

MINUTES OF MAY 4, 2007 NYSBA CPLR COMMITTEE MEETING
held at the House of the Association of the Bar of the City of New York, New York, NY.

I. **Introduction:** The meeting was called to order at 12:00 noon by Chair, David Ferstendig. Mr. Ferstendig told the Committee that in May and June, things will get hectic as bills get pushed toward the end of the legislative session. With thanks to all who have served on the Committee, Mr. Ferstendig advised that some members will get rotated off the Committee as new members join.

II. **Approval of Minutes**

Motion to approve minutes of January 24, 2007 CPLR Committee meeting was unanimously passed, subject to correction of the following sentence in item III(e): "J. Gacioch said that he would ask the NYSBA Administrative Committee to circulate proposals to our Committee." Mr. Gacioch subsequently informed the recording secretary that the sentence should read: "J. Gacioch said that he would ask the OCA CPLR Committee to circulate proposals to our Committee."

III. **Agenda**

A. **Status of CPLR Committee Bills**

Ron Kennedy reported on the status of the CPLR Committee's bills, first presenting a general discussion of the legislative process. Mr. Kennedy said that the legislative session begins in January with the Governor's State of the State message, but because of the need for a new governor to build staff, and with the budget consuming everyone in March, followed by a two-week break in April, the legislative agenda can move slowly, and this year has been very slow. Not too many bills have been reported out of the Assembly and Senate committees so far this year, but May promises to show more activity.

Mr. Kennedy then reported on the status of the following bills introduced by our Committee:

- (1) CPLR 4533-a - proof of damages (M. Chayt): This bill was introduced in the last two weeks.
- (2) CPLR 3101(a)(4) -- express elimination of "special circumstances" for non-party disclosure (D. Hamm): This bill was introduced in the last two weeks.
- (3) CPLR 2305-a - Notice in Lieu of Trial Subpoena (A. Young): We have an agreement with the OCA Advisory Committee on a compromise bill, the language of which was included in the previous meeting minutes. OCA's memorandum gives credit to our committee for having inspired its bill. Mr. Kennedy has introduced our version of the bill in both houses. (UPDATE: As of 6/11/07, our

version of the bill is S.02880/A.5981; OCA's version is S.3907/A.08192 and has passed both houses.)

(4) "Old bills" – A general discussion ensued regarding the question of our Committee revisiting "old bills, such as A.6042 (D. Hamm's proposal regarding a method to appeal from a signed but not-yet-entered order or judgment). As of February, this bill was in the Assembly Judiciary Committee. S. Gerstman queried whether we have a shot at getting our Mendon Ponds bill through now that we have a new governor. R. Kennedy said that the Assembly Judiciary Committee has this ready. See A.7328/S.4320. (UPDATE: As of 6/11/07, the bill has passed both houses.) M. Chayt brought up S.4212 (increasing penalty for disobedience of subpoena from \$50 to \$150), advocating that the penalty should be up to \$500, given inflation factors. R. Kennedy suggested that we should support the bill with a memorandum commenting that the penalty should be higher. Mr. Chayt volunteered to draft a report (but has subsequently decided he could not).

R. Kennedy pointed out that every two years with a new legislative session, old bills must be reintroduced. Our reports are then reissued. Many bills do not get out of the Rules Committee until the very end of the legislative session. Before 1992, our Committee wrote reports on pending legislation only; we did not write affirmative legislation. A discussion ensued as to whether we should go back to the "old" system.

R. Kennedy said that he has resources to identify 90% of the CPLR bills that are introduced. There was agreement to form a subcommittee to identify CPLR bills. The subcommittee consists of: David Ferstendig, Paul Aloe, Sharon Gerstman, Jim Gacioch, and John Cofresi.

It was agreed that our Committee can comment on pending legislation without the approval of the NYSBA Executive Committee as long as our comments are not in conflict with the official position of the NYSBA.

B. S.4149 – Expert Disclosure Bill

The Committee engaged in a spirited discussion of J. Gacioch's report (attached as Exhibit "B" to the agenda) and the policies, practices and politics of medical malpractice litigation. Editing suggestions were made by member of the Committee. (UPDATE as of 6/11/07: Mr. Gacioch has revised the report.)

C. New Ideas for Affirmative Legislation

Prior to this meeting, the Chair solicited input from Committee members concerning new ideas for affirmative legislation. This generated a number of e-mails from Committee members, some of which were discussed at the meeting. The timing of expert disclosure under CPLR 3101(d), for example, is a concern to many members, but as D. Ferstendig

and R. Kennedy pointed out, efforts to change the rules have not gone anywhere in the past.

Another topic of discussion was the desire by many Committee members to restore control of CPLR sections to the legislature and reduce the rule-making powers of the OCA. M. Stallman drew the Committee's attention to CPLR 102 and 3401; Article 6 of the state constitution; and Judiciary Law §§ 211 and 212. S. Gerstman called for a more formal process by OCA to consult with the NYSBA as the representative of the lawyers of this state. J. Blair pointed out that the OCA Advisory Committee merely makes recommendations to the Administrative Board of the Courts, which consists of the Chief Judge and the Presiding Judge of each department of the Appellate Division. A subcommittee was formed to explore issues concerning OCA rulemaking. The subcommittee consists of Ken Jewell, Paul Aloe, Sharon Gerstman, Rob Knapp, Jim Gacioch and Paul Feigenbaum.

IV. **E. Ron Kennedy's Promotion**

The Committee congratulated Ron Kennedy on his promotion to Director of the Governmental Relations Dept.

The meeting adjourned at 3:00 pm.

Respectfully submitted by,

Allan I. Young