

**MINUTES OF THE January 25, 2013 NYSBA CPLR COMMITTEE MEETING
Held at the New York Hilton, Nassau Hill, 2nd Floor, 1335 Avenue of the Americas, New
York, NY**

In attendance: Paul H. Aloe; Thomas C. Bivona, Esq.; Blaine Bortnick, Esq.; James N. Blair, Esq. (by telephone); Steven M. Critelli, Esq.; Daniel Finger, Esq.; Ellen B. Fishman, Esq.; James C. Gacioch, Esq.; Sharon Stern Gerstman, Esq.; David Hamm, Esq.; Helene R. Hechtkopf, Esq.; Leah Heifetz, Esq.; David P. Horowitz, Esq.; Ronald F. Kennedy, Esq. (Staff Liaison); Seunghwan Kim, Esq. Robert P. Knapp, III, Esq.; James K. Landau, Esq.; Thomas E. Myers, Esq. (Executive Committee Liaison); Harold B. Obstfeld, Esq.; James E. Pelzer, Esq.; Hon. Erin M. Peradotto; Christine M. Rodriguez, Esq.; Jorge A. Rodriguez, Esq.; Joel D. Sharrow, Esq.; Steven L. Sonkin.

The meeting was called to order by the Chair, Robert P. Knapp, III, Esq., at 12:20 p.m.

I. Agenda

A. Approval of Minutes

On motion to approve the minutes, which motion was seconded, the minutes of the September 14, 2012 meeting were unanimously approved.

B. Status Report re ALP's for CPLR 3212, § 3213, 3216 and 3402

Mr. Knapp advised the Committee that the ALPs for CPLR 3212, § 3213, 3216 and 3402 had been approved by the NYSBA executive committee in November 2012.

C. Legislative Report

Mr. Kennedy stated that the 2013 legislative session has begun. He advised that there had not been much activity on CPLR bills in 2012 and that there are a number of challenges to getting legislation passed in 2013. He advised that the state legislature has become more wary of even technical bills, that there has been a change in the power structure and that the interests of those in charge (including those of the new chair of the judiciary committee) do not primarily involve the CPLR.

Mr. Kennedy advised that the state legislature would be primarily concerned with passing a budget until April 1, 2013. Non-budget issues will be considered from mid-April through mid-June. This allows the Committee time to build relationships with leadership and staff members. To that end, Mr. Kennedy suggested that Chairman Knapp meet with the chair of the judiciary committee.

D. OCA proposed Rule 202-5(3) re: redaction of certain information from filed documents

Mr. Hamm advised that the New York Court of Appeals has issued new rules concerning redaction of confidential information that are more expansive than the FRCP 5.1, but not as expansive as the original proposal made by OCA. Mr. Hamm pointed out that the Court of Appeals rules apply only to the record on appeal to that Court, so that two separate sets of redaction would be required, and the Court of Appeals would have a different record than the Appellate Division. After much discussion as to the proper course for the Committee to take, the Committee decided to continue the discussion on the List Serv.

E. OCA proposed Rule 202.12(b) and 202.70(g) re E-Discovery

The Committee was advised that comments are due on March 8, 2013. The following members of the Committee volunteered to be on a subcommittee to study the proposed rule and draft a report:

Helene Hechtkopf, Esq.
Christine Rodriguez, Esq.
Daniel Finger, Esq.
David Horowitz, Esq.

The subcommittee's report shall be submitted to Chairman Knapp by February 25, 2013 and the Committee will vote on the report electronically.

F. Possible OCA rule to overrule *Biscone v. JetBlue Airways Corp.*

Mr. Aloe led a discussion of the *Biscone* decision in the Second Department that affirmed the motion court's decision to deny a motion to reargue, as the moving party failed to again e-file papers that had been previously e-filed, instead just referring back to such documents in the motion.

Mr. Pelzer volunteered to speak with Justice Austin who wrote the decision and report to provide more detail to the Committee. The Committee unanimously agreed to defer further discussion on this issue until the next meeting.

G. Subcommittee Reports

- (i) CPLR 4547 to conform to FRE 408**

Motion was made and seconded to approve the report on this issue drafted and presented by Mr. Aloe, which recommends that CPLR 4547 be amended to track the new language to FRE 408 regarding settlement discussions. The motion approving the report carried unanimously.

(ii) FRE 502

It was decided to discuss this report at the next meeting.

(iii) ALP's awaiting action by the Legislature

Paul Aloe has a list of ALP's approved by the NYSBA Executive Committee but not acted upon by the Legislature. They can be reintroduced, but some are clearly out of date. Ron Kennedy suggested "trying to identify some of our aces" by April.

The members of the Committee were encouraged to review CPLR bills moving through the Legislature and to pick at least one to review and report on as it is a good way to get involved in Committee work. There may already have been reports written on some of these bills and anyone interested in a particular bill should check the database on the Committee's website to see if one exists. Ron Kennedy said we cannot report on every bill and should focus on those that might move. Bills introduced only in one house have a much lower chance of passage.

(iv) OCA rule-making versus CPLR

This issue will be discussed at the next meeting.

(v) Certificates of Conformity

After some discussion about the particular language proposed, Chairman Knapp advised that he would take suggestions of additional language after the meeting.

H. Burden of Proof on Summary Judgment

Mr. Hamm led a discussion of several decisions (*Stern, Maniscalco, Roman and Rogers*) stating that the moving party must preemptively disprove affirmative defenses. Mr. Hamm proposes that CPLR 1411 or 1412 be amended to focus the initial burden of proof on culpable conduct.

Mr. Hamm will draft a proposal and send it to Chairman Knapp for review and circulation to the Committee.

I. New Business

Mr. Knapp advised that the date of the Committee's next meeting is May 10, 2013.

There being no further business to come before the Committee, the meeting was adjourned at 3:18 p.m.

Respectfully submitted,

James K. Landau
Secretary