MINUTES OF THE SEPT. 19, 2008 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. (by telephone); Scott W. Bermack, Esq.; Thomas C. Bivona, Esq.; James N. Blair, Esq.; Blaine H. Bortnick, Esq.; Raymond A. Bragar, Esq.; John T. Cofresi, Esq. (by telephone); Hon. Stephen G. Crane; Steven M. Critelli, Esq.; Thomas M. Curtis, Esq.; Paul A. Feigenbaum, Esq. (by telephone); David L. Ferstendig, Esq.; Ellen B. Fishman, Esq.; Sharon Stern Gerstman, Esq.; Claire P. Gutekunst, Esq., NYSBA Executive Committee Liaison; David B. Hamm, Esq.; David Paul Horowitz, Esq. (by telephone); Souren Avetick Israelyan, Esq.; R. Kenneth Jewell, Esq.; Robert M. Kaplan, Esq.; Ronald F. Kennedy, Esq., Staff Liaison; Sanford Konstadt, Esq.; Burton N. Lipshie, Esq.; Harold B. Obstfeld, Esq.; Philip C. Pinsky, Esq.; Lewis M. Smoley, Esq.; Steven L. Sonkin, Esq.; Allan Young, Esq.

NYSBA Staff: Kevin M. Kerwin, Esq. (by telephone)

The meeting was called to order by the Chair, the Hon. Stephen G. Crane, at 12:10 p.m.

I. Approval of Minutes

The minutes of the May 2, 2008 and June 13, 2008 meetings were approved as amended.

II. Administrative Announcements

Justice Crane announced that Mr. Young and Ms. Gerstman had been appointed as Vice Chairs of the Committee. Ms. Gerstman is to serve in this capacity for one year.

III. Agenda

A. Report of NYC Bar Committee's on State Courts of Superior Jurisdiction

The Chair gave an overview of the Report entitled "En Banc Review in New York Courts," which the Hon Andrea Masley, Chair of the NYC Bar Association's Committee on State Courts of Superior Jurisdiction, had forwarded to NYSBA President Bernice Leber for comment. Justice Crane noted the distinctive practices of the Appellate Division, First and Second Departments, and pointed out that the City Bar's proposal would require amendment of the New York State Constitution because of the present maximum of five Appellate Division judges on a panel.

A spirted discussion ensued, as members shared their experiences and perspectives with respect to the different Appellate Divisions. It was noted that two panels can come to opposite results around the same time, as has happened on occasion in the Second Department, creating conflicting lines of authority regarding CPLR §3101(d), for example. The feasibility of a reargument motion, as opposed to the proposed en banc

procedure, was considered. The length of time it takes to decide an appeal, without an additional layer of motion practice, was noted. Some felt the proposal is a solution in search of a problem.

Even those members who thought that there is a problem which might be addressed by an en banc procedure found fault with the City Bar's report and the proposal as drafted. Section III(B) of the report gave short shrift to the timing of a motion for leave to appeal, for example. Section III(D), which suggested that an en banc rehearing provision would assist in identifying leaveworthy cases, failed to persuade.

VOTE: Upon a motion duly made and seconded to support the City Bar's En Banc report, 15 members were opposed to the report as written and none were in favor.

A brief discussion ensued as to whether the Committee should point out the defects in the City Bar's written proposal, but the consensus was not to do so.

B. Meeting with OCA Advisory Committee on Civil Practice

Justice Crane reported on his September 12, 2008 meeting with George Carpinello. There was mutual interest in sharing views and in commenting on each others' proposals, despite some concerns about confidentiality and each Committee's independent role.

Despite a history of some successful collaboration, members noted certain challenges regarding coordination of activity with OCA. Based on past experience, caution was urged because if OCA adopts a proposal initiated by the Committee on CPLR, then activity on the proposal may be restricted because of OCA's internal procedures. In effect, OCA procedures sometimes create hurdles in the legislative process for our Committee's affirmative legislation, which also must go through the NYSBA Executive Committee. It was noted that any significant opposition, especially from the New York State Trial Lawyers Association, drastically reduces the chances of passage of such proposals.

There is a perennial issue concerning our ability to comment on last-minute OCA and third-party proposals. Members expressed their appreciation to Mr. Kennedy for his efforts in this regard.

C. Report on Affirmative Legislative Proposals

Mr. Kennedy reported that NYSBA has a fairly large legislative program, which includes a significant number of CPLR bills. He described the process within NYSBA for seeking approval of a legislative proposal, as well as the steps involved in seeking a sponsor for each bill and addressing any opposition thereto, which may take some years. Mr. Kennedy reviewed recent activity, especially in the last part of June 2008.

Mr. Kennedy noted that several bills had showed some life, particularly the proposed amendments of CPLR §§ 1008 and 3101(d). Mr. Hamm reported that in his discussions in support of the bill to amend §3101(d), he had met with a widespread lack of understanding as to why there should be any need for nonparty discovery absent special circumstances.

Justice Crane suggested selecting about five proposals as priorities to work on in a particular session. To this end, a working group was formed to identify those bills most likely to pass and those older bills which seem dead. In addition to the Chair, Mr. Aloe, Mr. Blair, Mr. Critelli, Ms. Gerstman, Mr. Hamm, Mr. Obstfeld, and Mr. Smoley volunteered for this working group.

