MINUTES OF APRIL 28, 2006, NYSBA CPLR COMMITTEE MEETING
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (12-3:30 P.M.)

MEMBERS PRESENT: David L. Ferstendig, Matthew J. Morris, Souren Israelyan, Chris Gannon, Allan Young, Raymond Bragar, Harold Obstfeld, Sharon Stern Gerstman, Paul Aloe, Jim Gacioch, Matthew Kreinces, Maurice Chayt, Steven Critelli, Rob Knapp, Bill Altreuter, Sanford Konstadt, Isaiah Juste.

BY PHONE: Phil Pinsky, Pat Connor, John Jablonski, Ron Kennedy, Bob Regan.

The meeting was called to order at 12:30 p.m.

1. **APPROVAL OF MINUTES**

Motion to approve the minutes (Attachment A to the agenda) of the prior meeting was unanimously passed.

2. **AGENDA**

a. **CPLR §2305-a (Notice/Subpoena Bill)**: David F. reported that he was just advised that the bill is being sponsored by Senator DeFrancisco. He explained that the OCA Advisory Committee has some reservations, for example, that the bill did not go far enough. Sharon G. will work with David and the OCA Advisory Committee, to work out a compromise.

b. **Harris/Allianz**: David F. discussed the history of the bill, that is, that he had met with the OCA Advisory Committee before the Court of Appeals' ruling in Harris; that the OCA Advisory Committee had agreed to work together with our committee, if the Court of Appeals ruled in a manner that we thought was problematic, but after the Harris decision we were presented with a fait accompli from the OCA. Subsequently, we created a subcommittee with Sharon G. as the chair, to work with Burt Lipshie (a former member or our Committee) to hammer out a compromise bill. The result was Attachment B to the Agenda. Sharon G. explained that the crux of the difference in approaches was that our committee wished to tackle the index number issue raised by Harris, while the OCA Advisory Committee (and particularly George Carpinello) wanted to "fix" the whole line of commencement by filing issues. The committee debated the merits of the bill and the underlying issues, including (i) the impact of Parker v. Mack, (ii) whether the Court of Appeals could still find ways to find "jurisdictional" defects, (iii) will the legislation adequately inform the Court of Appeals that its recent relevant decisions were wrongly decided, (iv) whether the dismissals resulting from the Court of Appeals' decisions are such that would render the extending provisions of CPLR 205-a inapplicable, (v) the waiver issues, and (vii) various other issues.

Ultimately, it was decided (motion passed with one dissent), that the committee would approve the OCA bill, but (i) Sharon G. and David F. would re-confirm with the OCA Advisory Committee that the proposal is not and cannot be a "joint proposal", (ii) a subcommittee was formed to determine whether a separate bill could be drafted to address the index number problem only. **The subcommittee members are Paul Aloe, Sharon Gerstman and Maurice Chayt.**

c. **CPLR §4545 (the collateral source rule, Attachment C to the Agenda)**: Allan Young reported on the most recent changes to this bill. The committee had approved the original version of the bill but changes have been made requiring Allan to consider a modification of the report. There was debate about whether the amendment included medical malpractice cases and what affect the amendments would have on property damage claims. Maurice C. raised the issue as to whether the bill's language included "medical malpractice," and Phil Pinsky responded that by definition the term, "personal injury," encompasses medical malpractice as well. Significant discussion centered on the property damage insurers and their right of subrogation. The consensus was that reimbursement to a property damage insurer (and its exclusion from the amendment), via subrogation, was not problematic. In addition, there had been opposition from that sector of the insurance industry. Rob Knapp raised the issue of ERISA and preemption. **The vote to approve Allan's report was unanimous.**

d. **RUAA AMENDMENTS**: Steve Critelli updated the committee on developments in this area[1]. This is "imminently" going to the Executive Committee. The language was tweaked to bring it in conformity with CPLR arbitration language. Our committee had already approved the RUAA and Steve recommended that the Chair simply put this in writing to the Executive Committee. An issue was then raised about a form for comment but Sharon pointed out that our committee is not allowed to comment on a bill we have supported. This issue will probably reach the Executive Committee next year.

