

State of New Jersey

New Jersey Law Revision Commission

ANNUAL REPORT

2011



Report to the Legislature of the State of New Jersey
As provided by 1:12A-9.

(LRC 87-2011)

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I. MEMBERS AND STAFF OF THE COMMISSION IN 2011

The members of the Commission are:

Vito A. Gagliardi, Jr., Chairman, Attorney-at-Law

Albert Burstein, Attorney-at-Law

Andrew O. Bunn, Attorney-at-Law

Edward J. Kologi, Attorney-at-Law *

Nicholas P. Scutari, Chairman, Senate Judiciary Committee, Ex officio

Peter J. Barnes III, Chairman, Assembly Judiciary Committee, Ex officio

Patrick Hobbs, Dean, Seton Hall Law School, Ex officio

Represented by Professor **Ahmed I. Bulbulia**

John J. Farmer, Jr., Dean, Rutgers School of Law – Newark, Ex officio

Represented by Professor **Bernard Bell**

Rayman Solomon, Dean, Rutgers School of Law - Camden, Ex officio,

Represented by **Grace Bertone**, Attorney-at-Law

The Staff of the Commission is:

John M. Cannel, Executive Director

Laura C. Tharney, Deputy Director

Marna L. Brown, Counsel

Jenene J. Hatchard, Administrative Assistant

Alexander Fineberg, Legislative Law Clerk

Benjamin Hochberg, Legislative Law Clerk

Keith Ronan, Legislative Law Clerk

Christopher J. Cavaiola, Graduate Student Extern*

* Edward J. Kologi, Attorney-at-Law, resigned December 2011

* Christopher J. Cavaiola, worked from May to September 2011

II. HISTORY AND PURPOSE OF THE COMMISSION

New Jersey has a tradition of law revision. The first Law Revision Commission was established in 1925 and produced the Revised Statutes of 1937. Since the Legislature intended that the work of revision and codification continue after the enactment of the Revised Statutes, the Law Revision Commission continued in operation until 1939. After that time, the functions of the Commission were transferred to a number of successor agencies, including the Legislative Counsel.¹

In 1985, the Legislature enacted 1:12A-1 *et seq.*, effective January 21, 1986, to transfer the functions of statutory revision and codification to a newly created New Jersey Law Revision Commission.² The Commission began work in 1987 and has, since that time, filed 105 Reports with the Legislature, 39 of which have been enacted into law.

The Commission's statutory mandate is to simplify, clarify and modernize New Jersey statutes. To do so, the Commission conducts an ongoing review of the statutes to identify areas of the law that require revision. The scope of the

¹ *N.J.S.* 52:11-61.

² The Law Revision Commission was created by L.1985, c.498, and charged with the duty to:

a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to

- (1) Remedy the defects,
- (2) Reconcile conflicting provisions found in the law, and
- (3) Clarify confusing and excise redundant provisions found in the law.

b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;

c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and

d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.

revision performed by the Commission varies by the project. It includes both modest changes, like the correction or removal of inconsistent, obsolete or redundant language, and comprehensive modifications of select areas of the law.

The Commission considers recommendations from the American Law Institute, the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) and other learned bodies and public officers.

Once a project begins, the Commission examines local law and practice, and, when appropriate, the law of other jurisdictions. The Commission also consults with experts in the field throughout the drafting process, seeking input from individuals and organizations familiar with the practical operation of the law and the impact of the existing statutes.

When the preliminary research and drafting is finished, the Commission issues a Tentative Report and makes it available to the public for formal comments. The Commission reviews all of the comments received, and incorporates them into the Tentative Report as appropriate. When a revision is completed, a Final Report is prepared and submitted to the New Jersey Legislature for consideration.

The Commission's work has been published in law journals, cited by the New Jersey Courts, and used by law revision commissions in other jurisdictions.

The meetings of the Commission are open to the public and the Commission actively solicits public comment on its projects, which are widely distributed to interested persons and groups. Since 1996, the Commission has maintained a website for the purpose of making its projects and Reports readily available to the public which may be found at <http://www.njlrc.org>.

