MINUTES OF THE September 19, 2014 NYSBA CPLR COMMITTEE MEETING
Held at the NYC Bar Association, 42 West 44th Street, New York, New York

In Attendance:

Rob Knapp, Chair; Ron Kennedy, NYSBA Liaison; Tom Bivona, Sharon Stern Gerstman, James Pelzer, Souren Israelyan, Albert Levi, James Landau, Brendan Cyr, Julie Hellberg, Joe Schmit, Daniel Doron, Marc Rapaport, Paul Cohen, David Hamm, David Horowitz, Paul Aloe, David Ferstendig, Daniel Finger, Steve Critelli, Cheryl Mallis, Harold Obstfeld, Cary Sklaren, Paul Feigenbaum, Herbert Ross, Tom Weigand, Ken Jewell, Blaine Bortnick, Andrew Keaveney, Raymond Bragar, Paul Aloe, Christine Rodriguez (by phone), Lisa Bluestein (by phone), Michael Sera (by phone).

The meeting was called to order by the Chair, Rob Knapp, at 12:00 p.m.

Agenda:

I. Approval of Minutes: On motion to approve the minutes, which motion was seconded, the minutes of the May 2, 2014 meeting were unanimously approved with the following changes: Jim Pelzer: second full sentence top of page 2 should just read "Jim Pelzer says that OCA argues that *Aho* disrupts orderly track for appeals." Delete rest of sentence, starting with "because." Also page 4, ¶VIII, second sentence should read "they haven't seen *it*." Harold Obstfeld later pointed out two separate references to CPLR 3213, on pages 1 and 2 which have since been combined.

II. Legislative Update: Ron Kennedy: Explains ALPs and his role. Ron then summarizes Rob Knapp's trip to Albany in October 2013 and bills then discussed. Fast forward to end of session: our CPLR 3216 passed in substance as OCA bill. Hamm CPLR 3212 (deadline for summary judgment motion) passed Senate in June but did not make it to floor of Assembly. Not sure whether there was objection to it or if clock just ran out. Rob is to come back this fall, after election. Control of Senate after election is uncertain. Assembly won't change. We should discuss adding other bills to short list, and remove CPLR 4111. CPLR 3212 would stay on short list. All bills have to be reintroduced.

III. CPLR 5501 - Sharon Gerstman working with OCA CPLR committee. Rob Knapp responds saying he doesn't know whether George Carpinello and Paul Aloe reconnected; Paul later says they did not. Sharon suggests that there should have been a meeting, to which Jim Pelzer said that it was left open because George Carpinello was in India. Ron Kennedy said Assembly staff is interested in concept. Staff liked our bill better than OCA. Ron spoke with Holly Lutz regarding Paul Feigenbaum's comment that there may be a compromise that OCA committee could live with. OCA had promised to put a writing together but nothing transpired. Jim Pelzer says there are a couple of ways to do this, that this is important and that we should reach out to George Carpinello to follow up. CCAJ likes this approach. Paul Feigenbaum says if OCA bill doesn't move when introduced, it won't move at all; that Legislature

doesn't like OCA bill, and that it's better that bill come under our name. Sharon Gerstman agrees saying there are two proposals, and that the Legislature doesn't want to deal with two bills. OCA wants quid pro quo: it has no objection to our proposed change, but won't support ours unless we support its change. Paul Feigenbaum agrees with Sharon Gerstman and argues OCA has to accept view of bill in Legislature and work with us to get action on our bill. Jim Pelzer reminds us that OCA has sponsor and our Committee doesn't. Two proposals involve two different things and we don't agree with their proposal. Sharon says their bills are automatically introduced. Paul argues that we need to take action. David Hamm notes, only half in jest, that if OCA is unable to get its amendment to CPLR 5501 enacted by the Legislature, it could promulgate an administrative rule to the same effect. Paul Feigenbaum says that's risk we should take. Jim Pelzer says OCA feels strongly about its bill. Ron Kennedy says that we should wait until election as problem needs to be addressed but he is not convinced that it has been and that they are not so fast to take on CPLR Committee bill. Rob Knapp doubts wisdom of throwing away 150 years of case law on "necessarily affects," as OCA proposes. Question is of what the term 'necessarily' means in "necessarily affects". Present law limits review of interlocutory orders on appeal from final judgment to those that necessarily affect final judgment. Related rule from *Matter of Aho*: interlocutory appeals lapse after judgment is entered, and any appeal is now from the judgment. OCA wants to overrule *Matter of Aho*, remove "necessarily affects" from CPLR 5501(a)(1) and allow appeal from interlocutory order to continue even after entry of judgment. There is concern that the OCA bill would allow review of academic issues. Everyone prefers our bill to OCA's but it seems Carpinello would not bless our bill unless we agree to removal of "necessarily affects." Jim Pelzer suggests that he David Hamm, Rob Knapp and Paul Aloe form subcommittee to come up with language acceptable to CCAJ, which also dislikes OCA proposal. Paul Aloe doesn't think it will be successful and that we would have to compromise with OCA. Jim Pelzer thinks there may be a compromise that CCAJ would accept, although the possibility is remote. Herbert Ross asks what interlocutory post-judgment appeals would be problematic: Paul Feigenbaum says sanctions and discovery. OCA is holding our bill hostage until we agree to its bill. Paul Aloe says we need to find out if OCA has real issue with our bill or if this is just quid pro quo. Steve Critelli asks whether CCAJ has position? Rob Knapp says that CCAJ has proposed bill which Executive Committee approved. Paul Feigenbaum says if we can get OCA on board with language that is more palatable, we could get something passed. Rob Knapp says let subcommittee meet to see if it can come up with solution. Sharon Gerstman believes CCAJ should be involved. Jim Pelzer says let subcommittee come up with something to run by CCAJ. Ron Kennedy suggests taking the Assembly's temperature on our proposal and OCA's. David Hamm asks why someone on our committee does not reach out to Carpinello directly.

