

**MINUTES OF THE JAN. 30, 2009 CPLR COMMITTEE MEETING
held at the Marriott Marquis Hotel, New York, NY**

In attendance: Paul H. Aloe, Esq.; Scott W. Bermack, Esq.; Carl David Birman, Esq.; Thomas C. Bivona, Esq.; David A. Blansky, Esq.; Raymond A. Bragar, Esq.; Hon. Stephen G. Crane; Steven M. Critelli, Esq.; Thomas M. Curtis, Esq.; Paul A. Feigenbaum, Esq.; David L. Ferstendig, Esq.; Ellen B. Fishman, Esq.; Sharon Stern Gerstman, Esq.; Claire P. Gutekunst, Esq., NYSBA Executive Committee Liaison; David B. Hamm, Esq.; R. Kenneth Jewell, Esq.; Robert M. Kaplan, Esq.; Ronald F. Kennedy, Esq., Staff Liaison; Sanford Konstadt, Esq.; Stuart W. Lawrence, Esq.; Harold B. Obstfeld, Esq.; Philip C. Pinsky, Esq.; Lewis M. Smoley, Esq.

The meeting was called to order by the Chair, the Hon. Stephen G. Crane, at 12:45 p.m.

I. Guest from OCA Advisory Committee on Civil Practice

Justice Crane welcomed George Carpinello, Esq., Chair of the OCA Advisory Committee on Civil Practice. Mr. Carpinello was accompanied by Holly Lutz, counsel to that Committee. Both Chairs expressed the hope to work together to a common purpose. Mr. Carpinello enumerated several issues the OCA Committee has been working on:

Expert disclosure: This issue has been discussed for over a decade. There is a tension between the practices of commercial litigators and personal injury litigators. Plaintiffs' attorneys feel the cost of retaining experts is prohibitive if the case is going to settle. General discussion ensued concerning the feasibility of a bill that has been drafted to set deadlines for the service of expert disclosure (providing for service by the party having the burden of proof 60 days before the date set for trial). Concerns have been raised regarding the preclusion of expert opposition to a summary judgment motion where no prior CPLR §3101(d) disclosure had been served (*see Construction by Singletree, Inc. v Lowe*, 55 AD3d 861 [2d Dep't 2008]). Therefore, the bill setting specific timeframes is to be amended so that there is no bar to opposing a summary judgment motion if the time for expert disclosure has not run. Members commented on the practicality of the proposed timeframes for CPLR §3101(d) disclosure and what the standard for forgiveness might be for those who fail to abide by the proposed deadlines.

Affirmations: There is a proposal to allow all affiants to affirm in a manner similar to federal declarations. The notary requirement for affidavits has posed problems in rural areas and in foreign countries. The proposal has been opposed in the Assembly in the past because the Penal Law would require amendment.

Uniform bills: OCA supports the uniform mediation bill and the uniform discovery bill.

Decedents' privileged communications: Where a deceased person had made privileged communications to the decedent's attorney, there is no present provision granting the personal representative a right to succeed to the privilege. One option is for the testator to anticipate this problem and authorize disclosure to the personal representative. The testator's attorney may also need to advise of possible disclosure to the personal representative.

Automatic stays: Although an OCA subcommittee is examining CPLR §5519 in general, the present proposal would eliminate in domestic relations cases the automatic stay authorized in subd. (a) without court order.

Conditional orders issued by the Appellate Division: A finality problem has arisen because of the different ways that the Appellate Division can phrase orders directing a new trial unless a party stipulates to a different damages award (*see Whitfield v City of New York*, 90 NY2d 777 [1997]). The proposed amendment to CPLR §5501 would fix a point when the matter would be deemed final (*e.g.*, service of the stipulation with notice of entry). Discussion ensued as to whether in practice the opposing party's stipulation to the reduction or additur would ever be served with notice of entry, as opposed to the amended judgment based thereon.

CPLR 3211(e): The OCA Committee had an extensive debate on whether to eliminate the requirement to seek leave to replead when opposing a motion to dismiss (*see Janssen v Incorporated Vil. of Rockville Ctr.*, __ AD3d __, 2008 NY Slip Op 09962 [2d Dep't 2008]). The matter was referred to an OCA subcommittee, which will consider, *inter alia*, whether a motion for leave to replead and a motion for leave to amend should have different standards.

Mr. Carpinello briefly answered a few questions posed by members of this Committee. In particular, questions were raised concerning the need for further amendments to CPLR 2214-2215. Mr. Carpinello said that issues concerning motion practice had been debated for years without consensus, but that he would ask his Committee to consider this topic again at the next meeting.

It was also suggested that consideration be given to whether a motion to vacate a note of issue should be the subject of a CPLR provision with a specified standard, rather than just being in the Uniform Rules (*see* 22 NYCRR §202.21[e]). This is related to the problem of when a summary judgment motion is due if discovery is ongoing.

II. Approval of Minutes

The minutes of the September 19, 2008 meeting were approved without amendment.

III. Agenda

A. Report on presentation to NYSBA Executive Committee re: CPLR 3212

Mr. Hamm advised that the proposed amendment to CPLR 3212(a) had received the NYSBA Executive Committee's unanimous approval. A sponsor is being sought for this bill.

