MINUTES OF THE MAY 2, 2008 NYSBA CPLR COMMITTEE MEETING held at the House of the Association of the Bar of the City of New York, 42 W. 44th Street, New York, New York.

In attendance: David Ferstendig, Chair, Allan Young, Robert Kaplan, John T. Cofresi, Thomas M. Curtis, Ronald Kennedy, Stuart W. Lawrence, Laura Gentile, Steven Sonkin, David A. Blansky, Michael C. Barrows, Thomas C. Bivona, Sanford Konstadt, Sharon Stern Gerstman, Steve Critelli, Burton Lipshie, Philip Pinsky, David Hamm, Rob Knapp, Jim Blair, Ken Jewell, Harold Obstfeld, David Horowitz, Paul Aloe, Hon. Michael Stallman. By teleconference: David Stein, Bill Altreuter, John Jablonski, Elliott Blumenthal, Chris Gannon.

The meeting was called to order by the Chair, David Ferstendig, at 12:25 p.m.

I. Introduction:

David Ferstendig announced that this is his last meeting as chair of the committee. David offered praise and thanks to all who have helped him. Praise and thanks to David were returned heartily by members of the committee.

David Ferstendig advised the committee that as things heat up in the legislature at this time of year, we should expect a flurry of e-mails on pending bills.

II. Approval of Minutes: Minutes of the 2/1/08 meeting were approved.

III. Report on Status of CPLR § 1008 Bill:

Staff Liaison/Director of Governmental Relations, Ron Kennedy, reported that our proposal (providing that certain defenses relating to improper service of process on a defendant/third-party plaintiff may not be asserted in the answer of a third-party defendant, so as to eliminate the harsh consequences of *Charles v. Long,* 2008 NY Slip Op 218 (2nd Dept. 2008) for third-party plaintiffs) was approved April 4, 2008 by the NYSBA Executive Committee and sponsored by Sen. DeFrancisco as S.7998. Ron met with Assembly staff yesterday and our bill will be included in the upcoming deliberations. June 23 is the last legislative day.

IV. Miscellaneous Items:

(a) "Libel Tourism" Bill: David Ferstendig advised the committee that the Libel Tourism bill was signed into law yesterday.

(b) Retroactivity of Amendment of Court of Claims Act § 11(b): David Ferstendig advised that S.6398A/A.9356A was recently enacted as Chapter 64, L. 2008 ("An act to amend chapter 606 of the laws of 2007, amending the court of claims act relating to the contents of a claim and notice of intention to file a claim, in relation to the effectiveness thereof"). A brief history: In *Kolnacki v. State of New York*, 8 NY3d 277 (2007), the Court of Appeals dismissed a personal injury claim against the State because the *ad damnum* clause failed to state a monetary amount of damages claimed, despite the fact that in 2003, CPLR § 3017 was amended to prohibit the mention of a specific dollar amount in any pleading based on personal injury or wrongful death. In response, Court of Claims Act § 11(b) was amended in 2007 to abrogate *Kolnacki*, but

the question remained whether the amendment was retroactive to 2003 and whether it should be interpreted to allow the revival of claims that were dismissed because of *Kolnacki* violations. Gov. Spitzer expressed opposition to retroactivity. The current amendment clarifies that the "no-*ad damnum* clause" rule applies to "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."

(c) Old Items: Sharon Gerstman asked about the status of David Hamm's 3101(a)(4) bill (clarifying that "special circumstances" need not be shown to obtain non-party discovery), the summary judgment bill, and Maurice Chayt's 4533-a bill (increasing *prima facie* proof of damages from $2,000 to $10,000). Sharon suggested ways to reach out to NYSTLA. Sharon and David Hamm offered to meet with "JR" (Junior Drexilius, legislative aide to Sen. Volker) Ron Kennedy said he will put together a list of items to talk to JR about.

(d) Bill to overturn Arons (ex parte conversations between defense counsel and plaintiffs' treating physicians): There is disagreement within the State Bar among various groups. TICL is opposed for the reasons stated in our committee's report. The Trial section is in favor. OCA was opposed, now is in favor. (Update: Several weeks after this meeting, the NYSBA adopted an official position disapproving the bill.)

V. Rulemaking Subcommittee (Agenda Item VI):

Rob Knapp reported that the subcommittee is about halfway finished with a proposed legislative fix. The subcommittee's goal is to attempt to move away from two different bodies of procedural rules. The subcommittee's report should be ready by September.

VI. Commercial & Federal Litigation Section report on E-Discovery (Agenda Item III, Attachment "B"):

David Ferstendig asked if we, as a committee, need to respond. David Hamm identified two major issues: (a) metadata, and (b) deletion of electronic data in the ordinary course of business. David Hamm. agrees with the CFLS report. Sharon Gerstman said we must make sure any report generated by this committee does not contradict State Bar policy. There was much discussion about the proposal's requirement to produce data in searchable form. This presents a problem for litigants who produce discovery in paper or PDF format. Tom Curtis asked how one would cross-examine a witness with the question, "Is this your signature?" with e-production? David Hamm pointed out that this proposal does not preclude paper discovery. Burt Lipshie advised that OCA is dealing with this too. Perhaps the solution is to have a rule addressing e-discovery in a Preliminary Conference order.

