

**MINUTES OF THE JANUARY 29, 2010 NYSBA CPLR COMMITTEE MEETING  
held at the New York Hilton, Morgan Suite, 2<sup>nd</sup> Floor, 1335 Avenue of the Americas, New  
York, NY**

In attendance: Paul H. Aloe, Esq.; Carl D. Birman, Esq.; Thomas C. Bivona, Esq.; James N. Blair, Esq.; Blaine H. Bortnick, Esq.; George P. Carpinello, Esq. (Guest); Prof. Oscar G. Chase; Hon. Stephen G. Crane; Steven M. Critelli, Esq.; Thomas M. Curtis, Esq.; David L. Ferstendig, Esq.; Paul A. Feigenbaum, Esq.; Ellen B. Fishman, Esq.; Sharon Stern Gerstman, Esq.; David B. Hamm, Esq.; David P. Horowitz, Esq.; Souren A. Israelyan, Esq.; R. Kenneth Jewell, Esq.; Ronald F. Kennedy, Esq. Staff Liaison; Robert P. Knapp, III, Esq.; Michael J. Kozoriz, Esq.; James K. Landau, Esq.; Stuart W. Lawrence, Esq.; Burton N. Lipshie, Esq.; Holly Lutz, Esq. (Guest); Harold B. Obstfeld, Esq.; Joel D. Sharrow, Esq.; Lewis M. Smoley, Esq.; Steven L. Sonkin, Esq.; Allan Young, Esq. (James C. Gacioch, Esq. wanted to participate via telephone but no telephone connection was available).

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

**I. Preliminary Matters**

Justice Crane welcomed Joel Sharrow, Esq., a new member to the committee.

**II. Approval of Minutes**

Justice Crane advised the committee that he made some non-substantive changes to the minutes of the September 11, 2009 meeting, which changes were given to Mr. Landau. The minutes of the September 11, 2009 meeting were approved subject to the incorporation of Justice Crane's changes.

**III. Agenda**

**A. OCA Advisory Committee Report**

Mr. Kennedy reported that a number of bills relating to the CPLR were discussed at the OCA Advisory Committee Meeting on September 30, 2009. Specifically, bills related to CPLR §1008, §3101(a), 3212, 4522(a), 3211(a) and 3212(a) were discussed.

Justice Crane welcomed George Carpinello, Esq., Chair of the OCA Advisory Committee on Civil Practice. Mr. Carpinello was accompanied by Holly Lutz, Esq., counsel to that Committee. After thanking the Committee for inviting them, Mr. Carpinello enumerated a number of issues that the OCA Advisory Committee was currently working on:

1. Sealing of Court Records. The OCA Advisory Committee is suggesting that the parties stipulate to file a motion involving arguably confidential information under seal and also file a public version with the confidential information redacted. The

Court would ultimately decide whether papers would remain under seal as soon as possible in accordance with Rule 216.1.

2. Notes of Issue and Certificates of Readiness. Mr. Carpinello reported that the consensus of the OCA Advisory Committee was that Notes of Issue as a concept were useful to get cases in line to be tried as long as they were coupled with a true certificate of readiness. He mentioned, however, that some judges are requiring the filing of Notes of Issue and a certificate of readiness before discovery was actually complete, in response to pressure from standards and goals. Mr. Carpinello reported that the consensus of the OCA Advisory Committee was to send a letter to the Chief Administrative Judge urging that Judicial Performance not be linked to the filing of the Note of Issue.

After a lengthy discussion of the foregoing issues with the Committee, Justice Crane thanked Mr. Carpinello and Ms. Lutz for appearing at the meeting and bringing the Committee up to date.

#### **B. Report on Meetings in Albany**

Mr. Kennedy reported that he and Justice Crane met with several members of the Senate Staff, including Melissa Gable, the new counsel for codes and John Worsham and John Imodio, who handle criminal and civil bills. Mr. Kennedy advised that all of the Assembly bills relating to the CPLR were sponsored by Assemblyman Weprin, and he is no longer in the Assembly, having become a city councilman.

Mr. Kennedy also reported that he received initial notes and comments on the Third Party Defense Bill and will advise the individuals on the Committee who were specifically involved in this legislation of such notes and comments.