B. Discussion re: CPLR 3211

Mr. Ferstendig reported that several members had worked on the proposed new CPLR 3211(i), providing for 20 days to move for leave to replead when a motion pursuant to CPLR 3211(a)(7) is granted. In the ensuing discussion, some members suggested that the period for so moving should be 30 days, consistent with the timeframe for a motion for leave to reargue or a notice of appeal; others pointed out that CPLR 3211(f) provides a 10-day period to answer after denial of a motion to dismiss. It was also suggested that the heading "motion to plead over" needs to be deleted from CPLR 3211(e).

VOTE: Upon a motion duly made and seconded, 10 members favored the proposed 20-day period as written for service of a new pleading and 6 preferred a 30-day period; 13 members were in favor of a 30-day period for a motion seeking leave under the new subdivision and 2 opposed.

After further discussion, 17 members voted in favor of the proposed amendment, with a 30-day period in the last sentence of the proposal, and 2 opposed.

C. Report on new legislative session

Mr. Kennedy provided an overview of NYSBA's plans to work with the new State Legislative Committee Chairs, who include Sen. Eric T. Schneiderman, Codes; and Sen. John L. Sampson, Judiciary. NYSBA President Bernice Leber has met with Senator Sampson to discuss priorities. It is hoped that a meeting between this Senator and Justice Crane can be arranged, as the anticipated meeting with Sen. Helene Weinstein could not be scheduled last fall.

It was noted that the January 2009 change in the Senate leadership may create a new dynamic, now that both houses of the Legislature are controlled by the Democrats. As presently constituted, the Senate may be more sympathetic to issues of concern to this Committee, although the budget is expected to be the highest priority

In the first year of the new session, a lot of legislation is being reintroduced. Although the new bill numbers are not all available, members are advised to check the Committee's web site http://www.nysba.org/statewatch/SBA_CPLR.HTM.

D. Selection of Jurors

Justice Crane reviewed the history of the jury selection bill that the Governor vetoed (*see* Veto Message No. 153 [2008]).

On January 12, 2009, the Chief Administrative Judge issued a publication entitled “Implementing New York’s Civil Voir Dire Law and Rules” that is available at <http://www.nycourts.gov/publications/pdfs/ImplementingVoirDire2009.pdf>. Some members questioned whether the protocols set forth in such a pamphlet are binding. The Chair asked Mr. Konstadt, who brought this matter to the Committee’s attention, to follow up on this issue.

E. Subcommittee reports

(i) Uniform Rules conflicts

This report was deferred to the May 2009 meeting.

(ii) Motion practice

Mr. Aloe reported that further problems with CPLR 2214-2215, as amended, have become apparent and warrant consideration.

(iii) CPLR §3213

Mr. Obstfeld noted that the proposed amendment to CPLR §3213 may be unlikely to pass because it appears to have a negative impact on consumers.

(iv) Expert disclosure

This report was deferred to the May 2009 meeting.

(v) Likely bills

The Chair stated that the group that is to identify those bills most likely to pass has not yet met.

F. Proposed CPLR amendments

(i) CPLR §7503(c)

Mr. Ferstendig presented several proposals which led to a wide-ranging discussion. Among other things, a further amendment to CPLR §7503(b)(1) was proposed, which may require further study.

VOTE: Upon a motion duly made and seconded, 13 members were in favor of the more radical revision (starting “Demand for arbitration”) and 0 opposed.

(ii) CPLR Article 12

Mr. Curtis distributed a report disapproving a bill to amend CPLR 1201, 1202, 1203, 1206, 1208, 1210 and 1211. Justice Crane asked him to prepare a cover

letter for distribution to other Committees that might be concerned. This item was deferred to the May 2009 meeting.

(iii) CPLR §1101

The Chair asked Mr. Lawrence to post his proposal on the listserv. This item was deferred to the May 2009 meeting.

G. Report on privacy

Ms. Gutekunst invited members' attention to the extensive report on privacy issues, which was presented at the House of Delegates meeting and the Executive Committee meeting on January 28-29, 2009. She stated that the House of Delegates had adopted a resolution to authorize a task force to seek input from NYSBA sections and other associations concerning the report's recommendations. The Committee's consensus was to wait to see if the CPLR will be implicated and if any member feels strongly about a particular recommendation.

H. New Business

(i) There is a possible issue regarding the upstate practice of attorneys' drafting orders for filing with their motion papers. Justice Crane questioned the need for statewide uniformity. Ms. Gerstman volunteered to look into what the concerns are in this regard.

(ii) Members raised a variety of other issues, including problems with E-filing and with respect to authorizations for an attorney to withdraw (CPLR §321[b]), fax service (CPLR 2103[b][5]), and service by mail (CPLR 2103[b][2]). It was noted that the five-day provision may require revision if, as has been suggested, the United States Postal Service eliminates one weekday delivery.

(iii) Discussion of Mr. Hamm's proposed amendment to CPLR 4406 was deferred to the next meeting, which may be rescheduled from May 8, 2009 to May 15, 2009.

There being no further business to come before the Committee, the meeting was adjourned at 3:35 p.m.

Respectfully submitted,

Ellen B. Fishman
Secretary