MINUTES OF THE: January 30, 2015 NYSBA CPLR COMMITTEE MEETING
Held at the Hilton New York, 1335 Avenue of the Americas, New York, NY

In Attendance:

Rob Knapp, Chair; Ron Kennedy, NYSBA Liaison; Paul Aloe; Thomas C. Bivona; James Blair; Lisa M. Bluestein; Blaine Bortnick; Raymond A. Bragar; Paul Cohen; Hon. Stephen G. Crane; Steven Critelli; Brenden Cyr; Daniel Doron; David Ferstendig; Daniel Finger; Sharon Stern Gerstman; David B. Hamm; Helen Hechtkopf; Julie Hellberg; David Horowitz; Michael J. Hutter; Souren Israelyan; Andrew Keaveney; Terence Keegan; Bonnie Mohr; Harold Obstfeld; Kimberly O'Toole (Law Student); James E. Pelzer; Hon. Erin Peradotto; Marc Rapaport; Herbert Ross; Herbert Rubin; Dan Schiavetta; Joe Schmit; Cary Sklaren; Steven Weinberg; Tom Wiegand (via phone).

The meeting was called by the Chair, Rob Knapp, at 12:00 noon. Andrew Keaveney volunteered to serve as secretary.

Agenda:

1. Introduction (Rob Knapp)

2. Approval of 9/19/14 minutes. Suggestion that future minutes leave out individual comments and not be exhaustive. No motion on the matter.

3. Legislative Update (Ron Kennedy)

    a) Purpose of the Committee is to comment on CPLR legislation and to formulate and present affirmative legislative proposals. Ron reminded the Committee that he is a registered lobbyist for NYSBA and that in order to avoid any possible violation of lobbying laws, any legislative proposals must pass through his office rather than through any independent channels. Ron pointed to Exhibit B of the meetings materials for the legislative activity as of 1/29/15 but reminded the Committee that the Committee website includes an active legislative update page which with sponsor memos, bill status and recent activity.

    b) Ron mentioned David Hamm's bill requiring a court order specific to the case to shorten the default 120-day deadline for making summary judgment motions after filing of the of issue (A03217, amending CPLR 3212.) This bill passed the Senate last session and has been referred to codes in the Assembly.

    c) OCA's proposed amendments to CPLR 301 and other statutes (*Dailmer* bill) were discussed. Sharon Gerstman discussed the amendment, which relates to consent to general jurisdiction by foreign business organizations authorized to do business in New York. The Committee supports the bill (which passed the Assembly) and opines that it is constitutional, although some members have doubts. The bill should be reintroduced this year.

d) David Hamm discussed his proposed amendment to CPLR 1412, which would place the burden on the defendant to plead and prove comparative negligence on a motion for summary judgment, rather than requiring the plaintiff preemptively to prove lack of comparative negligence. This proposal has been submitted to the legislature.

e) Ron Kennedy briefly discussed the proposed amendments to CPLR 3213 (motion for summary judgment in lieu of a complaint in certain actions) which have been introduced in the Assembly but need a sponsor in the Senate. Assembly staff mistakenly believe that the bill is anti-consumer.

f) Paul Aloe and Jim Pelzer discussed the proposed amendments (the Committee's and OCA's) to CPLR 5501. The issue is what orders should be reviewable on appeal from a final judgment, and the disposition of pending interlocutory appeals once a final judgment has been entered. The CPLR Committee proposal, also endorsed by the NYSBA Committee on Courts of Appellate Jurisdiction, would simply amend CPLR 5501(a)(1) to make clear that there is no such thing as a "final order" that must be separately appealed from the judgment. OCA, on the other hand, wants to remove "necessarily affects" from CPLR 5501(a)(1) and to overrule *Matter of Aho* (39 NY2d 241 [1976]), requiring dismissal of pending interlocutory appeals once a final judgment has been entered. The Committee's concern is that the OCA's proposal would allow post-judgment appeals of academic issues, such as appeals of certain discovery orders (which David Hamm suggested should be excluded from the proposed bill). The Committee on Courts of Appellate Jurisdiction shares the CPLR Committee's misgivings about the OCA proposal. The problem is that the Legislature will not entertain two competing CPLR Committee and OCA bills to amend CPLR 5501. The recommendation is to work with OCA to find common ground. Jim Pelzer will circulate a proposed bill to the subcommittee and then to OCA (George Carpinello) to see if OCA would agree to such proposal. If workable, it will be sent to full Committee for approval.

4. CPLR 901(b)

Herb Ross discussed the proposal to repeal CPLR 901(b) in light of *Shady Grove Orthopedic Associates, P.A. v Allstate Ins. Co.* (559 US 393 [2010]) and the inequities it creates between putative class members under Federal and State law. If a proposed class can invoke federal jurisdiction, which has become much easier under the Class Action Fairness Act, then it can bring a class action for recovery of statutory penalties under NY law. However, if the class can only bring the action in State Court, 901(b) would prevent the class from seeking the same remedy.

Professor Oscar Chase supports repeal of CPLR 901(b) due to the inequities it creates. At one time, he considered supporting Justice Ginsberg's dissent in *Shady Grove* suggesting that the Legislature reexamine each substantive statute and decide whether it creates a penalty and whether that penalty should be

enforceable by class action. (Justice Erin Peradotto pointed out that Public Health Law §2801-d already provides for penalties enforceable by class action.) Oscar now believes this is approach is unworkable. Oscar also states that attorneys are now seeking declaratory relief and waiving the penalties in order to maintain claims as class actions, but that the attorneys are still collecting class fees. Oscar questions whether this benefits class members. He also indicated that the Court of Appeals has recently narrowed what constitutes a penalty, circumventing CPLR 901(b).

