Minutes of NYSBA CPLR COMMITTEE MEETING
October 12, 2007 12:30 p.m., held at ABCNY, New York, NY

Attendance was taken, in person and by phone. (See above.) Ron Kennedy introduced Kevin Kerwin (participating by phone) the new NYSBA Associate Director, Department of Government Relations.

Rob Knapp acted as secretary to the meeting in Alan Young's absence. The Roman numerals below refer to the points on David Ferstendig's September 17, 2007 meeting agenda.

I. Introduction.

David Ferstendig began the meeting by explaining what the Committee does, and how our work has changed. We report on "hot" bills in the Legislature, which may have been introduced long before but only start to move in May and June. We are reporting on fewer bills than we used to, David noted, and should try to report on more. This would require assigning and reporting on bills before they start to move during the spring, so that we already have a report ready and agreed upon when the bill suddenly becomes hot. Not all the work can be done from scratch in May and June of each year. The Committee website has a page that tracks pending proposed CPLR amendments, thanks to Ron Kennedy.

With respect to affirmative legislation sponsored by the Committee, David noted two obstacles:

1.) Difficulty reaching agreement within the Committee itself [*e.g., Brill*], and then getting the proposal approved the NYSBA Executive Committee. Realistically, we must agree on a bill by the end of November in order to get it approved by the Executive Committee in January in time for submission to the Legislature before the end of the session.

2.) On any given bill, there will be one or more special interest groups in the Legislature on either side of the issue, and either such group has the power to "kill bill."

II. Minutes of the May 4, 2007 meeting were approved unanimously.

III and IV, Affirmative Legislation. Ronald Kennedy addressed the two listed legislative proposals, a new CPLR 4533-a concerning the introduction of (commercial) bills as prima facie proof of damages, and an amendment to CPLR 3101(a)(4) that would "eliminate" the requirement of "special circumstances" for non-party disclosure. Both bills were introduced in the Legislature and both were blocked, Ron noted. There was no written opposition to either bill; rather Ron characterized the opposition to the first as "verbal and undefined" and the opposition to the second as "knee-jerk." The first bill was opposed by the insurance industry and the second by the NYSTLA, which is apparently

gun shy about any new legislation in the wake of renewed calls for medical malpractice "reform."

On the first bill, Ron said that the critical person was "JR" Drexelius, counsel to Senator Dale Volker, Chair of Codes Committee, where most CPLR bills are introduced. Senator Volker offered to put Ron in touch with the opponent of the bill, Ron said. There would be no point packaging the amendment to CPLR 4533-a together with our summary judgment bill, according to Ron. He added that we needed someone to take the place of Maurice Chayt as the Committee shepherd of this bill.

Sharon Gerstman raised the possibility that the proposed amendment to CPLR 3101(a)(4) would be mooted by the Court of Appeals' pending decision in *Arons v. Jutkowitz* (which was decided on November 27, some six weeks after our meeting.) But the bill was not designed to affect expert discovery or medical witnesses, David Hamm responded. Rather, it was only a technical bill intended to overrule a Second Department misinterpretation of the existing statute and should not have been controversial.

V. Passed CPLR legislation. Sharon Gerstman's *"Mendon Ponds"* filing bill finally passed, after being twice vetoed by the previous Governor. It remains to be seen whether the bill will be followed, or ignored, Paul said. The Committee is indebted to Sharon Gerstman for her skill and persistence in getting this bill passed on the third try, David Ferstendig noted. Credit is also due to Ron Kennedy, to the new Governor (stronger on civil procedure than public relations?) and to the new Governor's counsel.

VI. Assignment of Bills for Reporting. Ron Kennedy has created a bill-tracking report on the Committee website but it is hard to keep track of our own old memos, Paul Aloe pointed out, which we need in order to see what position we have taken on the same or similar bills in the past. There was a discussion whether it would be possible to create an on-line database of our old reports.

