

**MINUTES OF THE SEPTEMBER 11, 2009 NYSBA CPLR COMMITTEE MEETING
held at the New York City Bar Association, 42 W.44th Street, 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.; Raymond A. Bragar, Esq.; John T. Cofresi, Esq.; Hon. Stephen G. Crane; Steven M. Critelli, Esq. (by telephone); Thomas M. Curtis, Esq.; David L. Ferstendig, Esq.; Ellen B. Fishman, Esq.; James C. Gacioch, Esq. (by telephone); Sharon Stern Gerstman, Esq.; David B. Hamm, Esq. (by telephone); David P. Horowitz, Esq. (by telephone); Souren Israelyan, Esq.; Robert M. Kaplan, Esq. (by telephone); Ronald F. Kennedy, Esq. Staff Liaison; Seunghwan Kim, Esq.; Michael J. Kozoriz, Esq.; Sherry Krauss, Esq. (guest, by telephone); James K. Landau, Esq.; Erika Nijenhuis, Esq. (guest); Harold B. Obstfeld, Esq.; Lewis M. Smoley, Esq.; Steven L. Sonkin, Esq.

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

I. Preliminary Matters

At Justice Crane's suggestion, the Committee engaged in a few moments of silence to remember the events of September 11, 2001 and the men, women and children who died that day.

Justice Crane thanked Ms. Fishman for her outstanding service as recording secretary and announced that Mr. Landau had volunteered and would be assuming the duties as recording secretary for the committee starting with this meeting.

Justice Crane also announced that Sanford Konstadt, Esq. had tendered his resignation from the committee due to health reasons. Justice Crane expressed the committee's good wishes to Mr. Konstadt for his restored health and thanked Mr. Konstadt for his good work on the committee.

II. Approval of Minutes

The minutes of the May 15, 2009 meeting were approved without amendment.

III. Agenda

A. Subcommittee reports

1. CPLR § 3213

Mr. Obstfeld reported that his subcommittee would meet prior to the next meeting of the Committee to discuss the proposal.

2. Expert Disclosure

Mr. Ferstendig and Mr. Horowitz reported that there was a strong difference in the subcommittee with people on the defendants' side wanting clear deadlines and people on the plaintiffs' side saying that the matter was too complicated and that deadlines should be determined on a case by case basis. After some discussion, it was decided that the issue would be tabled for now.

3. Motion Practice

Ms. Gerstman stated that she had nothing new to report and that she and David Horowitz would talk outside the meeting to discuss chairing a subcommittee to study issues in connection with striking notes of issue. Mr. Curtis suggested that a subcommittee be formed to explore revamping Article 65. Mr. Kim, Mr. Sharrow and Mr. Blair volunteered to be on this subcommittee which will be chaired by Mr. Curtis.

B. 2009 Legislative Session

Mr. Kennedy reported that there was a drop off in the number of bills considered and passed by the legislature, mostly due to the Senate's dysfunctional state from June 8, 2009 forward. He said there were ongoing issues in the Senate, and while there had been movement on a handful of bills only 1 relating to the EPTL had been signed. The bulk of the bills are still in committee. Mr. Kennedy noted that the Senate recently passed \$5 million in legal services money.

Mr. Kennedy further advised that by the end of this year, the Assembly will convene to discuss the outstanding budget issue. He stated that a bill calling for the revision of collateral source and subrogation rules of the CPLR was passed by the Senate in July and would be taken up by the Assembly before the end of the year. Mr. Kennedy expressed that he was optimistic this bill would pass the Assembly and the Governor would sign it.

Mr. Kennedy reported that he had not heard anything further on the proposal to amend CPLR § 214-a, which would extend the discovery rule to all malpractice causes of action and provide a one-year revival period. Justice Crane asked if the Committee should focus on this proposal. After some discussion, it was determined to table this issue for now.

