

COMMITTEE ON CIVIL PRACTICE LAW AND RULES
MINUTES OF THE MAY 3, 2002 MEETING
At the Association of the Bar of the City of New York

MEETING called to order at 12:20 P.M. by Sharon Stern Gerstman, Acting Chairperson

PRESENT: Steven M. Critelli, Chair, Maurice Chayt, Acting Secretary, Sharon Stern Gerstman, Vice Chairwoman, Paul Aloe, Ray Bragar, David Ferstendig, James Gacioch, Chris Garvey, David Hamm, James Kelly, Robert Knapp, Richard Laudor, Burton Lipshie, Harold Obstfeld, Steven Sonkin, , Michael Schmidt, Allan Young, and by phone connection Gail Nackley Eubelhoer, John Jablonski and Matthew Kreinces. Ronald F. Kennedy, NYSBA STAFF LIAISON, attending..

I. Minutes of the January 25, 2002 meeting approved without objection.

II. Reports on Affirmative Legislation Proposals:

A. Gerstman reported that the Executive Committee passed our proposal to amend CPLR 203(c) without discussion and without compliance with its 45 day prior distribution rule. Unfortunately, it was defective in that it didn't amend the statute of limitations.

Kennedy reported its legislative status; that it was out of the Senate Codes and Judiciary Committees and soon would be on the Assembly floor.

B. Discussion of the proposed revision to CPLR 3212 (Einstein/Aloe) was first deferred due to the absence of the proponents, but then after the arrival of Aloe was discussed and then tabled. In the discussion, Gerstman reported that the Executive Committee felt our proposal might adversely impact upon an in person action. It was suggested that our proposal be amended to provide for extension of time as in CPLR 3211(f). Gerstman recommended that on a subdivision (e) motion, one should be able to cross move and also that under Subdivision (a) we delete the words "that is served after issue is joined." Lipshie suggested that (a) be amended by adding, "unless the court orders otherwise."

C. Proposal to Amend CPLR 3216 (Schmidt)

Gerstman reported that the Judicial Section, by letter, expressed opposition to it, as "not necessary." The requirement of an Order to Show Cause was questioned. The Commercial & Federal Litigation Section proposed a change to 9 months plus two months which would increase the time involved to 11 months total.

Critelli stated that our proposal could incorporate the 60 days within the 9 month period, not add it on. But the elimination of an Order to Show Cause is not onerous. The usual motion procedure should suffice. Critelli will communicate with the Judicial Section to clarify their objection.

Gerstman stated the Report should be revised to reflect an additional option to the movant.

A motion to have Schmidt redraft the proposal to accept the Commercial & Federal Litigation Section recommendations passed with 2 abstentions.

III. OCA proposals.

A. E-filing: Critelli reported that OCA is expanding its E-filing program into other counties. This is a good thing because it saves time and expense for practitioners as well as the courts. It is not an option in those counties where implemented. The proposed rule is item 6 in the meeting distribution packet.

Bragar stated that the Southern District Bankruptcy Court requires filing electronically and expressed enthusiasm while admitting that he needs his associate to accomplish this !

Reportedly, as of April 3, E filing was commenced in the Northern District of N.Y. federal court.

Gerstman stated the State electronic extension proposal incorporates Sullivan county. Gachioch offered that there is an opt-out provision for commencement of the action by electronic filing but that it then is up to the judge as to whether to continue non-electronically. In response to an inquiry by Kreinces about reducing Exhibits to electronic form, Bragar responded that Exhibits are exhibits by traditional delivery. Kreinces noted the potential for fraud with E filing and this was discussed. Gerstman opined that deviations from E-filing more likely to be approved for small non-technical offices, but less likely for large firms. E-filing requires Adobe software. Critelli suggested a letter approving the shift to electronic procedures be sent to Amy Vance at the OCA CPLR committee. By consensus it was agreed that our Chairperson draft an appropriate letter with a copy to NYSBA Pres. Crane.

OCA has proposed fax filing for everything, not just commencement, which raised the issue of the appropriate fax recipient. Gerstman said that her judge will not accept motions by fax or any papers over 10 pages long by fax, without prior permission.

Discussion of the draft bill to amend CPLR Rules and the court of claims act (contained in Subdivision 6, "Draft - 4/3" of the meeting materials) followed. Lipshie noted the potential for chaos could be avoided by "§ 6" which provides for rules of the courts from the top down. Gerstman expressed opposition to motion practice by fax. Contrary to Lipshie, Bragar said this could be subject to allowance by each individual judge.

IV. New Business

Pending arrival of David Hamm, Garvey discussed his own contemplated Affirmative Legislative Proposal (ALP) in Article 75 and stated the problem, e.g. Parties to a contract with a provision for arbitration in MA, but applying CA law and the litigation defendant is a New York corporation; any arbitration award would have to be enforced in NY. But, does Article 75 language prohibit NY courts getting involved in such situations, and refers to Koop case [no cite]? Knapp responded that the Federal Arbitration Act would be applicable to such interstate matter, even in the state court, so amending the CPLR would not help. If the federal act doesn't provide provisional remedies, it may not be a legislative oversight and the state may be preempted.

A. Proposed amendment to CPLR 1413

Hamm spoke feelingly about drunk drivers being able to seek damages in an accident caused in any part by them and urged adoption of his ALP to bar this. Reference was had to the previous E-mail discussion of the proposal including "dram shop" rights of drunk and family [G.O.L. 11-100 and 11-101] A round table discussion of the pros and cons of the ALP followed and a "straw vote" was taken as to whether to adopt this ALP. 8 voted in favor and 9 opposed. However, this was followed by a motion to send the substance of the proposal to the TICLE section and to the Tort Reform Task Force, which was adopted by voice vote.

Critelli noted the termination of the terms of the committee officers, and the designation of the new officers: Sharon Stern Gerstman as Chairwoman, David E. Hamm as Vice Chairman and David L. Ferstendig as Secretary. This passage of power was greeted with enthusiasm and the retirement of our outgoing officers met with regret and a sincere expression of the gratitude of the members on behalf of the committee and the Bar Association for jobs conscientiously well done. On that rare note of unanimity, the meeting adjourned.