MINUTES OF APRIL 23, 2004 NYSBA CPLR COMMITTEE MEETING AT 12:00PM AT THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

MEMBERS PRESENT: Sharon Stern Gerstman, David Hamm, David L. Ferstendig, Jim Blair, Pat Conners, Rob Knapp, Joseph Einstein, Jacqueline Hattar, Michael D. Stallman, Steven L. Sonkin, Paul Aloe, Ray Brager, Allan Young, Harold Obstfeld, Maurice Chayt, Mayer Silber, Kim Juhase

BY PHONE: Steven Critelli, Ron Kennedy, Oscar Chase, Bob Redis

The meeting was called to order at 12:30pm

I INTRODUCTION / APPROVAL OF MINUTES

Motion to approve the minutes of the January 30, 2004 meeting was unanimously passed.

II LEGISLATIVE PROPOSAL APPROVED BY EXECUTIVE COMMITTEE APRIL 2, 2004 (S. GERSTMAN / ATTACHMENT B TO AGENDA)

Jim Gacioch will be executive committee liaison.

Executive committee had no problem with proposal, which was passed unanimously.

III UPDATE ON LEGISLATIVE PROPOSALS BEFORE LEGISLATURE (R. KENNEDY)

A. Summary Judgment Bill

Passed assembly; currently in Senate Codes Committee; to be put on agenda.

"In good posture"

B. Medical Records Bill

Introduced in both houses, Assembly bill 10552 and Senate bill 7028

Assembly bill is a bit different

Senate bill is our bill

It should not be limited to personal injury actions only (as limited in Assembly bill)

RK will try to coordinate Assembly bill with Senate bill

C. Mendon Ponds

On Assembly Judiciary Committee agenda for Thursday – RK thinks "it will move"

RK gave language to Volkers Office (in Senate)

§105 language was changed from our proposal; "clerk" should read "clerk of court"

SG will go over language with RK

IV SUBCOMMITTE REPORTS

A. Service by mail (P. Aloe; attachment C)

Michael Schmidt could not be present

Paul Aloe discussed the bills features, including:

- Includes references to §310-a and 311-a
- certified mail, RRR, added
- "answer" changed to "appear"
- 60 day provision – incentive for defendant to send it back
- nothing changes unanswered mail service; only applies if acknowledgement is returned
- if plaintiff properly uses mail service, then motion to dismiss order CPLR 306-b (120 day rule) will not lie
- carves out default judgment – once default judgment is entered "all bets are off"
- signing and returning does not wave jurisdictiona1 or venue objections

The purpose is to bring the mail statutue closer to modern practices

Paul noted that the 60-day period was from date of plaintiff's service to avoid encouraging defendant to delay inordinately in returning the acknowledgment.

There were several issues raised by committee members about the proposal. For example, it was suggested that the language be clear that a default judgment cannot be obtained unless the acknowledgment is returned.

Sharon Gerstman suggested that Paul Aloe modify the language to meet some of the concerns of the committee. Initially, however, she obtained a consensus from the members of the committee:

- that plaintiff should not be able to obtain a default unless the acknowledgment is returned
- that the 60 day period run from service of the initiating pleadings
- that if the defendant returns the acknowledgment, a motion to dismiss under CPLR 306-b cannot be made
- that service by mail should not extend the 120 day period (from filing)

Judge Stallman: Suggested that there be a deadline after filing / commencement for plaintiff to utilize mail service (to avoid, in essence, extending 120 day period).

David Hamm: The "return receipt" language should be cleaned up vis a vis "acknowledgment of receipt" language.

Jim Blair: We need memorandum of support

B. CPLR 3122 HIPAA and Subpoenas (Kreinces, Lipshie – Attachment D)

Both Matt Kreinces and Burt Lipshie were not present.

Purpose of legislation: CPLR 3122 has been interpreted to apply to all subpoenas, not just discovery subpoenas (i.e. it can apply to trial subpoenas); legislation tries to resolve this issue by permitting subpoena to be served without an authorization if there is a court order (correcting CPLR 3122 so that it is not more restrictive than HIPAA).

- **Query:** Does it include "so ordered" subpoenas? The consensus was that it did.

- **Paul Aloe**: Should we break out the medical provisions of subsection (a)?
- **Sharon Gerstman**: We should tell OCA that the committee is in favor of the amendment but that they should consider the issue of possibly moving the medical issues out of subsection (a). The committee unanimously passed SG's proposal.

C. RUAA (S. Critelli)

Report of subcommittee

There was a telephone conference between our subcommittee and the representatives of the ADR committee.

Our subcommittee will provide further comments to ADR group and "press on".

RUAA will probably not be part of legislative proposals this year.

A document will be prepared, including all objections to the RUAA.

D. Notices to Admit (Greenspan)

Michael Greenspan could not be present, so this issue will be put off to another meeting

V NEW SUBJECTS

a. Motions in Limine (D. Hamm)

Question is whether this issue should be treated in the CPLR

Various judges deal with motions in limine in different ways

Appellate Divisions treat the decisions on in limine motions as advisory in nature and therefore not subject to interlocutory appeal.

Federal courts generally deal with this issue at the pretrial conference

M. Stallman: At his "pretrial conferences," after the jury is selected (really a "trial conference"), he deals with these issues. He makes a record and issues a decision on the record.

There were some who believed we should leave things as they are; if it "ain't broke, don't fix it."

Could a proposal infringe on a judge's right to manage his calendar and deal with evidentiary issues in a streamlined and efficient manner?

How will the TAP system deal with such a proposal? Will the motions merely be "shifted over" to the trial judge?

Sharon Gerstman: A subcommittee of David Hamm, Jim Gacioch, Paul Aloe and Maurice Chayt will review the issue and report to the full committee. The consensus appeared to be that there should be a two tiered approach: motions that can be appealed interlocutorily, based on a more reasoned process involving the submission of papers well in advance of trial; and the other motions not to be appealed interlocutorily based on a more informal application very close to trial.

b. Class actions (J. Einstein)

J. Einstein: The subcommittee of the Association of the Bar of the City of New York made three recommendations:

- Class actions should be permitted against governmental entities
- Abolish rule that a motions for class certification be made within 60/90 day period
- CPLR appears to make notice mandatory even if dismissed is pre-certification; instead, this provision should be brought into line with federal practice which makes this issue discretionary.

The question is whether our committee should participate in this proposal. Members were asked to review the proposal to discuss in the future. Apparently, the City Bar's legislative proposal is going nowhere. Perhaps if our committee were to join and support the proposal, it might help move it along.

VI "PET GRIPES"

Because we had some extra time, Sharon Gerstman opened up the floor to comment:

Allan Young: NJ has a notice procedure in lieu of subpoena; perhaps NY could have a similar provision. The Committee's consensus was that such a change would be useful.

J. Hattar: When filing summary judgment motion, judges are forcing her to go forward with discovery notwithstanding CPLR 3214(b). Of course, the court has discretion under CPLR 3214(b) to remove the stay and some courts have blanket rules lifting the stay. The consensus was that it would be difficult to draft a change that could have a salutary effect.

Respectfully submitted,

David L. Ferstendig,
Secretary