

MINUTES OF THE OCTOBER 30, 2015 NYSBA CPLR COMMITTEE MEETING
Held at the Association of the Bar of the City of New York, 42 West 44th Street, New York, NY 10036

In Attendance:

Tom Gleason, Chair; Ron Kennedy, NYSBA Liaison; Paul Cohen; David Hamm; Cary Sklaren; Ken Jewell; Jim Landau; Jeffrey Alfano; Cheryl Mallis; Hon. Erin Peradotto; Mike Hutter; Brendan Cyr; Tom Bivona; Tom Wiegard; Herb Ross; Christine Rodriguez; Lisa Bluestein; Albert Levi; Andrew Keaveney; David Ferstendig; Sharon Stern Gerstman; Raymond Bragar; Herbert Rubin; Michael Sera; Paul Aloe; Hon. Michael Stallman; Souren Israelyan; Steve Critelli; Rob Knapp; and Steven Weinberg.

The meeting was called by the Chair, Tom Gleason, at 12:00 noon.

Agenda:

1. Introductory remarks from Tom Gleason.

2. Approval of 5/15/2015 minutes. Motion made by David Hamm as amended, correcting typo 3212(b) on page 3, subdivision (c) by substituting the word “opposing” for “approving” in line 11 so that it reads “opposing the bill except where failure to disclose the expert was in violation of . . .” The motion was seconded by Jim Landau and approved by the Committee.

3. Legislative Update (Ron Kennedy)

(a) Ron focused on the upcoming legislative session since nothing has occurred since the summer. Ron additionally commented on the significant leadership changes in both the Assembly and Senate along with a new format regarding the legislative process in that the new Assembly Speaker will have more recounts, and bill sponsors will have more control over the legislation they introduce. Ron also sought comments from the Committee concerning the following three bills: CPLR §§ 1412, 3212 and 5501.

(b) CPLR § 1412

The proposed bill was written to eliminate an anomaly in comparative negligence cases by shifting the burden of proof from plaintiff to defendant in summary judgment applications. The statute currently could be read to say that said burden is on plaintiff in these instances. Some Committee members believe the bill may not pass the legislature. The bill presently does not have a sponsor although it has passed NYSBA’s . There are two drafts of the bill with the second draft containing language that addresses circumstances not covered in the first draft. David Hamm is sending Ron Kennedy Second Department cases for his review in support of the legislative proposal.

(c) CPLR § 3212

This legislative proposal would permit a judge to determine the deadline by which a summary judgment motion can be filed in an action. The proposal would override all county and judge rules concerning same. While the Committee agreed that the four Appellate Divisions and the 62 counties should harmonize the summary judgment rules across the state, problems with blanket rules that limit summary judgment motions, a lawyers ability to access to each judge’s individual rules, home rule issues and whether a court should only be able to limit a summary judgment timeframe were also

discussed. The Committee also considered when and how to respond to a NYS Trial Lawyers Association letter that suggested the proposal would allow summary judgment application deadlines after statutory limit. In the end, the Chairman noted the importance of resolving this issue to the bar and that the Committee should find right place to proceed with addressing this problem.

(d) CPLR § 5501

The Committee adjourned discussion of CPLR § 5501 until its January 2016 meeting.

4. OCA Proposals.

(a) CPLR § 3212(b)

The instant proposal seeks to overturn the Second Department's decision in *Singletree* which held that an expert affidavit, submitted in support or opposition of a summary judgment motion, does not have to be considered by a court where there was no exchange of expert lists pursuant to CPLR 3101(d). This Committee submitted memo of opposition because it believes the intention of the bill is unclear. Committee discussion was centered on revisiting it's position. Some members oppose the bill believing that CPLR § 3101(d) effectively disposes of the issue. Other Committee members support the bill because expert disclosure has been problem for some time particularly in medical malpractice cases. The majority of the Committee, however, believe that some sort of carve out is needed with certain cases where it is clearly stated in an order that a court should have discretion with this issue. The Committee, however, had difficulty in articulating language and decided that it was best not to oppose the instant legislation.

(b) CPLR § 4503

This bill is a technical amendment that includes lifetime trustees in the definition of fiduciaries for purposes of extending the attorney-client privilege to these persons. No discussion of substance was had concerning this bill.

