

**MINUTES OF JANUARY 28, 2005 NYSBA CPLR COMMITTEE MEETING AT MARRIOTT MARQUIS, HART ROOM, 4<sup>TH</sup> ROOM**

**MEMBERS PRESENT:** Sharon Stern Gerstman, David B. Hamm, David L. Ferstendig, Matthew Kreinces, Sanford Konstadt, Matthew J. Morris, William H. Roth, Jim Gacioch, Allan Young, Steven Sonkin, Michael C. Schmidt, Alessandra T. Scalise, William C. Altreuter, Louis Cristo, Oscar Chase, Harold B. Obstfeld, Joe Einstein, Michael D. Stallman, Steven Critelli, Paul Aloe, Rob Knapp, Ron Kennedy, Jim Blair, Philip C. Pinsky, Maurice Chayt, Jacqueline Hattar, Patrick Connors, John Higgitt

**Guests:** Amy Vance, Brian Shoot, Glen Lefebre.

**The meeting was called to order at 12:35 p.m.**

**I. REPORT OF THE OCA ADVISORY COMMITTEE ON CIVIL PRACTICE (AMY VANCE/BRIAN SHOOT)**

**Amy Vance and Brian Shoot** provided a review of the proposals of the OCA Advisory Committee on Civil Practice, including (see report),

1. **E-Filing expansion**

Fax Filing

2. **New Measures**

a. **Subpoena Duces Tecum HIPAA**

Amending CPLR 3122: to permit disclosure where patient provides authorization or via court order

b. **No Right to Subrogation in CPLR 4545 Cases**

Brian Shoot discussed the conflict between the Second and Fourth Departments concerning the purpose of CPLR 4545; the Teichman decision (settlements); when can a health insurer intervene? (2d Dept: cannot; 4<sup>th</sup> Dept: can); and the inherent difficulty in the logic that an insurer can recover in subrogation what plaintiff cannot.

c. **50-A/50-B - reintroduction**

**II. INTRODUCTION OF MEMBERS AND GUESTS/APPROVAL OF MINUTES**

Sharon Gerstman asked the members to introduce themselves and welcomed the new members.

Motion to approve the minutes of October 22, 2004 meeting was unanimously passed.

### **III. SUBCOMMITTEE REPORTS**

#### **A. Motions in Limine (Lou Cristo)**

Lou Cristo distributed a handout and gave an overview of the issues. Sharon Gerstman advised that we would defer extensive discussion until the next meeting so that the members can review the materials. Some questions were fielded and answered. **David Hamm** pointed out that many of the in limine motions involve expert issues and it will be difficult to set deadlines for in limine motions when there are no precise deadlines for expert disclosure. **Paul Aloe** noted that because of the importance of in limine motions, an entire article in the CPLR should be devoted to it. **Judge Stallman** remarked that we should first determine the precise problems and their scope before we embark on extensive legislation. **Maurice Chayt** stated that a notice provision must be enacted to prevent being served on the first day of trial with a motion. The subcommittee will review the issues and report back to the committee at the next (April) meeting.

#### **B. Class Actions (Harold Obstfeld)**

Harold provided a handout and gave a brief overview of the proposed reforms (notice; government operations rule; 60 day rule).

Motion to approve the bar proposal with respect to CPLR 908 was unanimously passed.

Should the government operations rule be abolished? The subcommittee is in favor of its abolition. The language provided by the City Bar does not address the issue of awarding attorneys' fees for injunctive relief or in declaratory judgment actions against governmental entities (amendment to CPLR 909). Sharon Gerstman called for a straw poll as to whether the committee was in favor of elimination of the government operations rule together with some amendment to CPLR 909. The committee was split, but 2/3 of Committee voted in favor. The subcommittee will be speaking with the City Bar group next week.

#### **60 Day Rule (CPLR 902)**

Sharon Gerstman reiterated that the consensus of the committee was that the 60 day rule is a bad one. Several alternative proposals were discussed, including the subcommittee proposal (6 months after commencement). **David Hamm** questioned whether the deadline should run from commencement as opposed to when the answers are served. Concerns were expressed about the use of the term "as soon as practicable." **Paul Aloe** is concerned about use of terms such as "good cause shown" which has engendered much satellite litigation in other contexts.

### **Preference:**

The committee's consensus was: to eliminate #1 (the original bar group proposal); #2 (2 members voted in favor); #3 (15 voted in favor); #4 (2 voted in favor).

**David Hamm** suggested a change from "commencement" to "issue joined" for proposal #3 (12 voted for the change; 4 voted for the "commencement" language). The subcommittee will present language to the City Bar Group and report back to the committee as a whole via e-mail.

### **C. RUAA (Steve Critelli)**

Steve Critelli gave an update on the proposals of the joint committees. Many of the substantive comments of the committee have been included in the revised versions. There has been considerable adoption of New York procedures (from Article 75). Steve referred to positive elements of the proposal, particularly in the areas of discovery, potential waivers, the conduct of arbitrators, provisional remedies, and review by the courts. Steve would like the committee members to review the proposals and engage in e-mail discussion before the April, 2005 meeting. Steve is satisfied for the most part, that the concerns of the committee have been addressed. **Paul Aloe** is the "dissenter," asking whether New York should adopt a uniform law; moreover, he noted there is already a uniform law, that is federal law, which has been applied in interstate commerce situations and which has limited the applicability of New York law. Paul is also concerned about some specific provisions (e.g. ambiguity in provisional remedies provisions). **Joe Einstein** observed that despite its "warts" the proposal is a vast improvement over current New York law and, thus, a wise proposal to adopt and a helpful statute. The Committee is asked to review the materials distributed by Steve Critelli, and the committee will vote on the final version in April.

## **IV. NEW SUBJECTS**

### **A. Notice in Lieu of Subpoena (Allan Young) (attachment C to agenda)**

There was considerable discussion about the need for the proposal, as well as: 1) whether the notice could be served on a party outside the jurisdiction; 2) whether the notice could be served on an employee of a party; 3) what the appropriate penalty for failure to appear might be (e.g. penalties for disobedience of a subpoena, penalties for failure to comply with discovery, missing witness charge, etc.). The following subcommittee was appointed: Allan Young (chair), Matt Kreinces, Bill Altreuter, Paul Aloe.

### **B. Summary Judgment Motions after Brill**

Given the interest on this subject via e-mail, the Committee decided that further study should be given, and the possibility of amendment to CPLR 3212 proposed; in addition, since the summary judgment bill we worked on together with OCA may be reintroduced in the legislature this term, all amendments to 3212 should be considered at

once. The following subcommittee was appointed to study these issues and report no later than the April meeting: Jim Gacioch (chair), Paul Aloe, David Hamm and Matt Kreinces.

## **V. MISCELLANEOUS**

1. Glen Lefebre was introduced as the new SBA Legislative Affairs Director. Ron Kennedy will continue to act as liaison.

2. The following topics were deferred to the next (April) meeting:

Notice to Admit (M. Greenspan was not present)  
Service by Mail  
Proof of Damages (Attachment D to agenda)

In addition, we will have further discussion about Class Actions and the RUAA at that meeting.

Respectfully submitted,

David L. Ferstendig, Secretary