

MINUTES OF OCTOBER 22, 2004 NYSBA CPLR COMMITTEE MEETING AT 12:00 PM AT THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

MEMBERS PRESENT: Sharon Stern Gerstman, David B. Hamm, James C. Gacioch, Paul H. Aloe, James N. Blair, Raymond A. Bragar, Prof. Oscar G. Chase, Maurice Chayt, Steven M. Critelli, Joseph H. Einstein, Michael Evan Greenspan, Jacqueline Hattar, John R. Higgitt, Kim Steven Juhase, Robert P. Knapp, III, Matthew J. Morris, Harold B. Obstfeld, Alessandra T. Scalise, Steven L. Sonkin, Hon. Michael D. Stallman

Members Present by Phone: Louis B. Cristo, John J. Jablonski, Ronald F. Kennedy, Robert M. Redis

Guests: Hon. Lucy Billings, Daniel Murdoch

The meeting was called to order at 12:20 pm

I INTRODUCTION/ APPROVAL OF MINUTES

Motion to approve the minutes of the April 23, 2004 meeting was unanimously passed.

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

A. Medical Records Bill

Amendment CPLR 4532-a passed and signed into law.

B. Summary Judgment Bill

The joint NYSBA/OCA Summary judgment bill did not pass. We will consult with OCA on resubmission.

C. Mendon Ponds Bill (attachment B plus PDF file containing veto message)

1. Ron Kennedy reported on the veto. Ron does not believe that the bill was vetoed because OCA lobbied against it. It appears that there were no memos in opposition, but this will not be known until the bill jacket is finalized.
2. Discussion followed concerning what to do about legislation for next session. Sharon Gerstman proposed that we add language to make clear that the measure does not limit judicial discretion.
3. Discussion put on hold for CLE presentation on class actions by Joe Einstein, Judge Lucy Billings and Dan Murdoch, representing a City Bar group who

worked on amendment proposals.

III Discussion of the proposal on class actions

Following the presentation, Sharon Gerstman opened discussion on whether CPLR committee wants to co-sponsor the City Bar proposals. Each proposal was considered separately.

Proposal 1. Eliminate sixty day rule on seeking class certification. Consensus of the group is that the sixty day rule is a bad rule, but the committee has no consensus yet as to the appropriate remedy. Sharon Gerstman suggested that there be a subcommittee that could address these issues and confer with the City Bar group. Harold Obstfeld agreed to chair the subcommittee. Ray Bragar and Oscar Chase agreed to be part of the subcommittee.

Proposal. 2. Notice Requirements on a Precertification dismissal. Paul Aloe suggested that the proposal should require the court to consider whether or not to exercise the discretion, by using language like “Court shall determine whether or not notice is appropriate.” Subcommittee has authority to make those changes and will report back to the committee at the January meeting.

Proposal 3. Governmental Exception. Committee discussed limiting the elimination of the governmental exception to declaratory and injunctive relief. This would also have the effect of limiting the provision of attorneys fees against a governmental entity under CPLR 909, in that attorneys fees for declaratory and injunctive relief may be given only where the defendant’s conduct is extreme. Steve Critelli pointed out that the proposal needs to be careful not to cut back on the current right of litigators to pursue attorneys fees in class actions where this high threshold can be overcome. Committee debated the merits of the proposal and Sharon Gerstman called for a straw poll as to whether the committee was in favor of some form of elimination of the exception. Committee was split but about 2/3s of the committee was in favor of elimination or curtailment of the exception. The subcommittee will meet to formulate suggestions to be brought to the City Bar Committee, and will attempt to meet with the City Bar working group through the Joe Einstein.

IV Mendon Ponds

Committee resumed discussion of Mendon Ponds. Committee decided to make the addition of CPLR 2102(c) a separate bill, add a provision to it that the bill will not deprive the judge to decide whether a particular filing is legally sufficient. This will respond to the veto message. The remaining provisions, which are meant to correct the problems of Mendon Ponds will continue as drafted. Sharon Gerstman will also try to set up a meeting with the Governor’s counsel in order to discern whether anything can be done to avoid a veto in the next session.

V CPLR 3123

Discussion on proposal to amend CPLR 3123 – notices to admit. Mike Greenspan. Mike suggested that notices to admit are too frequently ignored and there needs to be reform. Committee discussed deferring notice to admit until after other discovery has been completed. It was determined that a full discussion of what the purpose of a notice to admit should be needs to be conducted before any amendment to CPLR 3123 can be presented. This discussion will be given sufficient agenda time at the January meeting.

VI Other Subjects

Due to the time limitations, discussion of Proof of Damages (Attachment E to the agenda), will be put over to the January meeting. Also, the various subcommittees should meet and report at the meeting in January.

VII Next Meeting

The next meeting of the committee will be held on Friday, January 28, 2005, at 12:30 pm at the Marriott Marquis, during the Annual Meeting of the NYSBA. Please mark your calendars.

Respectfully submitted,

Paul H. Aloe, Interim Secretary
Sharon Stern Gerstman, Chair