D. Draft Rules on Selection of Jurors

Justice Crane reviewed the history of the several recent bills that had been introduced to change the method of jury selection. A bill, which would have amended CPLR §4106 and created new CPLR §4107-a and Judiciary Law §212(2), had been passed by both Houses and was awaiting action by the Governor. This bill would have required the Presiding Justices of the Appellate Divisions to adopt new uniform rules for selection, with only slight room for the use of any alternative method.

A lively discussion ensued concerning the June 19, 2008 draft rules to be adopted if the bill became law. Several members noted the lack of transparency in the process of making such a significant change in jury selection and how little opportunity there was for public comment. Many members found fault with provisions in the draft uniform rules that appeared impractical and inefficient, including the required pre-voir dire settlement conference.

A consensus was reached to oppose the draft rules that had been prepared in anticipation of the bill being signed into law. Justice Crane agreed to draft a statement to this effect for submission to the NYSBA Executive Committee. A working group to respond swiftly to any further amendments was formed. In addition to the Chair, Mr. Bermack, Mr. Horowitz, Mr. Israelyan and Mr. Konstadt volunteered for this working group.

[Note: On September 25, 2008, the Governor vetoed the measure, per Veto Message No. 153.]

E. Subcommittee reports

(i) Uniform Rules conflicts

Ms. Gerstman circulated an outline of the subcommittee's report. She hoped to have a further draft prior to the subcommittee's November 15, 2008 conference call. In the interim, members will examine how other states deal with such conflicts.

(ii) Motion practice

Mr. Aloe discussed current issues arising from the recent amendments changing the notice required for service of motions and cross-motions, noting in particular the inconsistencies with regard to adding time for mailing. Legislation to address the perceived problem does not appear likely to be enacted and it is unknown what OCA may do in this regard.

(iii) CPLR §3213

Mr. Obstfeld reported on the current status of attempts to expand the use of summary judgment in lieu of a complaint so that certain classes of commercial cases could be litigated more quickly. He has been trying to discern the problems in the Legislature with this bill and stated that there have been some proposals to draft a new bill. Members questioned whether this was the proper approach in the current economic climate, as the bill would speed up debt collection. The Chair noted that it had been suggested that a better definition of instrument was needed.

(iv) Expert disclosure

Mr. Ferstending reported that the subcommittee had not come up with a draft and that it would be difficult to get another CPLR §3101 bill passed. He noted that the plaintiff's Bar feels tremendous financial pressure when forced to identify an expert.

F. Proposed CPLR Amendments

(i) CPLR §7503(c)

Mr. Ferstendig stated that this statute has a built-in ambiguity as to when an application to stay arbitration must be made and filed, arising because of the change from commencement by service to the commencement by filing system. He therefore suggested a clarification, which would increase the 20-day period for filing a stay application to 30 days after service of the notice or demand for arbitration. Some members questioned whether 30 days would be sufficient. It was suggested that a vote be taken to adopt Mr. Ferstendig's proposal and resolve the number of days later.

VOTE: Upon a motion duly made and seconded to propose an amendment to clarify CPLR §7503(c), the motion was passed with 23 members in favor and one opposed.

(ii) CPLR 3212

Mr. Hamm circulated a draft bill to amend CPLR 3212(a) to provide that a motion for summary judgment shall be made no later than 120 days after filing of the note of issue unless an order specific to the case sets a different date. He explained the present difficulties caused by the multiple different locations where conflicting rules may be found, even within the same county, as to when a summary judgment motion must be made. After discussion, it was agreed that Mr. Hamm will prepare a supporting memorandum for presentation to the NYSBA Executive Committee.

VOTE: Upon a motion duly made and seconded to propose an amendment to clarify CPLR 3212(a), the motion passed unanimously.

(iii) CPLR Articles 12 and 65

Mr. Curtis circulated and reported on the proposed amendments of CPLR §§ 1201, 1203 and 1206, and Rules 1202, 1208, 1210 and 1211, which would make these provisions gender-neutral. He noted that additional amendments are needed, based on Article 12's present references to non-existent statutes.

A discussion ensued as to whether gender-neutral amendments would be appropriate in this article or elsewhere, such as CPLR §105. Justice Crane noted that the General Construction Law has a provision that would render such amendments unnecessary. Other members noted that correcting gender problems in specific statutes might create problems elsewhere and that some statutes might appropriately have gender-specific language.

The Chair asked Mr. Curtis to draft a memorandum on correcting the deficiencies perceived in Article 12.

Mr. Blair and Mr. Jewell volunteered to work with Mr. Curtis on his Article 65 project.

(iv) CPLR §1101

This item was deferred to the January 2009 meeting, by which time Mr. Ferstendig will draft a proposal.

G. "Clean-up" of Ch. 156, L.2008 (CPLR §205[a])

The recent amendment of CPLR §205(a) has created a trap for the unwary, as the new language therein regarding a "general pattern of delay in proceeding with the litigation" is not referenced in CPLR 3216. Hence, movants who seek a dismissal for want of prosecution may be unaware that the norm is now a dismissal without prejudice. Ms. Gerstman and Mr. Lipshie agreed to draft a proposal to address this problem.

There being no further business to come before the Committee, the meeting was adjourned at 3:05 p.m.

Respectfully submitted,

Ellen B. Fishman
Secretary