III. LEGISLATIVE SUMMARY

Since it began work in 1987, the New Jersey Legislature has enacted 39 bills³ based upon the Final Reports and Recommendations of the New Jersey Law Revision Commission:

- Anatomical Gift Act (L.2001, c.87)
- Cemeteries (L.2003, c.261)
- Civil Penalty Enforcement Act (L.1999, c.274)
- Construction Lien Law (L.2010, c119)
- Court Names (L.1991, c.119)
- Court Organization (L.1991, c.119)
- Criminal Law, Titles 2A and 24 (L.1999, c.90)
- Evidence (L.1999, c.319)
- Intestate Succession (L.2001, c.109)
- Juries (L.1995, c.44)
- Lost or Abandoned Property (L.1999, c.331)
- Married Women's Property (L.2011, c.115)
- Material Witness (L.1994, c.126)
- Municipal Courts (L.1993, c.293)
- New Jersey Trade Secrets Act (L. 2011,c. 161)
- Parentage Act (L.1991, c.22)
- Probate Code (L.2001, c.109)
- Recordation of Title Documents (L.1991, c.308)
- Repealers (L.1991, c.59, 93, 121, 148)
- Replevin (L.1995, c.263)
- School Background Checks (L.2007, c.82)
- Service of Process (L.1999, c.319)
- Statute of Frauds (L.1995, c.36)
- Surrogates (L.1999, c.70)
- Tax Court (L.1993, c.403)

³ A total of 39 bills were enacted, implementing 42 reports. The Repealers project, enacted in 1991, was divided into three reports.

- Title 45 –Professions (L.1999, c.403)
- Title Recordation (L.2011, c.217)
- Uniform Child Custody Jurisdiction and Enforcement Act (L.2004, c.147)
- Uniform Commercial Code 2A –Leases (L.1994, c.114)
- Uniform Commercial Code 3 – Negotiable Instruments (L.1995, c.28)
- Uniform Commercial Code 4 – Bank Deposits (L.1995, c.28)
- Uniform Commercial Code 4A – Funds Transfers (L.1994, c.114)
- Uniform Commercial Code 5 – Letters of Credit (L.1997, c.114)
- Uniform Commercial Code 8 – Investment Securities (L.1997, c.252)
- Uniform Commercial Code 9 – Secured Transactions (L.2001, c.117)
- Uniform Electronic Transactions Act (L.2001, c.116)
- Uniform Mediation Act (L.2004, c.157)
- Uniform Prudent Management of Institutional Funds Act (L.2009, c.64)

IV. FINAL REPORTS AND RECOMMENDATIONS

A Final Report contains the determination of the Commission regarding a particular area of the law and includes an analysis of the area of law addressed by the project, proposed statutory language and commentary. A Final Report is approved and adopted after the public has had an opportunity to comment on drafts of the Report, and is filed with the Legislature. After filing, the Commission and its Staff work with the Legislature to facilitate its enactment.

In 2011, the New Jersey Law Revision Commission published 11 Final Reports and Recommendations to the Legislature.

A. Books and Records

The Commission released its Final Report on Shareholders' Rights to Inspect Books and Records in October of 2011. The Report recommends revision of *N.J.S. 14A:5-28* of the New Jersey Business Corporation Act, based upon the Appellate Division's interpretation of the statute in *Cain v. Merck & Co.*, 415 *N.J. Super.* 319 (App. Div. 2010). The major issue in the case was whether the reference to "minutes" in 14A:5-28(4) was meant to broadly cover minutes of board and executive committee meetings or was to be limited only to shareholder meetings. The Appellate Division read the statute to allow a court to compel production of the "minutes" of meetings of the board, executive committee, and shareholders. The Report reflects the court's language and recommends modification of the statute accordingly.

In addition, in an effort to keep the statutory language consistent and clear, the term "proceedings" has been changed to the term "meetings" since a majority of the states use the term "meetings" rather than "proceedings," without a difference in meaning. Also, because the issue of whether *N.J.S. 14A:5-28*

applies to foreign corporations has not been decided by recent or binding New Jersey case law, the statute has been clarified to hold that it only applies to corporations incorporated in New Jersey. Barring a clear mandate from either the Legislature or the Court, the Commission did not want to make any change that could place New Jersey at a competitive disadvantage.

