

MINUTES OF THE FEBRUARY 26, 2021 NYSBA CPLR COMMITTEE MEETING
Via Zoom Conference

Attendance: Souren A. Israelyan, co-chair; Domenick Napoletano, co-chair; Harold B. Obstfeld; Dolores Gebhardt; Steven J. Fink; Herbert C. Ross; James N. Blair; Cary S. Sklaren; David L. Ferstendig; Thomas J. Wiegand; Gary F. Knobel; Dennis R. McCoy; Lucy Billings; Raymond A. Bragar; Robert P. Knapp; Sharon S. Gerstman; Betty Lugo; Stephen Crane; Angela M. Giannini; Amanda L. Tate; Ivan A. Pavlenko; Kathleen M. Sweet; Daniel Tepper; Blaine H. Bortnick; Thomas F. Gleason; Lisa Bluestein; James E. Pelzer; John T. Loss; Michael Stallman; John I. LaMancuso; Kenneth A. Krajewski; and Adriel Colón-Casiano, NYSBA Staff Liaison.

Agenda:

1. Meeting called to order at 12:00 p.m.
Introduction: co-chairs Souren Israelyan and Domenick Napoletano
2. Approval of Minutes of November 13, 2020 meeting. Approved unanimously.
3. Adriel Colón-Casiano gave status of the legislative activity in the hill, the status of sharing the committee report of the proposal to amend Article 53 of CPLR, which the committee opposed, and the status of advancing the committee's affirmative proposal to codify the tolls contained in the Governor's Executive Orders from March 20, 2020 through November 3, 2020.
4. The chairs recognized the efforts of the committee to become more inclusive, including increasing the number of female members of the committee. The committee also acknowledged and congratulated Betty Lugo on being awarded the coveted Ruth G. Schapiro Memorial Award of NYSBA for her exceptional contributions for issues of concern to women, pro bono service and service to the bar associations and community organizations.
5. CPLR 3113 (d) and 3107 – The committee discussed the subcommittee's proposal for remote depositions. The subcommittee accepted and adopted the suggestion to section 3113 (d) to substitute the word "deponent" instead of "person." With that suggestion, the committee voted on the proposal and approved it.
Vote: 28 in favor / 1 against
6. CPLR 308 (7) – The proposal for an affirmative legislation to permit service of person upon a natural person through social media, email or other technology was discussed and rejected by the committee at this time.

7. CPLR 312- b – The proposal for an affirmative legislation for an alternative means of service through social media, email or other technology with leave of court upon a motion was discussed and voted on. Some members expressed that the words “social media” were not defined in the proposed statute and Tik Tok might be considered social media; the counter point was that the proposed statute provides that “electronic service by social medial, email, or other technology is more likely to reach the party” and courts will be gatekeepers as to which “social media” or other method is used to assure that the service is more likely to reach the party. Some members expressed that the statute is unnecessary because there is already an existing caselaw; others saw the need to codify the existing caselaw for the purpose of providing guidance to the courts and practitioners. The committee voted on the proposal.

Vote: 22 in favor / 7 against

8. CPLR 5004 – This proposal is contained in the FY 2022 Executive Budget, and would lower the statutory rate of interest upon a judgment from 9% to a variable market-based interest rate based on one-year United States treasury bill, which is currently 0.06%. Discussion was held on the issue. The concern was raised that insurance carriers and institutional defendants would have no incentive to pay any judgment. This would cause severe injustice to injured plaintiffs and their counsel, most of whom are solo to small practitioners, given that under the current New York law, CPLR 5001, interest accrues only from the date of judgment (exception exists for wrongful death cases, which allows pre-judgment interest). The 9% interest is a significant incentive for insurers and institutional defendants to settle cases, and removal of that incentive would increase appeals and all other maneuvering to delay cases. No study was performed of the expected impact on the administration of justice that would occasion through delays and increase in number of appeals. A point was made that insurers and institutional defendants have the capability to invest the funds in equity markets, and are not relying on the one-year treasury rates while they are holding and profiting from funds held that eventually should be turned over. A point was raised that 9% is punitive. A point was raised that variable rates could not work, and one point in time depending on the side the party ends up, it would be either harmful or helpful, but certainty is needed for parties, their counsel and courts. The committee voted to oppose the proposed legislation. A subcommittee was formed to promptly prepare a report on behalf of the committee (Angela M. Giannini and Betty Lugo, Co-Chairs of the Subcommittee).

Vote: 6 in favor / 23 against

9. CPLR 3001 (Declaratory judgment) – Brief discussion was held on *159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353 (2019, Wilson, J., dissenting) – whether a contractual provision barring a declaratory judgment is against the public policy and the implications for *Yellowstone* injunctions. A subcommittee was formed to study the issue

and report back (Domenick Napoletano, Ivan A. Pavlenko, Lisa Bluestein, and Robert P. Knapp, members of the Subcommittee).

10. CPLR 3025 (b) Motion to amend pleadings. Brief discussion was held about the split among the Appellate Departments about the requirements for a motion to amend pleadings. A subcommittee was formed to study and recommend a legislation or a court rule to bring certainty to this area of law (David L. Ferstendig, Michael J. Hutter, Cary S. Sklaren, and Gary F. Knobel, members).

11. Article 53 of the CPLR – Recognition of Foreign Country Money Judgments. The Subcommittee’s work was recognized. Due to fast-moving legislation, the vote on the Subcommittee report was submitted for review and vote prior to this meeting. The subcommittee opposed the proposed legislation. See the Subcommittee Report, dated February 23, 2021. NYSBA’s Office of Governmental Affairs will deliver the Committee Report to the legislators. Robert P. Knapp III, Chair of the Subcommittee, Steven J. Fink, Herbert C. Ross, Harold B. Obstfeld, Thomas Wiegand, and PJ Herne, members.

Vote: 32 in favor of the Report / 1 against the Report

12. Brief discussion was held on the significant changes that the new rules brought about by the Administrative Order of 270/20 (Dec. 29, 2020), which went into effect on February 1, 2021. A good number of CLEs have been offered on what to expect and how to prepare and implement them in practice, and members have been encouraged to attend these CLEs, including the ones offered by the NYSBA.

13. Members will be notified of the next meeting date, which will be held in the Spring.

13. Meeting adjourned: 2:12 P.M.