

**MINUTES OF THE MAY 15, 2009 NYSBA CPLR COMMITTEE MEETING  
held at the New York City Bar Association, 42 W. 44th Street, New York, NY**

In attendance: Paul H. Aloe, Esq.; William C. Altreuter, Esq.; Scott W. Bermack, Esq.; Carl David Birman, Esq. (by telephone); Thomas C. Bivona, Esq.; James N. Blair, Esq.; David A. Blansky, Esq. (by telephone); Blaine H. Bortnick, Esq.; Raymond A. Bragar, Esq.; John T. Cofresi, Esq.; Hon. Stephen G. Crane; Steven M. Critelli, Esq.; Thomas M. Curtis, Esq.; Paul A. Feigenbaum, Esq. (by telephone); Ellen B. Fishman, Esq.; Sharon Stern Gerstman, Esq.; Claire P. Gutekunst, Esq., NYSBA Executive Committee Liaison; David B. Hamm, Esq.; David Paul Horowitz, Esq.; Souren Avetick Israelyan, Esq.; R. Kenneth Jewell, Esq. (by telephone); Robert M. Kaplan, Esq. (by telephone); Ronald F. Kennedy, Esq., Staff Liaison (by telephone); Sanford Konstadt, Esq.; Burton N. Lipshie, Esq.; Harold B. Obstfeld, Esq.; Joel David 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 30, 2009 meeting were approved without amendment.

**II. Agenda**

**A. Subcommittee reports**

(i) Uniform Rules conflicts

Ms. Gerstman reported that the subcommittee was putting together a full working draft, which will address, *inter alia*, the relevant legislative history, failed legislative proposals, and federal analogs. She is awaiting a few additional pieces and anticipates that after a conference call, the draft will be ready for the September 2009 meeting.

(ii) Motion practice

Mr. Aloe reported that the flaws in the recent amendments to CPLR §2214 and 2215 are manifest. He mentioned that it would be desirable to work with OCA to avoid a piecemeal approach to the problem.

(iii) CPLR §3213

Mr. Obstfeld reported that this subcommittee has been working on a draft and is to meet to discuss the proposal.

(iv) Expert disclosure

This report was deferred to the September 2009 meeting.

**B. Report of OCA Advisory Committee on Civil Practice**

Members engaged in a lively discussion of many aspects of the January 2009 Report of the OCA Advisory Committee on Civil Practice to the Chief Administrative Judge.

(i) CPLR §§ 5513(e), 5611(b)

The proposed addition of these new sections is intended to eliminate uncertainty as to the determination of finality in connection with leave applications in the Court of Appeals. It is in part a response to *Whitfield v. City of New York*, 90 NY2d 777 (1997). The consensus was that while the underlying motivation may be laudable, the bill is flawed. For example, it provides for a time period to run from service of a stipulation consenting to an additur or remittitur with notice of entry, a step which does not occur in current practice. It also fails to take account of stipulations, such as those affecting apportionment, in which the consent of more than one party may be required pursuant to an Appellate Division order.

Mr. Blair volunteered to write a summary of the chief concerns expressed by this Committee. Mr. Kennedy stated that he would seek to engage with OCA as well.

(ii) CPLR Article 74

The proposed new article would adopt the Uniform Mediation Act. This is a NYSBA legislative priority.

Mr. Critelli, who had previously written a related report for the Commercial and Federal Litigation Section's CPLR Committee, agreed to circulate it.

(iii) CPLR §3101(d)(1)

This proposal would expand expert disclosure in commercial cases, including providing for depositions without a commission or showing of special circumstances. Members pointed out difficulties with the definition of what kind of case falls within the provision, the threshold amount which is inconsistent with the Commercial Part rules, and the deadline set 60 days prior to the trial date.

**C. 2009 Legislative Session**

Mr. Kennedy reported on efforts to develop a relationship with the new leadership and his meetings with staff members, particularly from the Codes Committee. Speaking

prior to the chaos that brought proceedings in Albany to a halt, Mr. Kennedy summarized NYSBA priorities, and provided status updates on bills of interest to this Committee.

Key issues included amendments to address problems with the collateral source rule and subrogation. The collateral source bill, which has both NYSBA and New York City support, would treat public and private defendants alike for purposes of CPLR Article 50-B. NYSBA has not taken a position on the OCA proposal to amend CPLR §4545, which would affect the subrogee's rights in the context of settlements and has been the subject of considerable lobbying from affected groups.

Mr. Kennedy also noted that New York State Trial Lawyers Association's legislative priorities include the proposed amendment to CPLR §214-a, which would extend the discovery rule to all malpractice causes of action and provide a one-year revival period; a bill to add CPLR §1405, which would allow plaintiffs to proceed directly against third-party defendants; and a bill to overturn the decision in *Arons v. Jutkowitz*, 9 NY3d 393 (2007), which NYSBA opposes.