B. Door to Door Sales

A Final Report regarding Door-to-Door Retail Installment Sales Act (DDRISA) was released by the Commission in March 2011. The project originated with an Appellate Division case, *United Consumer Financial Services v. Carbo*, 410 N.J. Super. 280 (App. Div. 2009), in which the Court concluded that federal regulations preempted certain provisions of New Jersey law.

New Jersey's DDRISA was enacted with the express purpose of protecting consumers from the "often unethical persuasion of certain door-to-door sellers." One aspect of the law's protective efforts is a mandated "cooling-off period" during which a consumer may rescind the agreement with proper notice to the seller. Found at N.J.S. 17:16C-61.5 a.(1), the period during which a consumer may rescind is allowable "not later than 5 p.m. of the third business day" following the sale. The form that notice to the seller must take is limited to certified mail.

Federal Trade Commission (FTC) regulations, however, provide for a slightly longer "cooling-off period" and a somewhat less restrictive form of notice to the seller. The federal rule, 16 C.F.R. § 429.1(b) allows a consumer to rescind up to midnight of the third business day and allows for notice via mail, delivery, or telegram. The federal regulations include a preemption provision expressly declaring state law that does not "accord the buyer . . . substantially the same or greater" protections than federal rules to be "directly inconsistent." 16 C.F.R. § 429.2(b).

The *Carbo* Court found the federal rules more favorable to the consumer than current New Jersey law. Accordingly, the court held portions of the DDRISA preempted by federal regulation because of the New Jersey law's shorter "cooling-off period" and more burdensome method of notice.

The Commission recommended revision of the DDRISA in order to avoid federal preemption. The Commission recommends that the "cooling-off period" be extended to midnight of the third business day following the sale and that the form notice may take be expanded to include regular mail and electronic communication. The Commission's report also requires more seller information to be provided to the consumer and it makes minor changes to make pronouns gender neutral.

C. Effect of Abstentions

In April of 2011, the Commission released a Final Report regarding the effect of an abstention from voting by a member of a public body. The complicated current law on this subject is found in case law. The basic common law rule is that if a member abstains from voting he is counted as voting "yes" unless he has expressed opposition, in which case he is counted as voting "no."

As a result of a number of exceptions to this rule, however, an abstention is only counted as an affirmative vote in a minority of cases: only where a member is entitled to vote, does not recuse himself and the statute does not provide that a particular number or percentage is necessary for approval of the matter. It may be particularly hard to determine whether a member fully recused himself or whether he merely abstained. In the first case, his vote would not count; in the second, he would be counted as affirmative.

While the complication of the rule is a serious defect, the greater problem is that the rule probably does not reflect the expectations of a person who

chooses to abstain. A person who abstains generally does not intend to cast any vote. As a result, the Commission proposed statutes that would clarify the effect of abstentions and establish that an abstention is neither an affirmative nor negative vote.

The Commission's proposal is in the form of three separate statutes dealing separately with state, local and school government bodies. Each of these three statutes can be compiled where it will be easily accessible to the people who need to know about it. If one general statute were enacted, it is likely that it would not come to the attention of people whose focus was municipal or school law.

D. Elective Spousal Share/Equitable Distribution

In November 2011, the Commission released a final report addressing the "black hole", a problematic interaction between the State's divorce laws and probate code. The project was spurred by the Judiciary's invitation to revisit the relevant statutory scheme in *Kay v. Kay*, 200 N.J. 551, 554 (2010) and its predecessor, *Carr v. Carr*, 120 N.J. 336, 340 (1990).

N.J.S. 2A:34-23h. allows the court to "effectuate an equitable distribution of the [marital] property" only when a "judgment of divorce . . . is entered". However, a cause of action for divorce abates with the death of either of the parties. *Carr*, 120 N.J. at 342. In the "black hole" scenario of *Carr* and *Kay*, the surviving spouse, unable to receive her share of the marital property and disinherited under the decedent's will, chooses to avail herself of the elective spousal share "one-third of the augmented estate". N.J.S. 3B:8-1. However, in a unique deviation from the Uniform Probate Code, U.P.C. § 2-202 (2008), New Jersey's probate law includes an important limitation, allowing a spouse to take under the statute only so long as:

at the time of death the decedent and the surviving spouse or domestic partner had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife, either as the result of judgment of divorce from bed and board or *under circumstances which would have given rise to a cause of action* for divorce or nullity of marriage to a decedent prior to his death under the laws of this State. *N.J.S. 3B:8-1* (emphasis added).