David Hamm noted that the bills often get amended at the last minute, after our report has issued, and that the final bill, as passed, rejected or vetoed, may present issues not addressed by our report. For instance, the declaratory judgment bill (which would have allowed a plaintiff to seek a declaratory judgment as to the defendant's insurance coverage, before actually obtaining a judgment against the defendant) was amended at the last minute also to require a showing of prejudice in order for an insurer to disclaim coverage by reason of late notice of claim. The amended bill was then passed by the Legislature but vetoed by the Governor. The final bill rejected by the Governor was therefore quite different from the one we had approved in our report. Whatever features of an old bill that led to its defeat or to its veto therefore may not be addressed in our old report, David noted, and the report may not be applicable to the new bill either.

Ronald Kennedy said that we had to make sure that our website is linked to latest version of bill. Our primary focus should be staying on top of pending legislation, said Ron, which is a big job.

Attachment C-3 to the agenda was a list of bills available for reporting. David Ferstendig will assign them to Committee members for reporting, unless a member volunteers to report on a bill first. Members preparing reports should first go the bill tracking website for the current version of the bill itself as well as any sponsor's memo, and should then go the Committee's website to see if we have ever reported on anything similar. Reports should be submitted within thirty days of assignment, DF said, so that we have a report ready when the bill starts to move.

Ron Kennedy said that the Legislature is involved with budget issues from January through March, and that OCA bills are not introduced until mid-May. There was discussion whether the Committee should have its own special meeting to consider the OCA advisory committee book that comes out in February. (Jim Blair, who is on the OCA advisory committee, said that OCA has a thin book this year.) Ron Kennedy suggested that priority be given to two-house legislation, introduced by the majority party in the house where the bill started.

VII. CPLR 6201(b) – The Committee voted in favor of Rob Knapp's report disapproving S3166-D, which would have added a new subsection (b) to CPLR 6201, creating a post-judgment order of attachment. Rob noted that the premise of this bill as set forth in the sponsor's report, that a judgment creditor can obtain an attachment under the Foreign Sovereign Immunities Act more easily than an execution, is incorrect. It was suggested that Rob speak to Jackie Hattar (not present for the meeting) who is a partner at Wilson, Elser, the law firm lobbying for this bill, and try to find out what is the real purpose of this legislation.

Ron Kennedy noted that 3166-D had not been formally introduced in Legislature as of the date of our meeting, but was expected to be introduced on October 22. The Committee voted to approve Rob's report for release by Ron Kennedy upon introduction of the bill. Ron said he would also discuss S3166-D with JR Drexelius. The Committee agreed that it would revisit this bill if the sponsor could explain its purpose.

Pat Connors objected that Rob had failed to distribute, with his report on an earlier version of this bill, the sponsor's reply to various constitutional objections that had been raised to that bill. (S3166-C would have added a new subsection (d) to CPLR 5201, to the effect that "... the situs of property or debt under this section will be New York when the garnishee for such property or debt is subject to the jurisdiction of the courts of this state." In fact, Rob had mentioned, although not attached, the sponsor's reply in an e-mail to the list serve on his earlier report. Rob also sent the sponsor's reply to Pat, the only person who requested to see it in response to Rob's e-mail.) Pat contended that the sponsor's reply showed that the earlier bill would have been constitutional, contrary to the conclusions reached in Rob's earlier report. Rob responded that the sponsor itself had subsequently withdrawn the situs-of-debt provision from the earlier bill, in apparent recognition of its constitutional infirmity, and that that earlier bill was now academic. Pat abstained from the vote on the present S3166-D but wished to have his objection noted to the procedure followed on the prior report.

VIII. OCA Rulemaking Subcommittee Report (Paul Aloe, Paul Feigenbaum, Jim Gacioch, Sharon Gerstman, Ken Jewell, Rob Knapp, chair.) This subcommittee was set up at the May 4, 2007 meeting to address conflicts between the CPLR and the various administrative rules that have come to control more and more aspects of civil practice. Sharon Gerstman noted that the Administrative Board and Appellate Divisions have rulemaking authority with respect to the practice of law, and that these rules stand on a different footing from the "Uniform Rules" adopted by the Chief Administrative Judge. The Subcommittee should focus on the interplay between Uniform Rules and the CPLR, suggested Sharon, outlining the places where they contradict each other.

