January 2004

POSITION STATEMENT OF THE COMMERCIAL & FEDERAL LITIGATION SECTION REGARDING PROPOSED AMENDMENTS TO CPLR 105, 304, 306-1 AND 2102

On January 29, 2004, the Executive Committee of the New York State Bar Association will consider a proposal submitted by the Committee on Civil Practice Law and Rules (the "CPLR Committee") to amend the CPLR in response to the Court of Appeals' decision in *Mendon Ponds Neighborhood Association v. Dehm*, 98 N.Y. 2d 745 (2002). The proposal also addresses the ability of clerks of courts to reject papers presented for filing. While the Commercial and Federal Litigation Section shares the CPLR Committee's concerns about the implications of the *Mendon Ponds* decision, we believe the proposed legislation does not satisfactorily address the issue. This memorandum summarizes our concerns.

In the *Mendon Ponds* case, the petitioner in an Article 78 proceeding purchased an index number from the county clerk but filed the notice of petition and petition with the clerk of the supreme court, as directed by the county clerk. The respondent thereafter moved to dismiss for lack of jurisdiction, arguing that CPLR § 304 obligated petitioner to file the notice of petition with the "clerk of the court" and, under the New York State Constitution and County Law § 525, this could only refer to the county clerk, and *not* the "clerk of the supreme court." The Court of Appeals agreed. In so doing, the Court quoted, but did not discuss, language in CPLR § 304 providing that papers may be filed with "any other person designated by the clerk of the court for that purpose." The dismissal came after the limitations period had run, and thus petitioner was out of court without an opportunity to correct the error.

Mendon Ponds is a troubling decision, not merely because the petitioner appears to have been unfairly denied an opportunity to pursue its claim, but also because it is not clear whether the rationale of *Mendon Ponds* applies to other types of filings, or how to address the legal and pragmatic issues that arise if it does.

The *Mendon Ponds* decision involved the filing of pleadings and other papers required to initiate an action, governed (then and now) by CPLR § 304. The CPLR Committee's proposed amendments address both the filing of initial pleadings (as in *Mendon Ponds*), and the filing of interlocutory papers, governed by CPLR § 2102. The heart of the CPLR Committee's proposal is to amend CPLR § 2102 to provide that (a) any papers required to be filed in supreme court or county court shall be filed with the county clerk; (b) any such papers shall be deemed filed for all purposes if filed "in accordance with the rules of the chief administrator or any local rule or practice established by the court;" and (c) if applicable "rules or practice" direct that papers be filed in any location other than the county clerk's office, such papers would have to be "transmitted to" the county clerk. CPLR 304, in turn, would be modified to require filing of initial pleadings and papers in accordance with CPLR 2102. The CPLR Committee would further amend CPLR 2102 to prohibit a clerk from refusing to accept any paper for filing unless specifically directed to do so by a rule of the chief administrator or order of the court. (The latter provision was inspired by *Sharrat v. Hickey*, 298 App. Div. 2d 596 (4th Dept. 2002), in which the Appellate Division held that a summons and complaint would be treated as filed on the day plaintiff initially presented them for filing to the clerk, even though the clerk rejected them for failure to provide three additional copies, as required by the clerk.)

The CPLR Committee's proposal is not the only suggested method of addressing the *Mendon Ponds* issue. Last year, the Advisory Committee to the Chief Administrator of the Courts developed a proposal that would have (i) amended CPLR §§ 304, 305, and 1007[1] to provide that papers commencing an action or special proceeding or commencing a third-party claim shall be filed with the county clerk (and no one else), while at the same time (ii) amending CPLR § 2001 (which permits courts to disregard mistakes that ought, in fairness, to be disregarded) to "forgive" practitioners who file pleadings with the wrong "clerk." In addition, we understand that the Chief Administrative Judge is considering a new uniform rule 202.5 which would (a) provide that for purposes of CPLR 304 "clerk of the court" means "county clerk" and (b) require posting of prominent notices stating with whom papers must be filed to commence an action. Copies of both of these proposals are attached. As is clear from the above descriptions, each of these proposals addresses only the filing of papers that initiate an action or a claim; they do not address the manner or location of filing of interlocutory papers.

While we agree that *Mendon Ponds* is a problematic decision, we question whether the CPLR Committee's proposal is necessary or sufficient to address the issue. Our concerns fall into three areas, described below.

Does the CPLR Committee's Proposal Pass Muster Under Mendon Ponds? This depends, we think, on whether the holding of *Mendon Ponds* was mandated by the New York State Constitution, or whether the holding ultimately rests on statutory considerations. The opinion refers to Article VI § 6 of the New York State Constitution, and might thus be taken to mean that, as a matter of constitutional law, the county clerk (and only the county clerk) must be the recipient of all papers filed for any purpose with the supreme court or county court.[2] However, the opinion does not go that far, and it is also possible to view *Mendon Ponds* as an attempt to divine the proper legislative intent with respect to the filing of pleadings -- an inquiry that was guided, but not dictated, by constitutional considerations. Unfortunately, New York practice does not permit us to go back to the Court of Appeals and ask them to clarify the basis of their decision. But if the import of *Mendon Ponds* is "thou shalt have no clerks before the county clerk," and if this result is mandated by the State Constitution, then why would the CPLR Committee's proposal -- which would permit courts to designate other filing locations by "local rule or practice" -- be any more acceptable than the filing at issue in *Mendon Ponds*?

