

**New York State Bar Association
Committee on Civil Procedure Laws & Rules
MINUTES OF SEPTEMBER 26, 2002 MEETING (12:00 NOON)**

The meeting was called to order at 12:20 p.m.

MEMBERS PRESENT: Sharon Stern Gerstman, Chair, David Hamm, Vice Chair, David L. Ferstendig, Secretary, Oscar Chase, Rob Knapp, William C. Altreuter, Alexander Powhida, Michael Schmidt, Susan V. Orna, Raymond A. Bragar, Jacqueline Hattar, Paul H. Aloe, Steven Sonkin, Allan Young, Maurice Chayt, Joseph H. Einstein, and Ron Kennedy, Staff Liaison. **Also on phone:** Steve Critelli, John Jablonski, Gail Uebelhoer, Tom Levin, Michael Greenspan and Richard Laudor. **GUESTS PRESENT:** Amy Vance, Counsel to OCA Advisory Committee on Civil Practice.

I. WELCOMING NEW MEMBERS AND INTRODUCTION

II. SHARON GERSTMAN'S REPORT ON MEETING WITH NYSTLA

Sharon and Ron Kennedy had met with the NYSTLA concerning six bills that NYSTLA have opposed. The purpose of the meeting was to determine whether the NYSTLA would reconsider their position. The bills were:

1. Simplified case procedure - the NYSTLA will review it.
2. Subpoena *duces tecum* (e.g., service of copy of subpoena on all parties) - the NYSTLA suggested that they may support this bill.
3. CPLR 3101(i) - the NYSTLA wants to leave this issue to the courts and will continue to oppose legislation.
4. Appeal from order signed but not entered. The NYSTLA may reconsider.
5. Raise permissible disbursement for EBT transcripts from \$250 to \$2,500. The NYSTLA does not want "piece-meal" legislation, *i.e.*, it wants to revise all antiquated permissible disbursements, including those related to subpoena fees. The Committee agreed to liaise with the NYSTLA on these issues. Michael Greenspan, who drafted the disbursements bill, will be our point person.

III. AMY VANCE REPORT OF OCA ADVISORY COMMITTEE

Amy gave us an overview of the procedures at OCA and expressed the desire to increase our Committee's cooperation and involvement.

Amy pointed to two new bills:

1. CPLR 5222 and 5232 regarding all owners of brokerage accounts receiving notice of a restraining notice.

2. Article 11 - amending terminology for “poor persons”.

Amy also discussed six old bills that OCA would like to deal with this year and get our input.

1. To revise the contempt law - to clarify and update law.

2. Improve efficiency in “moving” medical malpractice cases.

3. Pre-judgment interest and offers to compromise in personal injury actions - controversial.

4. Repeal of structured verdict provisions - Article 50A and 50B.

5. Expert disclosure - *e.g.*, establishing timeframe.

6. ADR - issues to be included in the CPLR.

IV. VINCENT ALEXANDER’S NYLJ ARTICLE REGARDING RECENT PASSED LEGISLATION SIGNED INTO LAW

Sharon referred to this handout and as a segue to discussing the Committee bills that were signed into law (*see* below).

V. CPLR COMMITTEE BILLS PASSED AND SIGNED INTO LAW

Sharon noted that two bills of our Committee had been passed and signed into law.

1. Corrective legislation regarding commencement of special proceedings which has retroactive effect. Sharon stated that cases that have been dismissed for failure to file the notice of petition or order to show cause since November, 2001, can apply to have the proceedings reinstated.

2. Steve Critelli’s business record bill, which was just signed. The bill provided that non-party business records may be obtained by a subpoena *duces tecum* issued by an attorney or the Court Clerk.

VI. FINAL APPROVAL OF NEW CPLR 3216 REPORT

Michael C. Schmidt’s CPLR 3216 report was approved unanimously (motion made by: Joe Einstein, seconded by Michael Schmidt).

VII. DISCUSSION OF NEW TOPICS

Sharon advised that the Committee was adopting a new procedure to deal with proposed legislation. A proposal will first be discussed at Committee meetings. If it is determined that the Committee should go forward, a subcommittee will be established to draft such a proposal.

The Committee then discussed various new topics:

1. CPLR 4532-a regarding identification of items to be offered into evidence (x-rays, etc.) (Maurice Chayt). Briefly, Maurice stated that his own study of x-rays and MRIs revealed that very few comply with the current statute.

It was agreed that the Committee should pursue this matter further. Thus, a committee was organized consisting of: Maurice Chayt, Michael Schmidt; Allan Young.

2. CPLR 312-a regarding personal service by mail. (Michael Schmidt) Briefly, CPLR 312-a was never extended to CPLR 310-a providing for personal service upon a limited partnership and to CPLR 311-a providing for personal service on limited liability companies. Michael Schmidt proposed that CPLR 312-a be amended to apply to CPLR 310-a and 311-a. Sharon suggested that the legislation should just be generally applicable with the exceptions noted. Oscar Chase noted that CPLR 312-a, as drafted, does not appear to permit a defendant to move to dismiss after it returns the acknowledgment. (David Hamm believes this problem is remedied by the language in CPLR 3211(e).) Paul Aloe suggested that a subcommittee be established to look at CPLR 312-a in its entirety. The issue was then raised whether it was better to prepare piecemeal legislation that would be easier and faster to prepare and pass rather than to do a complete review of the statute, which would take longer to accomplish and the proposal might be more difficult to pass.

It was agreed that a subcommittee should be formed to determine if “wholesale” changes are needed. Members of subcommittee: Michael Schmidt, Oscar Chase, Raymond Bragar, Michael Greenspan and Paul Aloe.

3. CPLR 3123 regarding penalties for unreasonable denial of a notice to admit (Michael Greenspan). Michael said that the penalties are insufficient. He pointed out that FRCP 36 permits a motion before trial. Michael would like the CPLR to adopt a similar motion procedure, *i.e.*, a procedure with more teeth that occurs prior to trial. Paul Aloe suggested that perhaps a CPLR 3123 notice to admit should be considered a discovery device, subject to discovery motions, penalties and sanctions.

A subcommittee was established to draft a proposal: Michael Greenspan, Bill Altreuter, David Hamm and Paul Aloe.

4. Miscellaneous Topics

a. Expert disclosure (John Jablonski) - the primary issue relating to the timing of disclosure. Any proposal that would preclude a plaintiff from hiring an expert after the note of issue is filed will be opposed by the NYSTLA. There is an economic impact issue, *i.e.*, plaintiffs having to retain experts in cases that ultimately settle. Sharon will talk with Amy Vance of OCA to discuss OCA's proposal. Our subcommittee will be headed by John Jablonski.

b. The TICL section may request of the Executive Committee permission to submit an amicus brief on behalf of the defendant in *McCoy v. Feinman*, Fourth Department. Sharon advised the TICL section that our Committee would be willing to provide assistance. Such assistance, however, would be individuals on the Committee as individual members. The case deals with statute of limitations issues.

The remaining topics on the agenda were left to future meetings. The next meeting is scheduled for January 24, 2003, during the Bar Association meetings.

Whereas, at 3:00 p.m. the meeting was adjourned.

Respectfully submitted,

David L. Ferstendig
Secretary

DLF\mn