

COMMITTEE ON CIVIL PRACTICE LAW AND RULES
MINUTES OF FALL MEETING
October 2, 1998

MEETING called to order at 12:15 p.m.

PRESENT: Paul H. Aloe, Chair, Sharon Stern Gerstman, Co-Chair, Steven Critelli, Secretary, and Joseph Einstein, Kim Steven Juhase, Maurice Chayt, Ray Bragar, Jim Gacioch, Susan English, James Blair, David Ferstendig, Hon. Myriam J. Altman, David Goldstein, Mathew Kreinces, Michael Schmidt, Christopher Garvey, John Jablonski, Robert Kaplan, and Hon. Michael D. Stallman.

I. Introduction to Meeting

The Chair opened the first meeting of the 1998-1999 term by giving an introduction of the officers, the principal mission and past work of the committee, noting the committee's web presence, its effective work to create, advocate and monitor CPLR legislation. Of the eight CPLR measures adopted into law in the last legislative session, three of the bills were the creation of our committee.

II Review of the 1998 Legislative Session. The Committee then reviewed the results of the 1998 legislative sessions with respect to CPLR bills. Specifically discussed were the following:

- A. [CPLR Bills enacted in 1998](#)
 - 1. New [CPLR 4547](#) - Electronic communications bill (Chapter 156)
 - 2. New [CPLR 4548](#) - Settlement discussion (Chapter 317) [now erroneously denominated "4547", but to be renumbered 4548]
 - 3. Amended [CPLR 3122](#) - responses to document request, produce documents as kept in the ordinary course of business or organized accordance to request. (Chapter 295)
- B. Other CPLR bills
 - 1. [CPLR 5205\(c\)](#), S7007, Ch. 206 (Roth IRA)
 - 2. [S6665](#), Ch. 448 (agents for service of process)
 - 3. [S6423](#), Ch 80 (clarifies duties of city marshals on execution of money judgments)
 - 4. [CPLR 311](#) Ch 202 (commencement by filing (Gerstman)
 - 5. [A9759](#) Ch 98 (agent orange statute of limitations) S6423 -
 - 4. [CPLR 311](#) Ch 202 (eliminates reference to proof of service and therefore brings corporate service in line with revised CPLR 306-b.
 - 5. [A9759](#) Ch 98 (agent orange statute of limitations)

III After a brief reference to the OCA bill on electronic filing which did not pass, the Chair and the committee discussed the following proposals which did not pass during the last legislative session.

- A. Committee proposals
 - 1. Motion practice bill([S2211/A2620](#)), which proposed a change in timing of motions and passed Senate, but failed in the Assembly. The Committee agreed to defer the measure in the last legislative session at the request of OCA. At this point, the OCA has not made comments on the bill. It was agreed that the Chair would contact the OCA again to obtain their consent to the bill or to make appropriate changes at their request, but that in any event, the Committee should have the bill (or a version based on OCA's comments) introduced into the next legislative session.
 - 2. Parent child privilege - [S180/A7763](#) Add S4502-a, Kim Steven Juhase reported on the status of the proposed revision advocated by the Committee. Tom Gleason (of the OCA Advisory Committee) has apparently drafted an alternative provision to permit either parent

or child to waive privilege in contrast with the Committee's bill, which would require both the parent and the child to agree to a waiver. After extended discussion, it was agreed that although the Committee prefers the original measure ([S180/A7763](#)) the OCA's bill might have a better chance of passage. After discussion, the Committee voted to seek permission from the Executive Committee to co-sponsor, with the OCA Advisory Committee, the OCA version of the bill, but without withdrawing the endorsement and sponsorship of [S180/A7763](#). Vote in favor: 16; opposed: 0; and abstentions: 1. See [Common Interest Privilege Proposal](#) of the Council on Judicial Administration of the Association of the Bar of the City of New York.

3. Bill to clarify service on limited liability companies: with the technical amendment should remedy problem with bill and should pass.

4. Commencement by filing in election law proceedings ([A624](#))- The bill was revised to reflect recent legislative changes in CPLR 306-b. OCA Advisory Committee is looking into the matter. Sharon Stern Gerstman to report later in meeting on issue of commencement..

