note of Issue. Suggestions were made to change the CPLR. David Hamm pointed out that judges are not following the CPLR anyway. Ultimately, it was decided to table this discussion to await comment from a subcommittee of the OCA Advisory Committee which is addressing this issue.

j. Proposed Amendment to CPLR 1009

Allan Young raised the following issue in an e-mail: "Currently, when the short window of opportunity to amend an Answer has expired under 3025(a), and one of the defendants decides to implead a third party, the other defendants need leave of court to amend their Answers to assert claims against the newly-impleaded third-party defendant. Of course, leave should be freely granted, but why should a motion even be necessary? Shouldn't a defendant's right to amend be as easy as that given to plaintiffs under the current version of CPLR 1009?"

Allan proposed changing CPLR 1009 from:

> Within twenty days after service of the answer to the third-party complaint upon plaintiff's attorney, the plaintiff may amend his complaint without leave of court to assert against the third-party defendant any claim plaintiff has against the third-party defendant.

to read as follows:

> Within twenty days after service of the answer to the third-party complaint, <u>any party</u> may amend its pleading without leave of court to assert against the third-party defendant any claim that <u>such party</u> has against the third-party defendant.

This proposal generated debate over the definition of "cross-claim" and "third-party claim." Sharon Gerstman believes that a direct defendant cannot assert a cross-claim against a third-party defendant. Rather, the claim must be a third-party claim. Sharon pointed out that, as a practical matter, once a third-party defendant appears, the plaintiff can in many circumstances amend the complaint to make him a direct defendant. This would allow the other defendants to then assert cross-claims. This, of course, assumes that the third-party defendant is subject to direct suit by the plaintiff, *e.g.*., that the SOL has not expired or that the new party is not the plaintiff's employer in a negligence case.

Allan Young mentioned that his experience downstate has been that direct defendants commonly assert "cross-claims" against third-party defendants and *vice versa*. CPLR 3019(b) defines cross-claim as "any cause of action in favor of one or more defendants . . . against one or more defendants, a person whom a defendant represents or a defendant and other persons alleged to be liable." Debate ensued over the phrase "other persons alleged to be liable" and whether that must be read in conjunction with the word "defendant" that precedes it. CPLR § 1007 describes third-party practice in terms of "proceed[ing] against a person not a party . . .." But once the third-party defendant is in the case, is he not "a party"?

Allan Young posed a hypothetical case involving numerous defendants in which every defendant wants to assert a claim for contribution against a particular third-party defendant who has just been impleaded as a result of one defendant's filing of a third-party complaint. Would that require multiple, individual third-party actions, each with its own $210 filing fee? Would it not be simpler and less expensive to permit defendants to assert claims (however denominated) against the newly-impleaded third-party defendant without having to file separate third-party actions?

Several members pointed out that even if the concepts of "cross-claim" and "third-party claim" were merged and the distinction, if any, eliminated, we might face resistance from OCA because of the fiscal implications of eliminating the $210 filing fee for third-party actions.

Because of time constraints, discussion on this topic remains unfinished.

The meeting adjourned at approximately 3:40 pm.

Respectfully submitted by,

Allan I. Young