e. **CPLR §3212** (Attachment D to the Agenda): An amendment to deal with the ramifications of the Brill decision was initially proposed by former committee member (and possibly returning member) David Hamm, Esq. That proposal was rejected by the committee members, in April, 2005, by a 15-12 margin. Since then, two proposals have come to light, one from the OCA and the other from the Commercial/Federal Litigation Section (CFL). Under the OCA proposal, CPLR §3211(e) would limit the time to make a 3211(a)(7) motion to dismiss for failure to state a cause of action to a "120 day" rule, subject to a good cause and interests of justice standard. Similarly, the summary judgment rule (3212(a)) would now include an "interest of justice" extension provision. This is an attempt to give discretion back to the Court. The CFL proposal also contained language providing discretion for the court to permit late summary judgment motions. In addition, it contains a provision that such a decision is not appealable. Sharon was

[1] Ray Bragar's excellent recent article in the NYLJ concerning New York law on the manifest disregard standard was noted.

particularly concerned with the non-appealability issue. As she framed it, the IAS Court would have "unfettered" discretion as to when to entertain or not to entertain a motion made outside the 120 days. Steve C. voiced the opinion that the non-appealability issue speaks only to whether the Court accepts the motion or not. Paul felt this was appropriate because the IAS Court should be able to manage its own calendar. Issues were raised as to the difference in Upstate/Downstate practice and the actual effect of these two proposals. Sanford raised issues concerning shorter deadlines such as in New York County (60 days) and Kings County (60 days); note of issue pressure relative to the OCA standards and goals for time limits on discovery; and extension problems where notes of issue are filed when there is outstanding discovery. Isaiah raised the question as to whether a two-tier motion procedure would be required, i.e., first a motion for leave; if the motion for leave were granted, then the summary judgment would be made. Maurice felt there should be financial penalties for the late filing. David F. explained that there had been a very heated debate on these issues in the past; that we have two diametrically opposed philosophies here; that deadlines downstate are ignored by the courts as a matter of course, and that the committee cannot seem to get past these hurdles. Sharon explained that litigants do not make these motions as often or as early as they should, that discovery does not always preclude moving for summary judgment and that too much discretion is being provided to the IAS Court. We voted on the two proposals separately. As for the original CFL proposal four were in favor with fourteen opposed; if amended to remove the last sentence (i.e. removing the non-appealability issue) then seven were in favor and twelve opposed. As for the OCA proposal, there were no votes in favor, seventeen opposed and one abstention. The Chair will decide who will write the report with respect to the OCA bill. Steve C. will report back to CFL.

3. **SUBCOMMITTEE REPORTS**

a. **CPLR §3126 (Gannon, Attachment F to the Agenda):** Chris reported on this bill relative to spoliation of medical records. Sharon questioned whether the amendment was limiting plaintiff's remedies and whether there needed to be total destruction of the records. Paul questioned why the bill should be limited to medical malpractice. Matthew Kreinces discussed the case of Baglio v. St. John's. Ultimately, the report was unanimously approved with the revisions discussed (which Chris will include is his redraft).

c. **CPLR §306-b (Greenspan, Attachment G to the Agenda)**: Michael G.'s report was unanimously approved.

d. **CPLR 4518 DMV Records (Cristo, Attachment E to the Agenda)**: Steve C. questioned why we should not allow all government records to be admitted. Jim explained that this was addressed to "abstracts" and that there might be information contained or behind the "abstract" that might not be admissible. I

explained that Lou C's concern was precisely that, i.e. that the abstracts could include hearsay or the like and the statute permits the admissibility of such certified records, including abstracts. The report was unanimously approved.

4. **NEW SUBJECTS**

a. **CPLR §3211(e) Leave to replead (Aloe**): **This generated a great deal of discussion and a subcommittee composed of Paul Aloe, Steve Critelli, Matt Morris and Harold Obstfeld was created.** The issues revolve around whether a party has a right to replead, whether it was discretionary, what is the time frame within which to replead and how this conforms to the Federal system. It was agreed that the rule needs to be clear and there should be some ability to replead. Sharon asked whether we were limited to actions dismissed purely for pleading failures. Paul felt one other problem would be that the losing party, via the Court's decision, would then have a road map on how to plead the second time. Souren I**.** felt there should not be a need to get permission to replead. Pat raised the time frames in CPLR §3025(a) and it was the consensus of the committee that the repleading issue would not be affected by that provision. Sanford discussed whether there had to be substantial prejudice connected to a right to replead. Harold Obstfeld felt that the Court should have to specify in its decision if the losing party has the right to replead.

Respectfully submitted,

Matthew Kreinces, Secretary