(c) CPLR § 2305(d)

This legislative proposal would allow for trial subpoenas to be returnable in an attorney's office instead of a courthouse. The bill has been proposed because of concerns regarding a court's capacity to handle additional work. Some Committee members take issue with subpoena being returnable to lawyer, and not to the courthouse. There are also concerns about all parties to the action being served although the bill requires that the subpoena is served on all parties; that the legislation needs to address issue of last minute subpoena; that in some jurisdictions, trial subpoenas not returnable in court unless a Note of Issue is filed, for example. Some Committee members argued that the subpoena should be returnable to court to ensure issuer doesn't abuse the device although concerns were raised concerning how electronic discovery would be handled if it were delivered to the courthouse; that a centralized document room with these records catalogued and accessible by judicially signed requisition slip would prevent problems. Other advantage of having it returnable at courthouse is to ensure that everything received under subpoena is accessible to all parties without compromise. Sharon Gerstman said Erie County has attorneys make appointments to come in and review. Other members argued we can't rely on the courts to keep records because of space and staffing issue. .that while part of the discovery process what is legitimate process/timetable for subpoena to be returnable, that the rules for

admissibility of medical records, for example, are archaic and need simplification. In the end, the Committee agreed that since trials can occur up to a year after NOI filed, attorneys will need updated records which supports the need for trial subpoenas in these instances. Ultimately, the Chairman wants more info regarding practicality of having records returnable at the courthouse and, thus, accessible to all litigants.

(d) CPLR §§ 5701, 5704

This bill concerns appellate review of ex parte orders by addressing the current lack of a stated procedural mechanism for things such as name change as there is no judgment to appeal from; only an order. Thus, the legislation unifies the mechanisms to prosecute an appeal. The bill also corrects the need for an Appellate Division stay has to be decided by panel not individual judge. Paul Aloe asked what is ex parte order that qualifies? Notice on 5704 or notice of appeal? The Departments decisions are split.

5. Modernizing service of process statutes (Cheryl Mallis)

Cheryl Mallis brings to the Committee's attention two decisions by the Honorable Matthew Cooper which state the judge's belief that CPLR Rule 308 needs to be modernized. Service on Facebook as a form of publication was discussed although some Committee members took the position that service by publication is non-service. The Committee then discussed whether utilizing a CPLR Rule 308(5) application, which leaves determination of service to the court when the other statutorily stated methods were ineffective, continues to be the best way to proceed in these instances. The Committee also considered whether updating CPLR Rule 316 so as to allow for electronic publication although there were concerns about how electronic publication has and could continue to change over time. The Chairman recommended that a sub-committee be formed to consider the issues and draft legislation for the January 2016 meeting. Subcommittee on 308(5) consists of Cheryl Mallis and Cary Sklaren.

6. OCA rulemaking power: (Rob Knapp)

This is a Committee discussion that centers on OCA's decision to enact rules notwithstanding the existence of a CPLR statute on the same issue thus causing a conflict as to what governs. The Committee noted Paul Feigenbaum's longstanding efforts on this issue. Some Committee members take position that CPLR has been more and more irrelevant because OCA enacts rules when their legislative efforts on the issue fail; that there are Constitutional issues with OCA proceeding in this manner. The Committee then considered whether creating a rules enabling act with legislative right of veto to amend rule sections of CPLR would resolve the problem as the Judicial Conference had a this kind of power until the Constitutional revisions of 1978 disbanded the Conference. Discussion was then had concerning the wisdom of having a rules enabling act. Ultimately two questions were formulated, namely, whether a legislative body had the ability to capture the intention of a rule in the same way an administrative body could, and whether having a proliferation of rules was a good idea. Some Committee members took the view that its not necessary to have every miniscule rule go through legislature. And that it's not viable in any event to have the Legislature control rulemaking since so much is currently missed under current system. Raises third issue of rulemaking process. The conversation then moved to having formal process to review the validity of comments and objections to proposed rules and using the State Administrative Procedure Act as a guideline or for ideas. The Chairman recommended that discussion should be had with the OCA CPLR Committee Chairman for brainstorming. Sharon Gerstman suggested that the Committee approach the new Chief Judge with this

issue.

7. Redaction of Confidential Information:

This is a Committee discussion on the current rules concerning the redaction of confidential information from documents filed with a court as each court has substantially different rules which place a high burden on the attorneys and excessive cost on the litigants to accordingly comply. Some Committee members believe the Federal rules are better because they are uniform. This issue was tabled until the January 2016 meeting.

8. CPLR Update Publication.

The Committee adjourned discussion of CPLR Update Publication until the January 2016 meeting.

Ron Kennedy then thanked Rob Knapp for being Committee chairman noting the fair amount of work on the chairman's plate. Rob said couldn't have done the work he did without Ron's help.

David Hamm also tendered his resignation from Committee as he is moving to Israel.

Motion to adjourn passed unanimously.

Ken Jewell, Committee Secretary