

**MINUTES OF THE MAY 14, 2010 NYSBA CPLR COMMITTEE MEETING
held at the Association of the Bar of the City of New York, 42 W.44th Street, New York, NY**

In attendance: Paul H. Aloe, Esq.; William C. Altreuter, Esq.; Thomas C. Bivona, Esq.; James N. Blair, Esq.; Blaine H. Bortnick, Esq.; Raymond A. Bragar, Esq.; Hon. Stephen G. Crane; Steven M. Critelli, Esq.; Thomas M. Curtis, Esq.; David L. Ferstendig, Esq.; Ellen B. Fishman, Esq.; Sharon Stern Gerstman, Esq.; R. Kenneth Jewell, Esq.; Ronald F. Kennedy, Esq. Staff Liaison; Seunghwan Kim, Esq.; Michael J. Kozoriz, Esq.; James K. Landau, Esq.; Harold B. Obstfeld, Esq.; Joel D. Sharrow, Esq.; Lewis M. Smoley, Esq.; Steven L. Sonkin, Esq.; Allan Young, Esq.

The meeting was called to order by the Chair, the Hon. Stephen G. Crane, at 12:15 p.m.

I. Approval of Minutes

The Minutes of the January 29, 2010 meeting were approved without amendment.

II. Agenda

A. Proposed CPLR § 4549

Mr. Aloe briefed the committee on the proposal he prepared with respect to this prospective new section of the CPLR. This new section is intended to largely adopt the language of FRE 502 with respect to the issues of waiver of the attorney-client and work product privileges. Mr. Aloe stated his belief that this is an area where the applicable Federal and State Rules should be unified.

After discussion, a motion was made, seconded and carried to adopt Mr. Aloe's proposal after he removed some of the preliminary language that was inadvertently added to the proposal and send it to the Executive Committee.

B. CPLR § 4547

Mr. Aloe advised that CPLR § 4547, at its inception, adopted the then existing language of FRE 408 *verbatim*. He further advised that FRE 408 has since been amended. He suggested that he prepare a draft of proposed legislation with supporting memo, amending CPLR § 4547 to reflect the amendments made to FRE 408.

After discussion, the Committee voted to have Mr. Aloe continue with this project.

C. CPLR § 3213

Mr. Obstfeld briefed the Committee on the changes to CPLR § 3213 that his subcommittee has proposed, and highlighted two issues that remained in dispute within his subcommittee. One issue is whether this section should carve out consumer transactions. The other issue is whether the defendant should be given an opportunity to view the original document that is the subject of the CPLR § 3213 motion.

After hearing from proponents of both sides of each issue and after discussion of each issue, the Committee: (a) granted the motion to include proposed CPLR § 3213(f) which excludes consumers from CPLR § 3213 and (b) defeated the motion (by a 16-4 vote) to include CPLR § 3213(c), which would have provided for an opportunity for the defendant to inspect the original document being sued upon. A motion was then made, seconded and carried to send the proposal regarding CPLR § 3213 with subsection (f) and without subsection (c) to the Executive Committee.

D. Interlocutory Appeals

Ms. Fishman advised the Committee that her subcommittee had gathered a lot of information regarding this issue but had not prepared a proposal, because the majority of the subcommittee was in favor of keeping the status quo. At Justice Crane's request, Ms. Fishman agreed to confirm whether the Commercial and Federal Litigation Section is doing a report on this issue and she will report back to the Committee at the September meeting.

E. CPLR § 5203

Mr. Blair reminded the Committee that the bill passed the Assembly unanimously but that the bill as written is unconstitutional, because it is inconsistent with voiding powers of the Trustee under the Bankruptcy Code. It is also likely to be passed by the Senate. The Committee agreed to oppose the proposed statute and address it when the law goes to the Governor.

F. Insurance Law §5102 – Definition of Serious Injury

Ms. Gerstman advised the Committee that §5102(a) of the Insurance Law excludes a large number of cases, involving "serious injury" (a term that is broadly defined), from summary judgment treatment even though this issue is not at all addressed in CPLR 3212. Ms. Gerstman suggested that the Committee address this procedural aspect of CPLR 3212 only.

Ms. Gerstman agreed to draft a proposal on this issue to be circulated on the List Serv.

G. Rink v. State

This case addresses the issue of intervention with respect to cases involving equitable subrogation. There is currently no rule addressing this issue in the CPLR. Ms. Gerstman and Mr. Altreuter agreed to form a subcommittee to study whether a new CPLR section/rule is appropriate to address this issue.

H. CPLR 2103

Mr. Aloe asked the Committee whether it would be useful to write a memo regarding modifying CPLR 2103 to clarify it in light of CPLR § 5513. Mr. Aloe, Mr. Obstfeld and Mr. Jewell agreed to study this issue and report back to the Committee at the next meeting.

I. New Business

1. Mr. Blair advised the Committee that there were a number of articles written about reviving statutes of limitations in cases against the Catholic Church and municipalities. Mr. Blair will draft a report on this issue and present it to the Committee.
2. The date of the Committee's next meeting is September 15, 2010.

There being no further business to come before the Committee, the meeting was adjourned at 3:25 p.m.

Respectfully submitted,

James K. Landau
Secretary