

**MINUTES OF THE May 13, 2011 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.; Thomas C. Bivona, Esq.; Blaine Bortnick, Esq.; James N. Blair, Esq.; Hon. Michael Cardozo; Hon. Stephen G. Crane; Steven M. Critelli, Esq.; Thomas M. Curtis, Esq.; Paul Feigenbaum, Esq. (by telephone); Jeremy Feinberg, Esq. (OCA); David C. Ferstendig; Esq.; Daniel Finger. Esq.; Ellen B. Fishman, Esq.; Thomas Hall, Esq. (by telephone); David B. Hamm, Esq. (by telephone); David P. Horowitz, Esq.; R. Kenneth Jewell, Esq.; Ronald F. Kennedy, Esq. Staff Liaison; Seunghwan Kim, Esq.; Robert P. Knapp, III, Esq.; Michael J. Kozoriz, Esq.; James K. Landau, Esq.; Harold B. Obstfeld, Esq.; Hon. Ann Pfau; Joel D. Sharrow, Esq.; Steven Sonkin, Esq.; Hon. Michael Stallman

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

I. Preliminary Matters

Justice Crane welcomed and introduced Hon. Ann Pfau, Hon. Michael Cardozo and Jeremy Feinberg, Esq. to the meeting as guests of the committee.

II. Agenda

A. OCA Proposal re e-discovery

Justice Pfau and Mr. Feinberg spoke about the OCA's ongoing efforts to address e-discovery. Judge Pfau advised that the OCA had appointed a task force to study this issue, which affects every aspect of the Court's business on the civil side. The goal of this effort was to build expertise for Judges and provide them with landmarks to help them adjudicate e-discovery issues. The educational subcommittee of the task force is developing and testing training programs for Judges. The operations subcommittee of the task force is putting the final touches on a model addendum to a PC Order relating to e-discovery which will then be rolled out in selected parts of the Court for testing. Judge Pfau advised that input from the committee on the OCA's ongoing efforts was welcomed. Judge Pfau and Mr. Feinberg then entertained several questions from members of the committee.

B. City of New York – Proposal re *ex parte* orders and TRO

Justice Crane introduced the Hon. Michael Cardozo, Corporate Counsel of the City of New York to the committee. Mr. Cardozo outlined certain issues that the City faced with the CPLR, as presently constituted, with respect to TROs, including that there is no end date and no requirement that a bond be posted by the moving party who obtains the TRO. He stated that the practical impact of the foregoing is that for example, in one case against the City, a TRO has remained in effect – without any bond required to be posted – for 16 months and counting, causing the City to face severe consequences.

Mr. Cardozo reminded the committee that the Federal Rules provide for a 14-day life span for TROs with one 14-day extension allowed upon good cause shown, and the posting of a bond is mandatory. He further advised that 39 other states had adopted the Federal Rule. He advised that there is a bill in the legislature providing that a time limit be added to the CPLR regarding TROs and that there is still no bond requirement.

Mr. Cardozo also reminded the committee that, at present, orders and judgments arising out of Article 78 proceedings are not appealable as of right and that the various Departments are not unified in their approach to the issue of whether TROs are appealable. He advised that the bill presently in the legislature seeks to amend the CPLR to allow an expedited appeal from Article 78 orders and judgments to 1 Justice of the Appellate Division with the availability of a review of that Justice's decision by a panel of 5 Appellate Division Justices.

Mr. Cardozo asked the committee for its support of this proposed legislation. After some discussion of the proposed legislation with the committee, Justice Crane thanked Mr. Cardozo for taking the time to explain his views and further advised that the committee would seriously consider the proposed legislation. After Mr. Cardozo completed his presentation, he, Judge Pfau and Mr. Feinberg left the meeting.

Upon the resumption of the meeting, Mr. Hamm and Mr. Hall were connected via telephone.

Later in the meeting, Ms. Fishman reported that the subcommittee considering the OCA's proposed legislation had issued a memorandum disapproving of such proposal, but that the bill has changed. Ms. Fishman presented the committee with an analysis of the differences between the proposal that was studied and the currently proposed legislation.

A motion was made and seconded to adopt the subcommittee's report with a change to acknowledge that there may be a problem associated with TROs but that such problem requires further study. Mr. Aloe agreed to make this change to the report.

C. Approval of Minutes

Justice Crane advised the committee that he made some non-substantive changes to the minutes of the January 28, 2011 meeting, which changes were given to Mr. Landau. On motion to approve the minutes, which motion was seconded, the minutes of the January 28, 2011 meeting were unanimously approved subject to the incorporation of Justice Crane's changes.

D. Legislative Report

Mr. Kennedy stated that there was only limited activity to report as relationships were being built with new Senators. Ms. Fishman advised that, at its April meeting, the Executive Committee voted to submit the proposal to amend CPLR 4111 as part of its legislative package.

E. Recommended Affirmative Legislative Proposal – S.4578

Mr. Aloe drafted a report recommending disapproval of this proposal, which provides for a 6-day extension regarding papers served by mail from outside New York. After some discussion, a motion was made and seconded to approve Mr. Aloe's report, subject to correction of some typographical errors. The motion carried by a vote of 19 for and 1 against. Mr. Kennedy advised that he would release this report for the Senate's Consideration.

F. Recommended Affirmative Legislative Proposal – Note of Issue

Mr. Horowitz said that the subcommittee studying this ALP was considering two proposals to modify CPLR 3402(a). One would provide that "Where joinder of issue has occurred, no note of issue shall be filed without a certification that all discovery is complete." The other would provide that "Where joinder of issue has occurred, no note of issue shall be filed without: (i) a stipulation between the parties certifying that all discovery is complete; or (ii) an order of the court stating that all discovery is complete or stating what post-note of issue discovery is to be completed or (iii) a certificate of readiness."

Mr. Horowitz advised that a report would be forthcoming discussing the pros and cons of each of the foregoing options and it would be posted on the List Serv when complete for the committee's consideration, discussion and vote.

G. New Business

Justice Crane announced that this was his last meeting as chairman of the committee. Justice Crane also announced that Mr. Knapp had been appointed chairman of the committee moving forward. Mr. Knapp advised that the date of the committee's next meeting is September 23, 2011.

There being no further business to come before the committee, the meeting was adjourned at 3:07 p.m.

Respectfully submitted,

James K. Landau
Secretary