C. Report of OCA Advisory Committee on Civil Practice

1. CPLR § 5513(e)

Mr. Kennedy reported that he had reached out to the Advisory Committee on the proposed addition of this section, which is intended to eliminate uncertainty as to the determination of finality in connection with leave applications in the Court of Appeals. Mr. Kennedy advised that while there was interest on the Committee to continue to discuss concerns with the present language of this section, he believed that they will have to be convinced to change the proposed language before the bill is passed. Ms. Gerstman raised the question as to whether our Committee should send someone to the next OCA Committee Meeting to make a presentation of the concerns. Mr. Kennedy expressed the opinion that this did not rise to the level of our making a presentation to the OCA Committee.

2. CPLR § 4406

Mr. Kennedy reported that the OCA Advisory Committee would be taking up the proposal relating to this section at their next meeting. No position has been taken to date on the preservation issue.

D. Report on the Uniform Interstate Deposition Act

Mr. Critelli reported that a draft of the proposed Uniform Interstate Deposition Act is before the Commercial and Federal Litigation Section but has not yet been adopted. Ms. Gershman asked whether a sub-committee should be formed with regard to the UIDA. Mr. Critelli stated that he thought that such a sub-committee would be useful. It was decided that Mr. Critelli would chair this sub-committee and Mr. Oxfeld, Mr. Bortnick, Mr. Cofresi, Mr. Aloe, Mr. Smolley, Mr. Kim, Mr. Bivona and Mr. Bragar all volunteered to serve on this sub-committee.

E. Tax Section Proposal re Statute of Limitations

Erika Nijenhuis, Esq., chairman of the Tax Section and Sherri Krauss, Esq. of the Tax Section joined the meeting at approximately 1:00 p.m. and were formally welcomed to the meeting by Justice Crane. Sherri Krauss gave an overview of the proposal, which recommends separating the New York State Department of Taxation from other judgment creditors and reducing its time from 20 years to 10 years. Ms. Nijenhuis expressed her appreciation to the Committee

for the time taken to hear their presentation. Ms. Nijenhuis also requested that a member of the Committee help the Tax Section in drafting a formal proposed change to the CPLR.

Justice Crane thanked Ms. Krauss and Ms. Nijenhuis for their participation in the meeting and stated that the Committee would take their request under advisement. Both Ms. Nijenhuis and Ms. Krauss then left the meeting.

After considerable discussion, it was moved that the Committee assist the Tax Section in the drafting of the proposed change to the CPLR while, at the same time making it clear that the Committee was not taking any position on the proposed change at this time. The motion was seconded and approved.

F. Proposal regarding CPLR § 5203

Mr. Blair reported that the bill passed the Assembly unanimously but that the bill as written is unconstitutional, because it is inconsistent with voiding powers of the Trustee under the Bankruptcy Code. Mr. Blair wrote and submitted a report recommending the disapproval of this bill and then the Senate went into melt down mode. Mr. Blair further advised the Committee that he made inquiry to OCA and that no one there had considered the constitutional aspects of the bill. Mr. Blair expressed his opinion that he did not believe that the bill would likely come up again for consideration by the Senate until sometime next year.

G. Proposal regarding CPLR Article 75

Mr. Ferstendig recommended that the language of the proposal be modified to clean up the issue of the notice of intention to arbitrate and then present the proposal to the Executive Committee for approval. It was decided that the language should be redrafted before sending to the Executive Committee.

H. Proposed amendment to CPLR 306(b)

Mr. Aloe reported that 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. It was moved, seconded and carried that the Committee wait for a formal proposal with an accompanying memo before discussing the proposal further.

I. Other Business

1. Each of the new members introduced themselves to the Committee.
2. Mr. Aloe reported that the Committee's website has a number of new features including:
 - (i) a list of recent CPLR cases – with a one sentence description of each;
 - (ii) a link to new CPLR committee chapters; and
 - (iii) a search function.

Mr. Aloe requested that members of the Committee volunteer to help search for CPLR-related cases. Both Mr. Hamm and Mr. Kozoriz volunteered.

3. Ms. Fishman raised an issue she had with CPLR 5003-a as presently drafted. She volunteered to draft a report on this issue and present it to the Committee at the next meeting.

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