Sharon said that ideally, the matters now addressed in the Uniform Rules would be returned to the "Rules" of the CPLR, which up until 1978 were subject to amendment by the Judicial Conference (predecessor to the OCA) but which now can only be amended by the Legislature. Yet Sharon felt this was a political impossibility: the Legislature would not re-delegate rulemaking authority to an administrative body such as OCA, even though Chief Administrator is, paradoxically, exercising more rulemaking authority now that the Legislature has withdrawn any judicial or administrative authority to amend the CPLR itself.

Perhaps the power of Chief Administrator should be limited, Sharon suggested. We should show how the Chief Administrator is changing procedural rights, she said, describing both the procedure for promulgation of the rules, and specific examples of their conflict with the CPLR (*e.g.,* Part 130 vs. CPLR 8303-a, conduct-of-deposition rules, *ex parte* TRO rules. The latter two rules began life as OCA legislative proposals and were only transformed into administrative rules after they had been blocked in the Legislature, Paul Aloe noted.) Rob Knapp suggested that we propose a state Rules Enabling Act, permitting the Chief Administrator (or other designated person or body) to amend the Rules of the CPLR, subject to legislative veto. It was also suggested that our own Committee's report be forwarded to the Executive Committee, which meets quarterly with the OCA.

A related issue is the manner in which the Uniform Rules are promulgated and amended, and the opportunity for comment, which is afforded for some rules but not others. Perhaps a more formal rulemaking procedure should be followed, it was suggested. The Chief Administrator is not bound by the State Administrative Procedure Act, Pat Connors pointed out at a previous meeting.

Yet another problem is that the Uniform Rules are not uniform. On any procedural issue, three sets of rules must now be examined: the CPLR, the Uniform Rules and the individual judge's rules. Sharon Gerstman suggested that rules of practice should be harmonized throughout the state, to which Paul Feigenbaum responded that the Uniform Rules were themselves supposed to be uniform.

IX. Post-*Brill* Rulings. David Ferstendig posed the question of what happens to cases where a meritorious summary judgment motion is denied as untimely. If a libel action is filed two years after the disputed publication, but the defendant neglects to move for summary judgment until 121 days after filing of the note of issue, does the action then

get presented to a jury, only to be dismissed upon the close of plaintiff's direct case on the grounds that the claim is barred by the statute of limitations? This seems like a waste of time, not least for the trial judge and jurors.

Sharon Gerstman said that the beauty of *Brill* is that plaintiffs are not required to oppose last-minute summary judgment motions. But the practice of allowing discovery after filing of the note of issue (and of refusing to strike the note of issue where discovery is incomplete) makes the *Brill* deadline unrealistic in many counties, with the time to move for summary judgment expiring long before discovery has been completed. Paul Aloe argued that the note of issue cannot trigger the deadline for a summary judgment motion if there is post-note-of-issue discovery. *Brill* was intended to prevent interference with the trial date by last-minute summary judgment motions, not to create an arbitrary deadline for summary judgment, Paul added. A realistic trigger for *Brill* was needed, suggested David Horowitz.

David Ferstendig noted that the Committee had never been able to reach agreement on *Brill.* David Hamm suggested that the issue of post-note-of-issue discovery itself had to be addressed.

David Hamm said he would try to have a summer associate or paralegal track cases in which meritorious summary judgment motions have been denied by reason of *Brill.* (These cases may be difficult to identify; courts usually will just deny the summary judgment motion as untimely, without adding a "but you would have won if you had filed this on time.") Paul Aloe, David Ferstendig, David Hamm, David Horowitz and Sharon Gerstman will form a subcommittee to examine this issue.

X. Affirmative Legislation (only reached as set forth in items III and IV, *supra.*)

The meeting adjourned at 3:00 p.m.

Respectfully submitted,

Rob Knapp
Secretary to the meeting