#### **C. Report of NYSBA Executive Committee Meeting**

Ms. Gerstman reported that the Executive Committee considered two proposals concerning the CPLR at its most recent meeting:

1. CPLR § 7503

Ms. Gerstman advised that the Executive Committee quickly approved the proposal relating to this section, as it was the fourth or fifth time that the proposal had been put in front of the Executive Committee.

2. CPLR §§ 211 and 212

Ms. Gerstman next reported on the Tax Section's proposal to separate the New York State Department of Taxation from other judgment creditors and shorten the Department's time from 20 to 10 years. Ms. Gerstman advised that

while all of the Executive Committee comments on this proposal were positive, individual members of the Executive Committee were concerned that the NYSBA should not come out in favor of this proposal at this time, given the current economic climate. Ultimately, the Executive Committee approved this proposal as well.

**D. Subcommittee reports**

1. CPLR § 3213

Mr. Obstfeld reported that his subcommittee had completed its work on a draft memorandum and that this draft was given to the chair. He advised that his subcommittee was proposing dividing CPLR § 3213, which is now one paragraph, into several subdivisions changing both the substance and structure of this section. Mr. Obstfeld further advised that the subcommittee was divided over two of the proposed amendments and the positions of both sides of the discussion were reflected in the memo. The memo will be put on the List Serv for the Committee's review and discussion.

2. Rules Subcommittee

Ms. Gerstman stated that she was missing certain pieces of the report that members of the subcommittee still needed to send her. Once she receives all of the pieces of the report, Ms. Gerstman will write up the report with the goal of getting it on the Executive Committee Agenda for the Spring meeting.

3. Uniform Interstate Deposition Act

Mr. Critelli reported that a report on the proposed Uniform Interstate Deposition Act had been circulated among the members of the subcommittee and there were a lot of questions as to how the Act would actually be implemented. He suggested that these questions should be answered by court rule. Mr. Kennedy reported that Ms. Lutz advised that UIDA is a priority for the OCA Advisory Committee and that we may need to work with the OCA Advisory Committee on this. A copy of the report will be put on the List Serv for the Committee's review and discussion.

4. Article 65

Mr. Curtis reported that the subcommittee had prepared a proposal and memorandum regarding suggested changes to Article 65. Mr. Curtis further reported that the subcommittee was divided on certain concepts and the subcommittee wanted to solicit a vote of the Committee regarding the disputed

concepts. The subcommittee will put the proposal and memorandum on the List Serv for review, discussion and ultimately a vote.

**E. Proposal re CPLR 6205**

Mr. Knapp reported on a proposed new section to Article 62 of the CPLR that would provide for a post-judgment order of attachment without notice in any action where a party has been awarded against a foreign state. The proposed section is based on 28 U.S.C. §1603. Mr. Knapp advised that the proponents of this bill insist that in practice the bar is set higher for an order of execution than an order of attachment and that a party with a pre-judgment order of attachment often comes ahead of a judgment creditor. These proponents want to provide for a post-judgment order of attachment limited to cases brought under the Foreign Sovereign Immunities Act.

Mr. Knapp suggested that the Committee issue a report that proposes a fix to the language by just referring to the language of the FSIA, thereby harmonizing it with the FSIA and leaving the interpretation to Federal Law.

**F. Proposed amendment to CPLR 306(b)**

Mr. Aloe provided proposed amended language and a memo for the Committee's review and discussion. Under the proposed amendment, the plaintiff would go to court and make application extending time before the 120 days expired and could do so *ex parte*. If such an application was made after the 120 days, it would have to be made on notice. The proposal was designed to encourage the Plaintiff to go to court before the time expires to seek an extension.

There was a general discussion of the proposed language and the merits of the amendment. A motion to proceed with this issue was defeated by a vote of 11 to 5.

**G. New Business**

1. Mr. Feigenbaum asked whether the Committee should open a dialogue with the Court Clerk's Association. Justice Crane asked Mr. Feigenbaum to investigate and post the results of his investigation on the List Serv.

2. Justice Crane asked if a subcommittee should be formed to study whether Interlocutory Appeals should be done away with. Members interested in joining such a subcommittee were instructed to give their names to Ms. Fishman at the conclusion of the meeting.

3. Mr. Aloe suggested the formation of a subcommittee regarding privilege issues. Justice Crane asked Mr. Aloe to put a proposal on the List Serv and solicit interest in forming a subcommittee.

There being no further business to come before the Committee, the meeting was adjourned at 3:32 p.m.

Respectfully submitted,

James K. Landau  
Secretary