

**MINUTES OF THE JANUARY 28, 2011 NYSBA CPLR COMMITTEE MEETING  
held at the New York Hilton, Madison Suite, 2<sup>nd</sup> Floor, 1335 Avenue of the Americas, New  
York, NY**

In attendance: Paul H. Aloe, Esq.; William C. Altreuter, Esq.; Thomas C. Bivona, Esq.; Raymond A. Bragar, Esq.; Prof. Oscar G. Chase; Hon. Stephen G. Crane; Steven M. Critelli, Esq.; Thomas M. Curtis, Esq.; Jeremy Feinberg, Esq. (OCA); David C. Ferstendig, Esq.; Daniel Finger, Esq.; Ellen B. Fishman, Esq.; Sharon Stern Gerstman, Esq.; Maura R. Grossman, Esq. (OCA); Thomas Hall, Esq.; David B. Hamm, Esq.; David P. Horowitz, Esq.; Hon. Allen HurkinTorres; Souren Israelyan, Esq.; R. Kenneth Jewell, Esq.; Ronald F. Kennedy, Esq. Staff Liaison; Robert P. Knapp, III, Esq.; James K. Landau, Esq.; Thomas E. Myers, Esq. Executive Committee Liaison; Harold B. Obstfeld, Esq.; Joel D. Sharrow, Esq.; Steven Sonkin, Esq.

The meeting was called to order by the Chair, the Hon. Stephen G. Crane, at 12:15 p.m.

**I. Preliminary Matters**

**A.** Justice Crane welcomed and introduced Thomas Hall, Esq. and Hon. Allen Hurkin-Torres as new members of the Committee.

**B.** At the Committee's meeting held on September 15, 2010, Justice Crane reported that President Younger was interested in simplifying disclosure in general and expert witness disclosure in particular. Justice Crane asked at that meeting whether, in light of President Younger's interest, anyone on the Committee would be interested in forming a subcommittee to study and make recommendations re CPLR Article 31 reform.

Following up on the foregoing request, Justice Crane reported that several members of the Committee had volunteered to serve on the subcommittee and asked to confirm their participation. The following members have agreed to serve on this subcommittee:

Justice Crane  
Paul Aloe  
David Hamm  
Blaine Bortnick  
Thomas Curtis  
Robert Knapp III  
William Altreuter  
Thomas Hall

**II. Approval of Minutes**

Justice Crane advised the committee that he made some non-substantive changes to the minutes of the September 15, 2010 meeting, which changes were given to Mr. Landau. The minutes of the September 15, 2010 meeting were approved subject to the incorporation of Justice Crane's changes.

### **III. Agenda**

#### **A. Report re Presentations to NYSBA Executive Committee**

Ms. Fishman advised that the Executive Committee voted to adopt the proposal regarding interlocutory appeals. Ms. Fishman further advised that the proposal to amend CPLR 4111 will be on the Executive Committee's agenda for its April, 2011 meeting.

#### **B. OCA Proposal re e-discovery**

Ms. Grossman and Mr. Feinberg spoke about the OCA's ongoing efforts to address e-discovery. They advised that the OCA had appointed a committee chaired by Judge Driscoll and Ms. Grossman to study adding rules regarding e-discovery to the Rules of the Chief Administrative Judge rather than the CPLR. Ms. Grossman and Mr. Feinberg advised that that this committee had also created three subcommittees, Education, Operations and Review and Recommendations. Ms. Grossman and Mr. Feinberg expressed the OCA's desire to have the Committee's views as deliverables are produced by the various OCA subcommittees.

Ms. Gerstman expressed her belief that new rules on this subject, if appropriate, should be added to the CPLR and not to the Rules of the Chief Administrative Judge. Others on the Committee also advised that they had not seen the OCA's report on e-discovery. Mr. Feinberg advised that he would send the OCA's report to the Chief Administrative Judge on e-discovery to the Committee so that it could be put On the List Serv.

#### **C. Recommended Affirmative Legislative Proposal — CPLR 4547**

A motion was made and seconded to adopt Mr. Aloe's proposal to amend CPLR § 4547 to harmonize it with FRE 408, subject only to Mr. Aloe's review of the status of any pending proposal to amend FRE 408. The motion was adopted (only Mr. Sharrow opposed). Mr. Aloe will post the status of any proposed amendment to FRE 408 on the List Serv.

#### **D. Recommended Affirmative Legislative Proposal CPLR § 3213**

Mr. Obstfeld advised that his subcommittee received feedback on its proposal to amend CPLR § 3213 from the Commercial and Federal Litigation Section of the NYSBA and the City Bar Association. His subcommittee revised the proposal to take into account certain revisions that were suggested by the Commercial and Federal Litigation Section including references to CPLR 3212 governing the proof that would be required on such a motion (subsection "b") as well as for the standard in granting the motion (subsection "d"). The definition of "property" in subsection "e" was also expanded to include both real and personal property within the definition of "other property".

Mr. Obstfeld moved to approve his subcommittee's revised version of the proposal to amend CPLR § 3213. The motion was seconded and unanimously adopted.

**E. City of New York — Proposal re ex parte orders and TRO**

Justice Crane suggested that a subcommittee be formed to study certain legal objections the Committee has to this proposal. Ms. Fishman agreed to chair this subcommittee. Ms. Gerstman, Mr. Aloe and Mr. Obstfeld agreed to serve on this subcommittee with Ms. Fishman.

**F. Recommended Affirmative Legislative Proposal — Notice of Pendency**

Mr. Curtis and Mr. Sharrow asked two questions that were put in the form of motions, which were both seconded. The first question was whether the proposed requirement of an accompanying affidavit or affirmation with the notice of pendency is a good idea. The Committee voted 14 yes, 7 no.

The second question was whether the proposal should include a definition of real property. The Committee voted 15 yes, 2 no.

**G. Recommended Affirmative Legislative Proposal — CPLR 2103**

Justice Crane advised that this proposal N, Vill'be discussed by the Committee on the List Serv.

**H. Recommended Affirmative Legislative Proposal — Note of Issue Justice**

Crane advised that discussion of this proposal was tabled until the next meeting.

**I. New Business**

The date of the Committee's next meeting is May 13, 2011.

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

Respectfully submitted,

James K. Landau  
Secretary