IV. Tom Weigand for Oscar Chase – CPLR 901(b). FRCP 23 doesn't have a counterpart to CPLR 901(b), prohibiting certification of a class action to collect a penalty. As a result of Supreme Court *Shady Grove* decision, refusing to apply CPLR 901(b) to bar federal class action to collect penalty created by New York law, federal class actions may now be used to enforce NY penalty statutes, as long as damages are more than

$5 million. ($5 million is the jurisdictional minimum of the federal Class Action Fairness Act.) This encourages forum shopping, means state penalty claims will be brought, and state law interpreted, mainly in federal court, and largely circumvents CPLR 901(b). Tom argues for repeal of CPLR 901(b), and for Legislature to specify instead, in each substantive statute creating a penalty, whether a claim to collect such penalty can be brought as a class action. Penalty cases are especially suited for class treatment because actual damages need not be calculated, Tom points out. Herb Ross points out that under this proposal, existing penalty statutes would all have to be amended. Paul Feigenbaum is in favor of repeal. Paul Aloe asks whether Supreme Court would have come out differently in *Shady Grove* if §901(b) weren't in CPLR? Should we make clear that the statute is substantive and not procedural? Tom Weigand says that Supreme Court would say it is procedural anyway. Jim Pelzer suggests we pull the bill jacket to learn what the policy was behind the bill in the first place before we change it. Paul Feigenbaum thinks the *Sperry* case was troubling in disallowing class treatment of State AT claims. Dan Doron opposes repeal citing a series of employment cases. Paul Feigenbaum believes we need to form a subcommittee. Marc Rapaport says plaintiffs can't bring a New York Labor Law claims in in state court because of CPLR 901(b), hurting lowest-paid employees most. David Hamm can't support any bill that would enlarge class action recoveries or the scope of class actions until Legislature fixes lawyer-driven class actions where class gets nothing under settlement. Tom Weigand and Herb Ross argue that the judges are at fault because they approve these kinds of settlements. Ray Bragar says coupon settlements are a thing of the past and not grounds for opposing repeal of CPLR 901(b). Subcommittee charged with looking at the reason for the original statute and the penalties that would be covered by the proposed repeal. Ron Kennedy believes there will be strong opposition from business and insurance lobbies. Paul Aloe asks whether the Committee should waste time on this. Sharon Gerstman said no subcommittee was needed. David Hamm says to let the Executive Committee make the political decisions; that it isn't the CPLR Committee's place to consider the politics. Subcommittee to be comprised of Herb Ross, Tom Weigand, Rob Knapp, Dan Doran, Marc Rapaport, and Harold Obstfeld. For next meeting, subcommittee is to look at the legislative history of CPLR 910(b) and how life would change without the statute.

V. CPLR 2309(c) – Rob Knapp states that this statute, providing that out-of-state affidavits may be sworn before anyone who could take an acknowledgment to an out-of-state deed under the Real Property Law, creates confusion, particularly with respect to when a certificate of conformity is required. Certificates of conformity are never required for deeds acknowledged by sister-state notaries, but courts sometime require certificates of conformity for affidavits sworn by the very same notaries. Either the courts are wrong or the real estate bar is wrong, as the same provisions of the Real Property Law govern both affidavits and deeds. Rob Knapp points out that where there is a sister-state notary, no certificate of conformity is needed, per Suffolk county decision; but many Appellate Division decisions go the other way. Amend statute to make clear that affidavits sworn before a sister-state notary do not require a certificate of conformity? In response to suggestion that a missing certificate of