#### **D. Proposed amendment to CPLR Article 12**

Justice Crane noted that at the January 2009 meeting, the Committee had approved the report that Mr. Curtis prepared, disapproving A.2530. Mr. Kennedy advised that it was unnecessary to solicit support from other Committees for this report. The Chair stated that he would make minor changes to edit the report, including deleting the last sentence of the conclusion, so that it can be finalized.

#### **E. Proposal re: CPLR 4406**

Mr. Hamm explained the few cases that had given rise to concerns among appellate advocates that contrary to long-established practice, every issue raised on appeal now may have to be the subject of a post-trial motion. The Chair offered his perspective, based on his experience as an Associate Justice of the Appellate Division, Second Department. He noted that the Court had the power to reach issues such as weight of the evidence and excessiveness regardless of whether those points had been raised on a motion to set aside the verdict at the trial level. A spirited discussion of Mr. Hamm's proposal ensued, in which members pointed out the costs and delay associated with making a futile post-verdict motion to a trial judge; the distinction between making no post-trial motion and making such a motion without raising a particular issue; and waiver as opposed to preservation of issues for appellate review.

VOTE: Upon a motion duly made and seconded, 19 members favored the concept of the proposed amendment and 2 opposed.

Thereafter, the proposed amendment and report were refined by a subcommittee consisting of Justice Crane, Ms. Fishman and Mr. Hamm. After reaching a consensus, including clarification that the proposed amendment is not intended to affect settled rules of preservation, the proposal was circulated to the full Committee. Following continued

debate online, the Chair asked Mr. Kennedy to prepare the proposal, as amended, for the Executive Committee. Other interested Committees and Sections are being offered the opportunity to comment on this Committee's proposal.

**F. Problems with vacating, striking, or restoring a note of issue**

Ms. Gerstman explained that there is nothing in the CPLR regarding vacating and reinstating the note of issue and that these procedures are instead the subject of a uniform rule (22 NYCRR §202.21 [e], [f]). She indicated that the response to a motion to vacate, based on the failure to complete discovery, for example, varies by locality. The Chair noted that an invitation to the Legislature to repeal CPLR 3404 appeared in *Basetti v. Nour*, 287 AD2d 126, 136 (2d Dep't 2001) (Ritter, J., dissenting). A wide-ranging discussion ensued as members shared their experiences concerning the utility of the note of issue and certificate of readiness, a comparison with federal practice, and the practice of treating conference orders as 90-day notices pursuant to CPLR 3216(b)(3).

Ms. Gerstman and Messrs. Altreuter, Bermack, Cofresi, and Hamm volunteered to form a note of issue study group.

**G. Proposal regarding CPLR §5203**

A 6922 is a bill in relation to enforcement of state court judgments, which was proposed by the Chief Administrative Judge with the intention of upholding the primacy of such judgments against evasion by strategic bankruptcy actions. It is a response, in part, to *Musso v. Ostashko*, 468 F3d 99 (2d Cir. 2006). Mr. Blair expressed the view that the proposed amendment is unconstitutional. Following a general discussion, he agreed to draft a report recommending disapproval.

The report drafted by Mr. Blair was thereafter circulated online and approved with minor revisions.

**H. Other Business**

(i) Future meetings

September 11, 2009 – New York City Bar Association, 42 W. 44th Street, New York, NY;

January 29, 2010 – New York Hilton Hotel, 1335 Avenue of the Americas, New York, NY; and

May 14, 2010 – New York City Bar Association, 42 W. 44th Street, New York, NY.

All meetings are to be held on Fridays, at 12 p.m. Members were advised that the site of next year's NYSBA annual meeting had been changed from the New York

Marriott Marquis Hotel to the Hilton.

(ii) Web site

Messrs. Aloe and Critelli have been working to maintain this important data base (accessible at cplr.org). They solicited members' input regarding the feasibility of scanning additional material onto the Committee's web site. Messrs. Bermack and Cofresi volunteered to assist in assessing such a project. Ms. Gutekunst noted that NYSBA does not have the resources to do substantive work, but she indicated that the Committee may wish to prepare a report on this subject for Finance to consider.

(iii) Executive Committee Liaison

The Chair announced that Ms. Gerstman had been appointed as the new NYSBA Executive Committee Liaison for this Committee. Justice Crane thanked the retiring liaison, Ms. Gutekunst, for the gracious assistance and invaluable guidance rendered to the Committee during her service.

There being no further business to come before the Committee, the meeting was adjourned at 3:15 p.m.

Respectfully submitted,

Ellen B. Fishman  
Secretary