Does Mendon Ponds Apply To Interlocutory Filings? Because the case involved the filing of a Notice of Petition and Petition, the decision, strictly speaking, does not answer this question. If the outcome in *Mendon Ponds* is constitutionally mandated, then its holding may apply equally to CPLR § 2102, which permits filing of interlocutory papers with "the clerk of the court in which the action is triable." However, for the reasons stated above, if *Mendon Ponds* is constitutionally mandated, we question whether the CPLR Committee's proposed modification

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[1] The CPLR Committee's proposal does not specifically address CPLR §§ 305 or 1007.

[2] CPLR § 304 provides that pleadings can be filed with the clerk of the court or "any other person designated by the clerk of the court for that purpose." *Mendon Ponds* quotes this provision, but does not discuss it. It could be argued that, if *Mendon Ponds* was merely an exercise in statutory interpretation, the Court should have relied on this provision to uphold the petitioner's filing; and the Court's failure to do so shows that the outcome was constitutionally mandated. On the other hand, if the Court intended to overrule the statute on constitutional grounds, it might have been expected to acknowledge that it was doing so. In the absence of any discussion by the Court of this provision , it does not provide a basis to say, conclusively, whether *Mendon Ponds* is grounded in constitutional or statutory considerations.

to the procedures for filing interlocutory papers would satisfy the *Mendon Ponds* standard. If, on the other hand, *Mendon Ponds* is an interpretation of legislative intent, then we question whether it is necessary to modify CPLR § 2102's provisions for filing interlocutory papers at all. After all, as presently worded, CPLR § 2102 distinguishes between papers to be filed with the "clerk of the court in which the action is triable" and papers to be filed with the "county clerk" -- suggesting that the legislature intended to permit the filing of interlocutory papers with "clerks of the court" whether or not they are part of the county clerk's office.

We recognize that, in the absence of a determination as to whether *Mendon Ponds* threatens the viability of CPLR § 2102, it might be prudent to amend the statute, just in case. If this could be done easily and without undue difficulty, we might agree; but we do not believe the current proposal achieves this result.

Is The CPLR Committee's Proposal Workable?

At present, the supreme courts in many counties maintain systems for handling active files that are not under the control of the county clerk. Examples include the motion support system in New York County (which, while maintained in the same building as the county clerk's offices, is under the control of court personnel, not the county clerk), and the numerous upstate counties where the county clerk's offices are at an entirely different location from the court. While in these cases the county clerk serves as the ultimate repository for court records, it plays little or no part in the day-to-day management of papers that are needed for issues then before the courts. For cases pending in supreme court or county court, the CPLR Committee's proposed amendments to CPLR § 2102 call for interlocutory papers to be filed with the county clerk in the first instance, or, if local rule or practice permits otherwise, any papers filed at some other location are to be "transmitted to the clerk of the court" -- that is, to the county clerk. While it may not have been the intent of this proposal to require a change from current court procedures, on its face the proposal appears to require that the county clerk become directly involved in the management of files that are in immediate use by court personnel. We do not believe this is feasible in most instances -- not, at least, without a substantial transfer of administrative resources and capital -- and we think it ill-advised to adopt a statute which by its terms would be inconsistent with current and anticipated future practice. Thus, particularly since it is not certain that *Mendon Ponds* requires a change in the manner of handling interlocutory filings, we cannot endorse this proposal.

As a related matter, if the proper location of filing can be modified by "local rule or practice," the New York court system will have taken a very large step in the direction of favoring local counsel and disadvantaging counsel from elsewhere in the state or country. We are not convinced that the benefits of such a change outweigh the disadvantages. Moreover, "local practice" provides a rather fuzzy standard for determining whether a jurisdictional filing has been properly completed.

To summarize: it is not clear that the modifications offered to address the *Mendon Ponds* problem are necessary or beneficial, and thus we oppose the measure in its present form. We note that the CPLR Committee has also proposed an amendment that would prevent clerks from rejecting court filings on their own authority. We recognize the appeal of a rule that would guard against arbitrary rejection of court filings, and would make the attorney, not the court clerk, the

arbiter of whether a paper is in proper form for filing. At the same time, we have questions about the effect of this proposal in certain cases -- as, for example, for uncontested matrimonial actions, which are often brought *pro se*. Thus, while this issue warrants further consideration, it does not provide sufficient independent reason for us to endorse the CPLR Committee's proposal as a whole.