

MINUTES OF MAY 16, 2003 MEETING AT 12:00PM

MEMBERS PRESENT: David L. Ferstendig, Sharon Stern Gerstman, Burton N. Lipshie, Matthew R. Kreinces, Michael D. Stallman, Robert P. Knapp, III, Steve M. Critelli, John J. Jablonski, Kim Steven Juhase, Jim Gacioch, Maurice Chayt, Steven L. Sonkin, Paul H. Aloe, Joseph H. Einstein, David B. Hamm.

BY TELEPHONE: Gail Nackley Uebelhoer, Bill Altreuter

The meeting was called to order at 12:30pm

I. INTRODUCTION/APPROVAL OF MINUTES (ATTACHMENT A)

Motion by Paul Aloe to approve the minutes of the January 24, 2003 meeting, seconded by Matt Kreinces, was unanimously passed.

II. REPORT ON LEGISLATIVE PROPOSALS

A. CPLR 3212 (Sharon Gerstman)

Our bill was introduced by Mr. Weprin in the Assembly. We have no one in the Senate yet to introduce the bill. We spoke to OCA and they liked their language better. OCA introduced their own bill (attachment B to the handouts) and asked our committee to withdraw our bill. Instead, we asked the OCA to get a Senate sponsor for their bill and we would amend our bill to the Assembly to conform with the OCA bill. There are minor differences between our version and OCA's. Nothing is now happening with respect to this bill.

Paul Aloe: What are the chances that the bill will be passed?

Sharon Gerstman: If the trial lawyers do not oppose, it has a good chance to pass.

B. Various Tort Reform Bills (Sharon Gerstman)

The only bill that has a chance to pass is the one eliminating a long-term lessor as a secondarily liable party.

III. APPROVAL AND DISCUSSION OF COMMITTEE PROJECTS

A. CPLR 4532-a (M. Chayt) (Attachment C)

Maurice Chayt said that some of the changes the OCA made were positive. The bill provides two foundations: (i) an exchange, (ii) where there is a neglect to do that, a notice can be served. In sum, he thinks that the OCA changes were excellent. **Maurice Chayt's motion for its introduction (proposal by George Carpinello), seconded by Matt Kreinces, was unanimously passed.**

Sharon Gerstman: Maybe in the accompanying report we should explain why the reference to attorneys was removed (i.e. applicability of CPLR 2103), and why any other changes were made.

B. CPLR 312a (Schmidt) (Attachment D)

Michael Schmidt is in transit from Las Vegas, so Paul Aloe, member of the subcommittee, discussed the proposal. If a plaintiff follows the statute, a defendant who “sits” on the service cannot bring a motion to dismiss on improper service (where there is no default). **Subdivision g.** The amendment added a certified mail requirement so that the statute is strengthened. Also (i) the time to respond was extended (60 days from the date service made; no dependency on defendant submitted the acknowledgment). **Subdivision b.(2)** (ii) signing and sending back the form does not waive personal jurisdiction or venue objections. **Subdivision h.**

Sharon Gerstman 312a(b): If we changed the language from “serve an answer” to “appear”, why do we exclude a summons with notice in the introductory language?

Burton Lipshie: Just remove the first part of the sentence, and start with “the defendant shall appear”.

Burton Lipshie: 312a(a): CPLR 313 should be included to clarify that service can be made outside of New York.

Paul Aloe/Sharon Gerstman: But CPR 313 is not a service statute.

Sharon Gerstman: We can just change language to say serve “within or without the state”.

Steve Critelli: Certified mail can be refused or unclaimed.

Judge Stallman: Certified mail gives an indication to the recipient that the mail is of some importance (compared to regular first class mail).

Joseph Einstein: Some of his clients always refuse certified mail; thus, why not provide for a regular mailing after a “failed” certified mailing.

Paul Aloe: There can be no default on this round of service. Once there is a default, this statute does you no good. But if there is no default, the defendant will be precluded from moving to dismiss on service grounds.

There was discussion as to whether a mailing on the 118th day of the filing would preclude the defendant from making a service objection.

Judge Stallam: As long as someone is not being precluded from defending a lawsuit, he has no problem in lessening the burden on the plaintiff to serve.

Sharon Gerstman: The consensus is to eliminate certified mail (in favor of first class mail); provide language similar to 308(2) (that is, the mailing must be to defendant's actual place of business, dwelling place or usual place of abode); service is to be attempted within a set number of days after commencement (e.g. within 30 days); possible shortening of 60 day period.

Assuming these changes were made, the number of members willing to support such a bill would be 10-3-2. Paul Aloe will work on the changes with the subcommittee.

C. **Mendon Ponds/Clerk Project (Paul Aloe) (Attachment E)**

The first document in attachment E is our committee's draft discussion piece, and the second is the OCA proposal.

The OCA bill codifies "county clerk" within CLPR 304 and amends CPLR 2001 by overruling **Mendon Ponds**.

Paul Aloe believes the OCA proposal is well intentioned but does not cure the essential problem, that is, an attorney should be able to file with a clerk in the court who takes the pleadings and accepts the fee.

Joseph Einstein supports Paul and his bill (over OCA's).

David Hamm: Under the proposal, in any case where there is a default judgment, the defendant should contest "filing"; agrees with Paul.

Sharon Gerstman: Do we have a consensus that the committee will put in an opposition to the OCA bill? Yes. Paul will prepare opposition.

Sharon is concerned with people filing documents with unauthorized individuals (i.e. not being directed by someone in the County Clerk's office to do so).

Paul Aloe: The committee cannot produce our own proposal; it must go through the executive committee.

Sharon Gerstman: We can issue a report opposing the OCA bill and we could suggest alternative ways to cure the problems.

Paul Aloe: There will be opposition to the proposed amendment to CPLR 2102(c) because of its prohibition upon the clerks to refuse to accept the filings.

David Hamm: We can amend CPLR 2102(c) to add words re clerk cannot refuse for filing any paper for failure to comply with the rules, etc.

IV. **ELECTRONIC FILING AND ELECTRONIC RECORDS (Sharon Gerstman)**

There is a hearing (i) today in Albany, (ii) on May 30, 2003 in New York City, and (iii) on June 12, 2003 in Buffalo, concerning electronic filing and electronic records.

There are six questions that will be addressed (see www.nycourts.gov/publicaccess). An essential issue is public access to records on the internet.

Sharon Gerstman: Does the committee want to submit a statement?

David Hamm will volunteer as subcommittee chairman to look into whether to submit a statement. The Association of the Bar of the City of New York is about to issue a statement. We will look at it to help us formulate our position.

Sharon Gerstman: We can at least issue a statement that notwithstanding the resolution of these issues, these discussions should not effect electronic filing issues . Matthew Kreinces has volunteered to work with David Hamm on this project.

V. **OTHER SUBJECTS**

A. Notice to Admit (Greenspan)

See the CPLR's Most Dangerous Discovery Statute, NYLJ, March 28, 2003

B. Expert Disclosure (Ferstendig)

There was no consensus at all among members of the subcommittee about expert timing issues in the OCA proposals.

Respectfully submitted,

David L. Ferstendig
Secretary