There was discussion about the proposal to amend CPLR 3122 to place the burden of the cost of production on the producing party, contrary to current NY law. Other comments: this proposal is deliberately silent on cost-shifting. NY law is fuzzy on the issue of who bears cost; generally it is the party seeking production. Burt Lipshie argued that NY law is clear; the producing party only has to make documents "available" for copying and inspection. Sharon Gerstman suggested that there should be a presumption as to who bears the cost of production. Federal practice presumes that the producing party bears the cost of production. Jim Blair said that the intent of this proposal was not to change current law on cost bearing. Paul Aloe pointed to troublesome

case law. Some courts require parties to turn over entire hard drives or laptops on the theory that the material must be made "available" that way. Currently, said Paul, the CPLR does cover electronic documents. Federal rules have good protections that NY should have. Tom Curtis opined that this proposal does not go far enough in defining "not reasonably accessible." "Reasonably accessible" is an electronic issue, while "burdensome" is a paper production issue.

Sharon Gerstman said that the comments in the report are good, but they won't become part of the law, as the UCC's official comments are. Perhaps a legislative memo could address this. John Cofresi opined that there should be a rule distinguishing preservation of data for cases in suit. Paul Horowitz argued that this is a solution in search of a problem. Cost-shifting is rarely a litigated issue, and cloning of hard drives is mostly a matrimonial issue.

Paul Aloe stated that under current rules, most litigants don't respond adequately to discovery requests. For example, who bothers to produce backup tapes? There are no current ground rules. The federal rules strike a reasonable balance. We should follow the federal rules. Information retention and disclosure should not be governed by different rules depending on what court the dispute winds up in.

Sharon Gerstman suggested adding the word "technological" between "undue" and "burden" in the report's proposed added language to CPLR 3122(a). Another person (on the phone) suggested "not reasonably accessible technologically."

Michael Stallman said the law adapts to technology and business practices. We have an existing body of case law for paper discovery that deals with notions of "burdensome" and "overbroad." Why do we need special rules for e-discovery? There is no difference between sifting through a shipping container and doing a computer search.

Paul Aloe said that the law obligates producing parties to identify what exists, so if data is on 100 BlackBerries, each one should be identified. Sharon asked, How is that different from 100 shipping containers? This proposed legislation does not make it clear that it is only about identifying sources. David Hamm said there is no law that defines "burdensome." It is all *sui generis*. This law simply reminds us that e-discovery is not necessarily as easy as pushing a button. It should be made clear that this law does not supplant CPLR 3101; it incorporates it.

Jim Blair pointed out that the Uniform Commercial Division rules require certain issues to be addressed at Preliminary Conferences, including e-discovery. The City Bar recommends that this rule be applied to all PCs.

David Ferstendig reminded the committee that this is not our committee's proposal.

Sharon Gerstman suggested that the chair of our committee should write to the NYSBA Executive Committee that we are not clear about the role of the commentary in this report.

Bill Altreuter asked, Do we really need this legislation?

VOTE: 19 say legislation is needed. 6 say no need for legislation now.
VOTE: 21 in favor of this legislation. 5 opposed.
VOTE: 11 vote for proposal as is. 14 vote for the proposal NOT as is.

Motion by Sharon Gerstman to endorse the proposed legislation but express concern about the language in the commentary, with suggestion of moving the commentary into a legislative memorandum. VOTE: 19 in favor (PASSED).

VII. Motion Practice Amendment proposed by Aloe (Agenda Item V, Attachment "C"):

Paul Aloe proposed to amend CPLR 2214 to require that all motion papers (original motions, cross-motions, answering papers, and reply papers) that are served by mail should have a uniform three days added for mailing, or one day added for overnight courier. Paul's proposal also suggests changing 12 days to 16 days in CPLR § 403 (service of notice of petition) to make it consistent with the recent change in CPLR 2214.

Sharon pointed out that CPLR 2103(b) still says "5 days" for mailing, so that would have to be addressed. She suggested getting rid of the 8-2 rule. Burt Lipshie agreed. Under the proposal, the 8-2 rule might give the opponent as little as 3 days to serve opposition by mail. Michael Stallman stated that 3 days for mail is not sufficient. Paul Aloe opined that OCA would probably not agree with a 5-day rule to be added for all papers served by mail.

David Hamm suggested that efforts to speed up motion practice by setting overly-short response times often have the exact opposite effect, because parties seek and obtain adjournments anyway.

Sharon moved to table the discussion and to form a subcommittee to work with OCA. VOTE: 14 to table. 10 not to table.

A subcommittee was formed consisting of David Hamm, David Ferstendig, Sharon Gerstman, Mike Stallman, and Laura Gentile.

VIII. OCA Annual Report (Agenda Item VII, Attachment "D"):

The Chair asked the committee members to focus on three items in the OCA Annual Report for commentary by our committee:

Item 1 of "New Measures" concerns providing courts greater opportunity for oversight of applications for approval of transfers of structured settlements (GOL § 5-1705).

Item 5 of "New Measures" proposes adopting the Uniform Interstate Depositions and Discovery Act of 2007 to authorize disclosure in New York State in an action pending in another jurisdiction (CPLR 3119 [new] and CPLR 3102(e)).

Item 1 of "Recommendations for Amendment to Certain Regulations" proposes giving the court discretion to accept an untimely submission of an order, judgment or decree for good cause shown or in the interest of justice. (22 NYCRR 202.48(b)). This is OCA's response to *Farkas v. Farkas*, 40 AD3d 207 (1st Dept. 2007) (vacating judgment where plaintiff failed to submit form of judgment to court within 60 days).

Because of time constraints, discussion on these topics was limited, but the Chair invited volunteers to write commentaries.

The meeting adjourned at approximately 3:20 pm.

Respectfully submitted by,

Allan I. Young