

**COMMITTEE ON CIVIL PRACTICE LAW AND RULES
MINUTES OF THE JANUARY 24, 2003 MEETING
AT THE HART ROOM, MARRIOTT HOTEL
NEW YORK, NY**

The meeting was called to order at 12:45 p.m.

MEMBERS PRESENT: Sharon Stern Gerstman, chair, David B. Hamm, vice chair, David L. Ferstendig, secretary, Oscar E. Chase, Honorable Michael D. Stallman, Allan Young, Steve M. Critelli, Michael C. Schmidt, Matthew R. Kreinces, Joseph H. Einstein, Kim Steven Juhase, Maurice Chayt, Harold B. Obstfeld, Steven L. Sonkin, Jacqueline Hattar, Richard Laudor, Robert P. Knapp, III, Gail Nackley Uebelhoer, James C. Gacioch, Paul H. Aloe and Ronald F. Kennedy.

I. COMMITTEE PROJECTS

A. **CPLR 4532-a (Maurice Chayt):** *See* Attachment C to agenda. This section concerns the admissibility of medical or diagnostic tests. Maurice provided a background of the proposed legislation. The proposal is being submitted to the Executive Committee. Judge Stallman suggested a change of the phrase "injured party" to "patient." Oscar Chase asked if the word "patient" would include someone examined by the other party's examining doctor (*e.g.*, the defendant's doctor). A motion to approve the current version subject to it being re-circulated via e-mail was made by Paul Aloe, seconded by Matthew Kreinces, and passed unanimously by 18 members.

B. **CPLR 312-a (Michael Schmidt):** *See* Attachment D to agenda. Michael Schmidt explained the background of the proposal and certain proposed changes. Paul Aloe discussed some further proposed changes. General concern was expressed over reliance on mail service, and the defendant's inability to move to dismiss on service grounds. The proposal provides, in pertinent part, that once plaintiff serves by mail, the defendant waives the service defense by appearing. Kim Juhase stated that the subdivision dealing with the form of the acknowledgment, must also be amended to change the 20-day requirement to 60 days. A question arose as to the extent to which (g) would apply where service was first attempted by 312-a, and then completed by another method. Also raised was whether service by mail should be treated differently than service by other methods where the defendant appears. For example, if the plaintiff attempts service under CPLR 308(2), shouldn't the defendant also waive its service defense by appearing? A straw poll concerning keeping subdivision (g) in principal in the proposal was taken: in favor: 10; opposed: 8. A subcommittee headed by Michael Schmidt will be established to revise subdivision (g). All wording issues are to go to the subcommittee.

C. **CPLR 3123 (Sharon Gerstman):** Michael Greenspan was not present and so this issue was left to a future meeting.

II. SEPTEMBER 26, 2002 MINUTES

A motion to approve the minutes of the September 26, 2002 meeting was made by Sharon Gerstman, seconded by Oscar Chase and unanimously passed.

III. **CPLR 3212 (Sharon Gerstman):** One issue was raised by the OCA. Our reference to cross-motion raised an ambiguity. While our proposal was just meant to deal with the three-day issue, it appeared to prohibit the making of any summary judgment motion in response to other motions. The language of our proposed bill will be clarified and OCA will now support the bill.

IV. **CPLR 3216(a) (Sharon Gerstman)**: None of the sections that reviewed the proposal had seen the latest version/report. This proposal will go out to all sections shortly, and will be on the Executive Committee's agenda.

V. **UMA (Sharon Gerstman)**: The Executive Committee approved the City Bar report to endorse the legislation enacting the UMA. It may, however, establish a task force to monitor the legislation.

VI. **2003-4 LEGISLATIVE SESSION (Sharon Gerstman)**: The Committee is in the process of putting assignments together and will circulate them shortly. If someone cannot deal with an assignment within three to four days, he or she should notify Sharon Gerstman immediately.

VII. **OCA ADVISORY COMMITTEE PROJECTS (Sharon Gerstman)**:

A. **Repeal of CPLR 50A and 50B**: The Committee will support OCA's efforts to repeal 50A and 50B.

B. **Expert Disclosure in Commercial Cases**: Conceptually, the Committee supports the proposal. Sharon asked that David Ferstendig head a subcommittee with Jim Gacioch, Harold Obstfeld, Richard Laudor, Matthew Kreinces and David Hamm to suggest language changes to the OCA.

C. **Timing of Expert Disclosure**: Paul Aloe stated that this provision is in conflict with "B" above, and thus our Committee should oppose this provision. Joe Einstein suggested that the subcommittee dealing with "B" above also consider the timing issues. David Hamm mentioned products liability cases, in which a defendant frequently will not even be aware of the alleged defect until the plaintiff's expert provides his opinion. J. Stallman would welcome bright line deadlines. Paul Aloe stated that the "bright line" provided is too far along in the litigation.

VIII. **NEW SUBJECTS (Sharon Gerstman)**:

A. **Mendon Ponds**: There is an OCA proposal which confirms the reasoning in Mendon Ponds (*i.e.*, substituting "county clerk" for "clerk of the court"). Gail Uebelhoer expressed strong disagreement with the proposal, as did Paul Aloe. Sharon Gerstman asked whether the Committee wishes to pass legislation which will be in accord with or overrule Mendon Ponds. If the legislation is in agreement with Mendon Ponds, we want to assure that it is properly drafted. Paul Aloe said that the Court of Appeals ignored the language "or any other person designated by the clerk of the court" in CPLR 304. Sharon Gerstman stated that if we opposed Mendon Ponds we risk the possibility of opening up 60+ different procedures in various counties. Joe Einstein said the words "or his designee" should be added to the last sentence after the phrase "county clerk."

Paul proposed a definition of "filing," which is expansive. He views Mendon Ponds as creating pitfalls.

Sharon Gerstman will write to the OCA that the proposed legislation does not really change the law, and that by pushing such a proposal, we are precluded from "changing" Mendon Ponds.

B. **Rejection of Papers by Clerks of the Court**: Paul Aloe referred to language in the Federal Rules which does not permit the clerk to reject papers. Matthew Kreinces related a new rule in Kings County where the clerk will not accept papers which include a third-party action on the caption. David Hamm stated that there are some circumstances where the rules or the CPLR (*e.g.*, consumer credit transactions) provide the clerk with the authority to reject papers. Sharon Gerstman stated that we

should try and find a way to draft a proposal which will not offend the court clerks. Paul Aloe will lead the subcommittee with Matthew Kreinces, Joe Einstein, David Hamm, J. Stallman and Jim Gacioch.

Respectfully submitted,

David L. Ferstendig
Secretary