<u>MINUTES OF APRIL 8, 2005 NYSBA CPLR COMMITTEE MEETING AT ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (12-3:30P.M.)</u>

MEMBERS PRESENT: Sharon Stern Gerstman, David Hamm, David L. Ferstendig, Allan Young, Joe Einstein, Jim Blair, Rob Knapp, Patrick M. Connors, Michael D. Stallman, Maurice Chayt, John J. Jablonski, William C. Altreuter, Matthew J. Morris, Steve Critelli, Paul Aloe.

BY PHONE: Kim Juhase; Harold B. Obstfeld; Ron Kennedy.

The meeting was called to order at 12:25 p.m.

I. APPROVAL OF MINUTES

Motion to approve the minutes of the January 28, 2005 meeting was unanimously passed.

II. INTRODUCTION

a. **Sharon Gerstman** announced that this would be her last meeting as Chair of the Committee. Membership/Officer issues will be resolved in early May. Judge Michael Stallman thanked Sharon on behalf of the entire Committee for her devotion and commitment over her three year term.

b. **<u>Mendon Ponds:</u> Sharon Gerstman** will be turning her attention to this issue and will meet with staff people in the Legislature.

III. SUBCOMMITTEE REPORTS

A. <u>Notice in Lieu of Subpoena</u> (Allan Young): (suggested as CPLR 2305-a, a new section) : We are dealing with an individual party or an employee of the party. The issues that pertain to forcing those individuals to appear are not identical. **<u>David Hamm</u>** also mentioned that there are different considerations when we are dealing with a trial subpoena as opposed to a discovery subpoena. For example, there may not be sufficient time to make a motion (for a protective order) if the party being sought does not want to be produced for trial in New York. In addition, at the time of trial that party's deposition presumably has been conducted. **<u>Paul Aloe</u>**: We were primarily trying to deal with parties "found in New York" and to simplify the process by serving his/her counsel. It was not intended to reach a party in Lithuania to bring him/her into court. **<u>Joe Einstein</u>**: This proposed amendment adds a new layer of possible sanctions with respect to trial subpoenas. For example, in a MVA, a particular defendant may not be necessary at trial, yet a plaintiff's counsel could subpoena that defendant for trial and, if the defendant did not appear, that defendant could be subject to sanctions (dismissal; resolving claims against him) not presently available.

A wide-ranging discussion ensued about, among other things, (1) removing the words “or otherwise can be found within the state” – agreed; (2) the number of days before the trial the notice should be served – numerous suggestions other than the “20 day” period provided were discussed; but the consensus was that the 20 day period was appropriate/sufficient; (3) its application to a non-natural person; (4) the substitution provision; (5) adding “modify a notice of substitution” in sub. (b); (6) changing the word “motion” to “application” to permit informal motions; (7) CPLR 3126 or subpoena sanctions in sub. (c) – the consensus was CPLR 3126 sanctions; (8) the ability to resort back to subpoena power if this provision did not provide the desired benefit.

Sharon Gerstman asked Allan Young to incorporate the changes discussed and to circulate revised language via email.

III. RUAA (S. Critelli)

Steven Critelli provided a brief overview of the positive characteristics of the RUAA. “We are gaining more than we are giving up”.

Joe Einstein concluded that the RUAA was a very thoughtful product and a vast improvement over what we currently have.

Paul Aloe provided the minority position. Paul’s concerns, include: (a) Is there a need for a uniform act at this time? His feeling was that there was no need, because any matter that touches interstate commerce – which applies to most disputes – is governed by the Federal law (limits: where parties state that New York law applies). (b) This is not a “uniform” statute; there are inconsistencies. (c) Potentials for abuse – it dramatically increases the arbitrator’s powers (*e.g.* on provisional remedies); Paul is concerned about arbitration provisions in consumer contracts and possible due process violations (*e.g.* credit card contracts, employment situations).

Sharon Gerstman stated that our options with respect to the RUAA are as follows: endorse it, oppose it or take no position with respect to it. Our “thinking time” is over. Further discussion then ensued about the RUAA.

S. Critelli: Formal motion made

Approve: 10
Disapprove: 5

SG: We will indicate that the Committee approves the proposed RUAA by a divided vote.

V. BRILL

Both **David Hamm** and **Jim Gacioch** provided proposals**. John Higgett**, a law clerk for a NY Judge, believes nothing needs to be done.

<u>The initial issue: is there a need to do anything?</u>

<u>Sharon Gerstman</u>: The 120 day rule is a marked improvement over prior practice which engendered motions on-the-eve of trial.

<u>David Hamm</u>: My amendment retains the timing issues but gives the Judge a bit more discretion.

<u>J. Stallman</u>: The Court of Appeals will interpret "interest of justice" rigidly. Instead, after the words "note of issue", we should place the words "unless the court in its sole discretion grants leave to make such motion" (the word "sole" was eventually removed after further discussion).

<u>Pat Connor</u>: We should not say that Brill misinterprets CPLR 3212

<u>John Jablonski</u>: Brill is not bad law; it is just trying to enforce time limits.

<u>Bill Altreuter</u>: Brill highlights the uneven calendar practice in state court.

<u>Paul Aloe</u>: We should ultimately leave it to the discretion of the judge.

An initial straw poll was conducted as to whether a bill was necessary, resulting in 9 votes for such a position. Sharon then "honed" down the bill amendment choices as follows:

Very specific list of issues (JG type)	2 voted for
"Interest of Justice" (DH)	4 voted for
"in the Court's (sole) discretion" (MS)	6 voted for
Abstention	1 voted for

David Hamm will redraft the legislation and the supporting memorandum report and circulate them.

<u>It was agreed that CPLR 4533-a will be put on the calendar as the first item at the next meeting.</u>

Respectfully submitted,

David L. Ferstendig, Secretary