

**MINUTES OF SEPTEMBER 8TH, 2006 NYSBA CPLR COMMITTEE MEETING
ASSOCIATION OF THE CITY BAR OF NEW YORK (12:00 – 3:30)**

Meeting called to order at 12:45 P.M.

I. Moment of silence in remembrance of September 11th observed.

II. **Approval of Minutes**

Motion to approve minutes of April 28, 2006 CPLR Committee meeting was unanimously passed.

III. **Agenda**

a. **CPLR 4533-a Proof of Damages, Affirmative legislation** -There was an explanation as to the process a proposed piece of legislation goes through after it is approved by the Committee. Once the Committee has approved a piece of proposed Legislation, it goes to the SBA Executive Committee for approval. With regards to this specific piece of legislation, Ron K. reported that it has already been approved by the Executive Committee; however, there will be no activity to get it introduced until the Legislature reconvenes in January 2007. In January, Ron K. will seek out sponsors for the bill. David F. will also go to Albany to promote the bill. Bills are not automatically (re)introduced; they must always have a sponsor. The Senate will be in session in the fall but mainly to confirm Judge Pickett. Paul A. commented on the low priority given to CPLR bills and suggested keeping an inventory of bills to push those which are forgotten. Ron K. described how the CPLR is amended. The Legislature approves amendments and the Governor signs them into law; however, the proposals come from the Committee and must be approved by the Executive Committee. Paul A. commented on the difficulty of getting bills approved. Sharon stated that the Legislature misunderstands the amendments at times.

b. **CPLR 2305-a Notice/Subpoena Bill** – This bill has been introduced by Senator DeFrancesco. The OCA Committee has a different view than this Committee on this particular issue. Jim B., who is also a member of the OCA Advisory Committee, thinks that the OCA bill addresses the same issues as the Committee's bill. David F. reported that OCA's bill states that service on a client's attorney in New York is sufficient as against that client no matter where the client is located. This is dramatically different from the bill the Committee is proposing. Sharon suggested that a small group of Committee members meet with a small group of OCA Committee members. Paul A. agreed that the bills are very different and that the goal of the Committee's bill is not to expand jurisdiction.

- c. **CPLR 3211(e) leave to replead – Affirmative legislation** – Paul A. reported that CPLR 3211 was amended last year to eliminate the requirement that a party cross-move for leave to replead in its opposition to a motion to dismiss. He further advised that a subcommittee has been working on a proposal to amend the CPLR to provide for (i) a specific method to replead, (ii) a time limit to move of 20 days from the date of notice of entry, and (iii) the standard for leave to replead to be the same as to amend a pleading. Paul F. questioned as to whether it should be a minimum of 20 days. Paul A. stated there was no intention to preclude the judge from shortening the time. Michael S. suggested setting an outside time limit. Paul F. proposed an amendment to read “not longer than 60 days”. Paul A. responded there were no time limits for amendments. David H. suggested that the phrase “except for good cause shown” be added to the last line. Some concerns were expressed about adding such a standard. Pat C. did not think the amendment was necessary and instead the party should cross-move. Pat C. also suggested that you could amend as of right when a motion to dismiss is made as well. Paul A. stated that this applies where the party does not cross-move; moreover, there is no amendment as of right after an order of dismissal. Pat C. pointed out that the prior language made it tougher because you had to submit affidavits to plead again. Scott stated that the standard must be clearer here. David F. stated that there are two issues, the time limit, and whether or not the amendment is necessary. Jim wanted to make the time limit longer than 20 days. Paul F. suggested deleting the last sentence and use CPLR 3025(b) language instead. Paul A. stated that the problem will be that a dismissal is a dismissal of the entire complaint and CPLR 3025(b) applies only when an action is pending. Michael S. stated there must be an outside time limit and it is unfair to put plaintiff in the uncomfortable position of having to move in the alternative to replead. Ken agreed with the need for finality. Paul A. was concerned with the difference between a complete dismissal v. a partial dismissal. David F. asked how many members thought there should be a showing of merit. 8 yes, 7 No, 2 abstain.
- d. **CPLR 3101(a)(4) amendment** – David H. – 2nd Department requires “special circumstances” for non-party discovery. 1st and 4th departments disagree. There were concerns raised about discovery from treating physicians. Michael S. stated there is no problem with discovery from treating physicians because you cannot get expert witness deposition. Jim suggested that we should state in the legislative memo that expert disclosure is not affected by the proposed amendment. David H. agreed to amend the memo accordingly. Paul F. asked whether the Court of Appeals will weigh in here. David H. stated that this issue will never reach the Court of Appeals. Paul F. expressed the belief that the solution is through advocacy. David F. asked to approve language with the proposed changes to the memo. Motion passed unanimously. David B. stated the language in the memo about the Second Dept. is too

inflammatory. Paul F. is in favor of mentioning the 2nd Dep't. David H. will revise the memo accordingly and circulate it via e-mail.

- e. **Rules of Chief Administrator/New Deposition Rules** – Paul F. stated that the new OCA deposition rules impinge on the attorney-client privilege and questioned as to whether OCA has the right to, in effect, amend the CPLR. Paul A. stated that OCA has created a parallel system which has overrun the CPLR. Paul F. suggested that the State Bar meet with the other Bar associations and raise these issues. David H. agreed with Paul F but does not know if the Committee is the place to bring this up. Jim G. will try to get this issue before the SBA Executive Committee. Paul A. stated there are many rules that have impinged upon the practice of law. Pat C. stated that there is a 4th Department case that a statute has precedence over the rules. The CPLR gives attorneys the right to make objections. Pat C. stated that the OCA recommended these rules before. Paul F. expressed a concern that the rules prohibit counsel from directing a witness not to answer. Paul F. asked if the NYSBA president could request that the enactment date be delayed. David H. said that the rule is contrary to case law. Paul F. moved that the Committee ask the NYSBA president to communicate with the Administrative Judge and ask that the effective date of the rules be delayed to allow for comment. David F. will communicate along with Jim and others. Paul A. stated that the OCA cannot supersede the Legislature and it is wrong that the OCA did this without notice. David H. does not think we should take on the OCA. Pat C. stated that it would be helpful to compare these rules to the new advertising rules, where comment was allowed on those and there was two month's notice.

Respectfully,

Isaiah Juste