Blaine Bortnick opined that the proper scope of class actions is a political issue and that proposing to repeal CPLR 901(b) may cast the Committee as "left wing" and may stymie future Committee proposals. Ron Kennedy also indicated that business counsel would not approve a repeal of 901(b) and neither would the Senate. Sharon Gerstman suggested that if the subcommittee could not reach a consensus then maybe the proposal should not move forward. Professor David Ferstendig moved the vote whether the Committee would like the subcommittee to continue work on the matter. Justice Stephen Crane, as a point of information, suggested that the subcommittee look into amending individual penalty statutes. Paul Aloe opined that such project would interfere with the work of other committees and would be beyond the jurisdiction of CPLR committee. David Ferstendig's motion to table further consideration of repeal of CPLR 901(b) passed, 17 votes to 11.

5. CPLR 2309(c)

Herb Ross discussed the proposed amendment to CPLR 2309(c). The comments were that the present statute, requiring a certificate of conformity for out-of-state affidavits, is cumbersome and unnecessary especially in light of the recent amendment to CPLR 2106 which allows for foreign affirmations. Most members agreed that the purpose of the oath should be to "awaken the conscience" and to subject the person swearing to the document to the penalty of perjury should the statement be untruthful. There was a general consensus that the process needs to be more streamlined. David Horowitz moved to adopt the subcommittee's proposed amendment, as indicated in page 7 of Exhibit E, which provides an oath or affirmation taken without the state shall be treated as if taken within the state **if the person administering the oath or affirmation is a notary public of the state or is a notary public or any other state in the United States, Puerto Rico, the US Virgin Island, or any territory, possession, or dependency of the United States where the oath or affirmation was taken.** 28 for, 0 opposed.

6. Repeal, Amendment of CPLR 4111, Articles 50-A and 50-B?

David Hamm opined that CPLR 50-A and 50-B were not working, have created a cottage industry and should be repealed. In addition, CPLR 4111 should restored to its old form, prior to enactment of CPLR 50-A and 50-B, to allow juries to consider present value in calculating damages. Sharon Gerstman points out that NYSBA has favored repeal of Articles 50-A and 50-B for twenty years. Ron

Kennedy will check for the Association's position. The matter was adjourned until the next meeting. In the meantime, David Hamm will draft a proposed fix to CPLR 4111. Sharon suggests that there should be a single bill, repealing Articles 50-A and 50-B and amending CPLR 4111.

7. OCA Proposals

a) CPLR 3212(b)

Professor David Horowitz discussed the problems with the recent *Singletree* and *Rivers* decisions and their effect on summary judgment motions. Horowitz (and OCA) proposes a "technical fix" that would prohibit the trial court from precluding an expert affidavit in support of or in opposition to a summary judgment motion "because an expert exchange pursuant to [CPLR 3101(d)(1)(i)] was not furnished prior to the submission of the affidavit." David Hamm opined that the bill would eradicate the note of issue for purposes of expert discovery. But Justice Peradotto noted that CPLR 3101(d)(1)(i) applies to trial experts, not summary judgment experts. There was concern that the proposed amendment would overrule Commercial Division expert discovery rules as well as explicit court orders on expert discovery. Sharon Gerstman suggested a "carve out" for these two areas. A motion was made to ask OCA to address these issues. 26 in favor; 2 against; 1 abstention.

b) CPLR 4549, 4550, 4551

Professor Mike Hutter stated that the Committee had recommended that the state adopt FRE 502 but the OCA's proposal (which would enact a new CPLR 4550) adds a prejudice standard relating to the inadvertent disclosure of privileged material. Mike suggested the OCA explain its position and the reason for its change from the federal rule.

OCA has also proposed a new CPLR 4549 to overrule *Wagman v Bradwhaw* (292 AD2d 84 [2d Dept 2002]) concerning the admissibility of expert testimony based on reports or data that are not themselves in evidence. *Wagman* held that an expert may rely upon specific, inadmissible out-of-court material to formulate an opinion, provided such material "(1) is of a kind accepted in the profession as reliable as a basis in forming a professional opinion, and (2) there is evidence presented establishing the reliability of the out-of-court material referred to by the witness." 292 AD2d at 85. The proposed bill would eliminate the second element but does not address *Wagman's* further holding that "[a]dmission into evidence of a written report prepared by a non-testifying healthcare provider would violate the rule against hearsay and the best evidence rule," 292 AD2d at 87, which the Third Department has refused to follow. Mike suggested the OCA consider following FRE 703, and allow admission of relied-upon out-of-court material in the court's discretion.

The final OCA proposal would enact a new CPLR 4551, repealing New York's narrow "speaking-agent" exception to the hearsay rule and following FRE 801(d)(2)(D), which excludes from the definition of hearsay an opposing party statement that "was made by

the party's agent or employee on a matter within the scope of that relationship and while it existed."

Jim Blair advised that the proposed bills will be submitted to the Legislature in one to two months. Professor Hutter said he would prepare reports on all three bills. Paul Aloe, Helene Hechtkopf, Souren Israelyan (*Wagman* only) and Jim Pelzer all volunteered to help with the report.

Motion to adjourn *sine die* passed unanimously (next meeting was subsequently set for noon on May 15, at the City Bar.)