

MINUTES OF JANUARY 27, 2006 NYSBA CPLR COMMITTEE MEETING AT THE NEW YORK CITY MARRIOTT MARQUIS (12:30 P.M. -3:30 P.M)

MEMBERS PRESENT: David F. Ferstendig, Steven Critelli, Paul Aloe, Christian Gannon, Allan Young, Prof. Oscar Chase, Hon. Michael Stallman, Michael Greenspan, Jacqueline Hattar, Robert Knapp, Prof. Patrick Connors, Matthew Morris, Frank O'Regan, Maurice Chayt, Sanford Konstadt, Charles R. Jacob, III, Harold Obstfeld, Sharon Stern Gerstman, Raymond Bragar, Jim Gacioch.

BY PHONE: Paul D. McCormick, Bill Altreuter, David Stein.

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

I. APPROVAL OF MINUTES

Motion to approve the minutes of the September 23, 2005 meeting and the minutes of the December 8, 2005 telephone conference meeting was unanimously passed.

II. OPENING REMARKS

The chair, David I. Ferstendig, greeted the members and made his opening remarks.

III. AGENDA

A. **Harris/ Allianz:** David F. advised that there has been oral argument before the New York State Court of Appeals approximately 3 weeks ago in Harris; that a decision is imminent; that he met with the OCA Advisory Committee which agreed that if the Court were to affirm Harris- thereby finding the failure to pay the index number fee a subject matter jurisdiction non-waivable objection- we would "unite" to prepare appropriate legislation. **The committee agreed that after the Court of Appeals rules we will consider our options.**

B. **CPLR 4533-a (Proof of Damages Bill) (Maurice Chayt):** Maurice Chayt reviewed the history of the matter. He distributed page two to the proposed bill which changed the word from "rendering" to "furnishing" (and make several other minor changes). This bill will make it much easier to prove medical bills during trial. He noted that the bills paid by third parties in the medical field did not have any limit. Under the present law, the real dispute is between the third party and the defendant, not the plaintiff. **A motion to approve the Bill was unanimously passed. David Ferstendig stated that the OCA Advisory Committee expected to get back to us in the next several weeks although they anticipated no objection.**

C. **Electronic Discovery (Steve Critelli):** Steve stated that electronic discovery has become a very important feature of the legal practice. As such, he proposed the formation of a subcommittee on electronic discovery to explore the possibility of enacting rules in the CPLR governing electronic discovery. **The subcommittee will include Steve Critelli, Bill Altreuter, Rob Knapp and Charles Jacob, III.**

D. **RUAA Amendments (Steve Critelli):** Steve Critelli reported that the current version has been offered to the Executive Committee of the New York State Bar Association for sponsorship and eventual passage by the Legislature. Various associations have supported this bill.

E. **Mendon Ponds (Sharon Stern Gerstman):** Sharon Gerstman provided a brief history of the issue. Mike Stallman had previously recommended that the Committee sever the issues and prepare two separate bills, which the Committee had approved. Sharon stated that dividing the Bill into two parts was a possible feasible solution to avoid another veto by the Governor. Sharon added that the problem appeared to be that no one wants to take on the Clerks. Sharon stated that she planned to meet with Senator Volker's staff members regarding this bill in the near future. Sharon also noted that she was following up regarding the summary judgment bill (actually an OCA bill which our committee supported).

F. **CPLR 4545 (Sharon Stern Gerstman):** David Ferstendig stated that Brian Shoot and Amy Vance of OCA had previously come before the Committee to discuss this bill. Sharon reported that the Committee of Tort reform has approved this bill based upon a voice vote. It is viewed as a "lawyer friendly" bill. The Committee on Tort Reform did not feel that this was a tort reform issue and, as such, they did not issue a written report. (TICL will issue a report supporting the bill). The bill appears to have widespread support, apart from the health insurers. The Committee concluded that it should issue a report regarding this bill. **Allan Young agreed to draft a report for the Committee to review.**

G. **CPLR 2306 Bill – S4855- Governor's Veto (David Ferstendig):** David noted that although the Committee supported the bill, the Governor did veto the bill. Mike Stallman suggested that someone follow up with the Governor's counsel's office to ascertain the underlying, perhaps unstated (in veto message), reasons for the veto and whether this bill might be a political hot potato. Paul Aloe pointed out that since it was not "our bill", we did not need to be aggressive in pursuing it. David F. said he would try and identify the underlying sponsors of the bill and determine whether there is anything our committee should do.

H. **Class Actions (Subcommittee Report by Harold Obstfeld):** Harold provided a history of the issue and the bill. He stated that in response to concerns our committee expressed Scott Rosenberg (who made the presentation to our committee with Lucy Billings) suggested that attorneys' fees against municipalities etc. should be treated the same way as CPLR Article 86 (attorneys' fees against the state). Numerous members of the Committee, including Mike Stallman, Paul Aloe, Mike Greenspan, and Jim Gacioch, expressed reservations about such a bill against municipalities. **On motion, 16 members voted in favor of not making this legislation an affirmative act of our committee; 3 voted in favor of doing so. The subcommittee will convey this position to Mr. Rosenberg.**

I. **CPLR 205(a) - Impact of Andrea v. Arnone (Paul Aloe):** Paul provided a history of the issue and he stated that this was a dismissal for failure to prosecute bill. He discussed the recent holding by the Court of Appeals in Andrea v. Arnone, where the Court stated that a dismissal of an action for failure to comply with discovery orders is a dismissal "for neglect to prosecute the action" within the meaning of CPLR 205(a). Paul stated that there was a

deficiency in the CPLR in this specific area and, as such, a provision was needed to deal with this issue directly, especially in light of the Andrea decision. Sharon Gerstman proposed that the problem could be resolved by defining the term, “failure to prosecute.” Mike Stallman agreed with Sharon’s proposal. Various members voiced their opinions as to the Andrea decision and the current state of Article 31. Mike Stallman noted that there are provisions in Article 31 regarding the dismissal of actions for “willful” disobedience of discovery orders. However, there is no clear rule to guide the courts as to when dismissal is warranted where a party has failed to comply with a discovery order. David F. stated that before taking any further action with regard to this bill, the Committee should issue a revised report to incorporate the impact of the Andrea v. Arnone decision. **Jim Gacioch stated that he would prepare the report and would investigate with Paul Aloe and others as to other alternatives to resolve problems presented by the “failure to prosecute” issue.**

IV. NEW SUBJECTS

- **CPLR 312-a: Service of Process Subcommittee:** Paul Aloe stated that the committee had expended a great deal of effort to make CPLR 312-a work, to no avail. The members expressed varying opinions about this issue. Steve Critelli noted that the most important issue relates to notice. Although it was acknowledged that the current service system is antiquated - especially when viewed in the context of e-filing - it is not apparently clear what solutions are feasible at this time.

The meeting was adjourned at 3:10 p.m.

Respectfully submitted,

Jacqueline Hattar, Interim Secretary