B. Other CPLR bills that failed to pass

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 1. [A7032](#) WEINSTEIN. Amends CPLR 6313 to require prior notification of TRO applications. An OCA proposed bill. We issued [Report No. 70](#) (Kaye) on June 10, 1997 in favor of the bill, and lobbied for the bill in the last session, but due to opposition in the Senate, the bill failed. The Chair pointed out that this bill has been around for many years and it does not appear it has any hope of passage due to opposition in the Senate. The Committee discuss a number of court rules, including the Rules of the Second Department, which require notification prior to applications. The Committee concluded that it should explore proposing rule to be adopted as part of the Uniform Rules for Trial Courts to require such notification. Michael Schmidt agreed to draft such a proposed rule for consideration by the Committee at its January, 1999 meeting.
 2. [A04023](#) SCHIMMINGER -- amd §3213, CPLR -- Expands basis upon which a motion for summary judgment in lieu of filing a complaint may be made so as to include additional commercial causes of action. The bill was originally proposed by the Commercial and Federal Litigation Section of the NYSBA and was endorsed by the Committee. The Chair addressed passage of the Bill in the Assembly, but learned that there was opposition by members of the Assembly. The concern is apparently for small business people who might be deprived of a right to trial on routine collection matters. M. Chayt agreed to contact Assemblywoman Weinstein concerning the bill.
 3. [S06803](#) VOLKER -- Amends §2305, amd R3120 & 3122, add R3122-a, CPLR. Simplifies the method by which documents are obtained for discovery from non-party witnesses and procured into evidence. Bill based on work originally done by members Critelli and Blair for the Commercial and Federal Litigation Section. We filed [Report 142](#) (Blair) on June 11, 1998, approving the bill. Although there was some early indication that the bill might receive passage, Steve Critelli advised the Committee that the trial lawyers wanted more time to review the bill.
 4. [S03617-B](#) VOLKER Amends R2217 & S5701, rpld R2221, add R2221-a, CPLR. Clarifies procedural law pertaining to reargument and renewal of motions in court proceedings. This was an OCA Advisory Committee bill. The Chair reported that substantial revisions were made to the bill in response to the concerns raised in a report by this Committee and based on those revisions, the Committee had supported the bill. The bill, however, failed to pass, principally because slightly different versions were passed in the Assembly and the Senate.
 5. Court Reorganization. The Chair reported that the comments of the Committee had been transmitted to the NYSBA Task force and incorporated in their report. The Court

Reorganization measure, however, failed in the Assembly, and because it is a constitutional amendment which must be passed by two successive legislatures, it is unlikely that there will be such a reorganization in the near future.

6. [S07457](#) VOLKER, Lack, Skelos/[A10972](#) WEINSTEIN. Amends §304 and Rules 2101 & 2103, and adds §8023, CPLR; and amends §212, Judiciary L. Authorizes pilot program for use of facsimile transmission or electronic means to commence an action or special proceeding. We filed [Report No. 146](#) (Aloe) on June 12, 1998, approving the bill. Bill failed in the Assembly, apparently out of concern for the amount of discretion being vested in OCA in connection with the project.
7. [S06813](#) VOLKER/ [A11019](#) KLEIN-- OCA Advisory Committee bill to limit speaking objections at depositions. The Committee had endorsed the bill. After discussion, a number of members commented that the balance has swung to favor those attorneys who abuse of the deposition process. Discussion by Jim Blair as to background of legislation. Ray Bragar and Mathew Kreinces discussed present practice and what reforms may be required to address abuse by attorneys who seek to inquire into tangential matters not material - protective order motions not felt to adequately address issue . *Joe Einstein will report on this and propose legislation to address this issue.*
8. Tort Reform. Tort Reform did not pass in the last session. The Tort Reform Task Force still studying our report and others
9. Medical Malpractice statute of limitations. Mathew Kreices discussed various bills to amend the medical malpractice statute of limitations that he had addressed in [Report 214A](#). None of the bills passed.

IV. New Proposals

- A. Expert Disclosure. The Committee discussed a [proposal](#) by member John Jablonski to amend CPLR 3101 to adopt in substance Fed. R. Civ. P. 34 with respect to expert witnesses and the need to for them to provide reports and to submit to depositions. After extended discussion, it was agreed taht the bill should be refashion the proposal to create a disclosure rule that balanced the obligation to disclose and the economic and administrative burdens attendant on expert disclosure. *A subcommittee composed of John Jablonski, Susan English and Steven Critelli will draft a report and proposed legislation to be acted upon by the Committee..*
- B. Commencement by Filing. Sharon Stern Gerstman brought commencement by filing and the fact that in Special Proceedings, clerks around the state have divergent practices concerning the obligaiton of the parties. The problem appears to stem from the fact that many proceedings are commenced by an order to show cause, which must be issued by a judge, and cannot be sought until he proceeding has been commenced. In other proceedings, the return date is not provided until after the papers are filed. The Committee considered having special proceedings commenced by service, but after discussion, it was agreed that special proceedings should continue to be commenced by filing but the filing should be of the petition rather than the notice of petition or order to show cause. Sharon Gerstman agreed to write a report and proposed legislation on the subject.

VI. Mr. Aloe then raised the subject of proposed legislation that was debated in the Executive Committee in spring; viz., (A) David Ferstendig drafted legislation to explicitly provide that a proposed appellant who serves notice of entry is entitled to 5 extra days to take an appeal if the service of the notice of entry is made by mail, thereby resolving a conflict among the Departments and (B) Joseph Einstein drafted legislation to provide that an order will be effective upon notice of the signing of the order. (rather than notice of entry). Because of some questions raised by the Trial Lawyers Section, the Committee will attempt to address those concerns and prepare legislation for submission to the Executive Committee.

VII. The Chair also discussed our work with the NYSBA Commission on Providing Access to Middle Income Consumers in connection with the draft of the Simplified Case Resolution proposal. Our Committee made recommendations to the Commission with respect to their proposal. *Mr. Aloe is expected to communicate with the Commission to determine the progress of their proposal.*

VIII. Other existing CPLR Committee projects: *Jim Gacioch will propose a repeal of both "CPLR 8303-a" sections in deference to Uniform Court Rule 130.1.*

IX. The Committee also decided not to seek to extend the commencement by filing rule to the lower courts.

Whereupon, all business being concluded, the meeting was adjourned at 3:10 p.m.