conformity is not a problem because it is correctable, Rob says the issue leads to tremendous amount of motion practice - 50-60 reported decisions, about ten per year recently. Sharon Gerstman refers to case where out-of-state affidavit submitted on reply was fatally defective because it lacked "sworn to" language. Paul Aloe argues that while notary can both acknowledge a signature and take an oath from an affiant in New York, not all the officers listed in the Real Property Law as authorized to acknowledge a deed, will necessarily be authorized to swear a witness under the laws of their own states. Jim Pelzer: abolish notary's ability to take oath? Is formal oath really needed? Is a federal-style declaration the best solution? Judge Stallman: on all the out-of-state affidavits he has considered, he has never seen a challenge over the lack of a certificate of conformity. What policy is served by requiring one? Requirement does not serve comity with other states as the implication is that their notaries do not know how to administer an oath, and that a certificate of another officer, that the notary properly swore the witness under the law of the particular state, is needed. Paul Feigenbaum argues that "sworn to . . " jurat at the end of the affidavit should be sufficient, and that any further formalities just invite procedural nitpicking. Judge Stallman: perhaps additional protections required where out-of-state affiant is not a party to the action or a New York resident and might not be subject to prosecution in New York. Jim Pelzer: whoever is allowed to administer an oath in the state where the affidavit is sworn, should be OK for affidavit to be submitted in New York. Sharon Gerstman would rather have oath administered by lawyer than anyone else. Sharon Gerstman said focus should be on whether notary is authorized under his or her own state's laws. Paul Aloe and Paul Feigenbaum want instrument to be sworn to under penalties of perjury. Rob Knapp asks whether there should be subcommittee? Paul Feigenbaum asks if oath administered by any person authorized to take same in jurisdiction where affidavit is sworn, would be sufficient? David Ferstendig suggests that affirmations are the solution. Sharon Gerstman sees several possible approaches: certificate of conformity; oath administered by person authorized to do same in state where the oath taken; affirmations. Subcommittee created consisting of Harry Sklaren, Rob Knapp, Jim Landau, Herb Ross, Cheryl Mallis, Sharon Gerstman and Jim Pelzer. Adjourned to 1/30/2015 meeting.

VI. CPLR Articles 50-A and 50-B – Rob Knapp: Our CPLR 4111 bill, correcting undisputed error in that statute, failed in legislature as no one wanted to touch anything that involved Articles 50-a and 50-b. Wrongful death calculation required by present CPLR 4111 no longer has any practical effect, and is just an academic arithmetic problem for the jury. David Hamm: Artices 50-a and 50-b were created to benefit insurance companies but no longer do so. Souren Israelyan agreed. David Hamm: these statutes don't work but have created a cottage industry. Souren Israelyan says that the statutes were enacted when interest rates were 11% and defendants would deposit future payments. David Hamm: interest is added on to award. Sharon Gerstman says if we are to draft something new, it must be run by Tort Reform Task Force which was behind the original legislation. David Hamm: as part of any repeal, 4111 should be restored to its original form, before Articles 50-a and 50-b were enacted. David Hamm said he would check because he thought there were amendments to 4111 after enactment of Articles 50-a and 50-b. Statute would have to

be restored to its prior form for him to support. He will double-check and propose bill.

VII. OCA rulemaking: Rob Knapp. Consumer credit bill didn't pass Senate, but OCA then enacted much of it by rule. New rule overrules CPLR in consumer credit transactions, by making compliance with the statute of limitations part of the claim, that must be affirmatively pleaded and proven by plaintiff, rather than a waivable affirmative defense. Paul Feigenbaum: OCA has exceeded its powers under Articles 28 and 30 of the state Constitution. When he was general counsel to OCA, he tried to characterize any new rules as "calendar practice," which OCA is constitutionally empowered to regulate. But now failed legislation often becomes administrative rule, *e.g.* TRO rule, depositions, sanctions. Sometimes the rules directly conflict with the CPLR as in the case of Part 130 (sanctions). Intent of 1977 constitutional amendments has been forgotten, per PF. We had subcommittee to report on this problem. Sharon says that subcommittee had passed parts of its report to Rob Knapp before he became Chair. Paul Feigenbaum says he has to look at draft and any new case law. Lots written already. Need to pick up project in middle. Maybe Committee can educate CAJ? David Hamm says OCA will ignore any objections we raise. Paul Feigenbaum says we should look at this anyway because problem has gotten worse. Sharon Gerstman some rules have been enacted without notice of rulemaking. Cites CJ's new proposed rule on 50 hour pro bono requirement and early bar exam administration to third years. Any report should be for new Chief Judge since current CJ steps down in 13-14 months by virtue of his attaining 70 years. Winter 2015 meeting was control date for our report. David Hamm says immediate purpose of report is for lawsuit against CJ with NYSBA being advocate. Sharon says NYSBA will not bring suit. State Bar considered bringing suit on mandatory pro bono reporting but concluded that negotiations were better way to go. Paul Feigenbaum says suit is difficult but that report would be helpful. Paul cites *Morgenthau v. Cooke* as proof that challenges to judicial rule-making can be successful. Cooke, C.J. recused himself in that decision. Paul Feigenbaum represented him. David Hamm: purpose of report should be to influence Executive Committee to support amicus brief. Subcommittee recreated with Albert Levi, Brendan Cyr and Ken Jewell as new members.

VIII. Venue Legislation: Ken Jewell: reconstituted OCA matrimonial advisory committee is now chaired by Judge Sunshine, Kings County Supreme Court. We are waiting for its opinion. Sharon Gerstman thinks issue should go before Executive Committee before speaking with OCA matrimonial Committee, and that we should write report to get Executive Committee approval.

IX. Paul Feigenbaum: Our report on OCA rule on recognition of tribal judgments was not posted on OCA website. Paul Aloe will follow up.

Next Meeting: Friday, January 30, 2015