MINUTES OF JANUARY 24, 2007 NYSBA CPLR COMMITTEE MEETING held at the New York Marriott Marquis, Soho Suite, 1535 Broadway, New York, NY.

The meeting was called to order by Chair, David Ferstendig, at 2:30 p.m.

I. Congratulations to all on the Committee who have published.

II. **Approval of Minutes**

Motion to approve minutes of September 8, 2006 CPLR Committee meeting was unanimously passed, after the spelling of Judge Pigott's name was corrected.

III. **Agenda**

a. CPLR 4533-a – Proof of Damages; affirmative legislation: The Chair reported that this bill will be submitted to the Legislature this session.

b. CPLR 2305-a – Notice in Lieu of Subpoena/Subpoena of Party; affirmative legislation: The Chair reported that we worked with the OCA Advisory Committee, which proposed its own version of the bill. Among other things, OCA's original version would have allowed extraterritorial service of a subpoena (or a notice in lieu of subpoena) upon a party, or at least implied that it was allowed. We opposed any version of a bill that would have allowed extraterritorial service. Accordingly, the OCA Advisory Committee conceded that point and came up with the following language:

> Where the attendance at trial of a party or person within the party's control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with Rule 2103(b) to the party's attorney of record.

The bad news is that our version of the bill will probably not go through. The good news is that OCA's bill is substantially the same as ours, although shorter. Sharon Gerstman said that OCA has agreed to give us credit, but we have not seen the language yet. The Chair said that he would circulate the language to the Committee.

c. CPLR 3101(a)(4) – "circumstances" vs. "special circumstances" and non-party disclosure; affirmative legislation: The Chair reported that he has a meeting tomorrow on this subject with the Executive Committee and will report back to the Committee.

d. CPLR 3211(e) – Leave to Replead; affirmative legislation: Paul A. reported to the Committee on his subcommittee's work since the last meeting concerning the 1/1/06 amendment of CPLR 3211(e) which eliminated the requirement that a party facing a motion to dismiss on the sufficiency of the pleadings must include

in its opposing papers a request for leave to replead and submit supporting evidence. At the last meeting, the Committee voted by a bare majority that there should be a showing of merit in order to be granted the right to replead, and a great deal of discussion ensued at this meeting. The end result was a 14-10 vote against any further amendment to CPLR 3211(e).

e. **OCA Annual Report**: The Chair reported that representatives of the NYSBA met with Judge Lippman to discuss the recent implementation of Part 221 of the Uniform Rules relating to conduct of depositions, the concern being that there had not been enough notice or time for comment. This raised the broader issue of notice and opportunity for comment with respect to all proposals for changes affecting civil practice. Members of the Committee commented that significant changes in the rules of civil practice are being proposed by various groups, and we need to be aware of them. P. Aloe mentioned that 40 to 60 CPLR bills are introduced in the Legislature every session and we should take a close look at them. There was comment concerning the "flawed legislative process" with respect to civil practice bills. D. Hamm said that our Committee cannot "take on the whole system," but all agreed that we should at least be aware of what proposals are in the pipeline. J. Gacioch said that he would ask the NYSBA Administrative Committee to circulate proposals to our Committee. S. Gerstman stated that there has been a new dialogue between the NYSBA president and the OCA regarding publicizing proposed rules. The consensus of our Committee was that we should form a subcommittee to review proposals in the OCA annual "book." A subcommittee was formed consisting of D. Ferstendig, J. Gacioch, P. Aloe, S. Gerstman, J. Blair, D. Hamm, and S. Bermack.

f. **Electronic Filing Task Force Report** – Sharon Gerstman, Co-Chair of the NYSBA Task Force on Electronic Filing of Court Documents, reported concerning the Task Force's final report and recommendations. A resolution was scheduled to be heard by the House of Delegates on January 26, 2007 to consider the report and recommendations. A comment period would be open until March 5, 2007, and formal debate and vote by the House would be conducted on March 31, 2007. Ms. Gerstman said that the Task Force recommended implementation of e-filing in the Surrogates' Courts statewide at this time because these courts are a "creature of OCA," making the process easier to implement than in other courts. The report concludes that e-filing should be mandatory after an initial transition period. Recommendations concerning e-filing in supreme and county courts, appellate courts, specialized courts and all courts of original jurisdiction are also contained in the report, which runs 72 pages, with a 413-page appendix. The report is available on the Bar Association's website at **http://www.nysba.org/Content/ContentGroups/Reports3/Efiling/Efiling.htm**.

g. **CPLR 205(a) – Recommencement of action within 6 months of termination (*Andrea v. Arnone* issue); affirmative legislation:** P. Aloe reported that the *Andrea* case seems to create a new category of "failure to prosecute" under CPLR 205(a). In *Andrea*, the Court of Appeals held that dismissal of an action for failure to comply with discovery orders is a dismissal "for neglect to prosecute the action"

within the meaning of CPLR 205(a); thus, actions dismissed for such discovery failures are not saved by CPLR 205(a) from the bar of the statute of limitations. Discussion ensued about the differences between § 3126 (penalties for refusal to comply with order or to disclose) and § 3216 (want of prosecution); and what other types of "failures" might be construed as neglect to prosecute, such as a plaintiff who does not get new counsel immediately after an attorney withdraws from representation, or a plaintiff's failure to serve a complaint after serving a summons with notice. S. Gerstman suggested adding language to § 205(a) saying that a dismissal under § 3126 does not entitle a plaintiff to recommence an action. The Chair will circulate an e-mail to the Committee to see if there is any interest in bringing § 3126 into § 205(a).

IV. **"Clean Up" legislation:**

D. Hamm asked if we still wish to pursue an old legislative proposal, which was to allow a party to appeal from an order or judgment that has been signed by a judge but not yet entered by the county clerk. David illustrated the problem with a recent case of a declaratory judgment under CPLR 3001, which clerks typically do not "enter" without the accoutrements of a judgment, such as a bill of costs. In addition, other situations that require quick appellate review are often delayed because of the time it takes for an order or judgment to make its way from the judge's part to the county clerk. David mentioned that Assemblyman Weprin has the bill under A.2994. [A subsequent check shows that the bill is now designated A.6042, and was referred to Judiciary on 2/28/07]. The Committee voted affirmatively to pursue lobbying efforts to try to get this bill passed.

V. **Other Business**

J. Gacioch suggested that Committee members should get CLE credit for some parts of our quarterly meetings. All agreed.

The meeting adjourned at 5:00 pm.

Respectfully submitted by,

Allan I. Young