Thus, although still technically married to her decedent husband, the surviving spouse has no claim in probate court.

The Commission sought to extend judicial authority to divide marital property, thereby closing the “black hole”. The proposed revision to *N.J.S. 2A:34-23* specifies that equitable distribution is permitted prior to a final judgment of divorce. The revision also avoids other unintended consequences that arise when a party dies in the midst of a divorce proceeding, including an estranged spouse’s inheritance under intestacy right of survivorship.

E. Flag Salute

In January of 2011 the Law Revision Commission approved a Final Report recommending amendment of *N.J.S. 18A:36-3*, which requires public schools to display the American flag and requires students to stand and recite the flag salute. The statute allows students with conscientious objections to the pledge or the salute to refrain from participating, but requires them to stand at attention during the ceremony. The requirement that a student stand was held unconstitutional by the United States Court of Appeals in *Lipp v. Morris*, 579 F.2d 834 (C.A.N.J. 1978). Although it has been unenforceable for more than 30 years, the provision has never been removed from the statute. As a result, school officials who consult the statute may be led to believe that it is still the law and attempt to enforce it, causing needless controversy. The Commission

recommended that the unconstitutional provision be excised and proposed an amendment to achieve that result.

F. Payment of Tax Pending Appeal

A Final Report clarifying the requirements for appealing a tax assessment was released by the Commission in October 2011. The project was undertaken to codify the holding in *Trebour v. Randolph*, 25 *N.J.Tax* 227 (N.J. Tax Ct. 2009), which identified an ambiguity in *N.J.S. 54:3-27*.

The revision recommends a modification to the law clarifying that, to sustain an appeal, a taxpayer must be current on taxes assessed against any property which is the subject of that appeal. The taxpayer need not have paid taxes on all of the taxpayer's properties in order to appeal an assessment on a single parcel.

G. Pejorative Terms

The Commission issued a Final Report in September of 2011 which recommends elimination of demeaning, disrespectful, and, in many cases, archaic terminology that is used in the New Jersey statutes when referring to persons with developmental, cognitive or psychiatric disabilities.

The Commission released an initial Final Report dealing with this subject matter in 2008 in direct response to the amendments to Article II, Section I, Paragraph 6 of the New Jersey Constitution that eliminated the words "idiot or insane" when referring to a person's right of suffrage. Since that time, the Legislature enacted P.L. 2010, c. 50, which calls for the use of the terms "intellectual disability" or "developmental disability", as appropriate, in place of the terms "mental retardation", "mentally retarded", "idiot" and "feeble-minded".

The Commission's second Final Report, issued in 2011, continues the purpose and subject matter of the 2008 Final Report but also recommends additional statutory revisions to replace demeaning language that remains in the statutes. In most cases, the term "mental incapacity", or its equivalent, are recommended to replace the pejorative term. However, in some cases, replacement terms that focus on the capacity of the individual to understand and make choices about the activity or conduct at issue were crafted to fit the circumstances addressed by the statute. Person-first language is used as recommended by mental health professionals.

The Commission consulted with the professional mental health community, the Administrative Office of the Courts and legal practitioners expert in guardianship and Title 3B issues when drafting replacement terms for the offending language.

H. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

In February 2011, the Commission released a Final Report based on the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) which was approved by the Uniform Law Commission (formerly NCCUSL) in 2007.

The UAGPPJA provides a uniform mechanism for addressing multi-jurisdictional adult guardianship issues that have become time-consuming and costly for courts and families. It has been adopted in 29 states and the District of Columbia, and endorsed by the Alzheimer's Association, the National Association of Elder Law Attorneys (NAELA), the National College of Probate Judges, the Conference of Chief Justices, the Conference of State Court Administrators and the National Guardianship Association.

The UAGPPJA was modeled after the Uniform Child Custody Jurisdiction

Act, and its successor, the Uniform Child Custody Jurisdiction and Enforcement Act, both of which address similar multi-jurisdictional issues in connection with child custody determinations. The Act seeks to resolve disputes over court authority to make decisions about guardianship by first ensuring that only one state exercises jurisdiction over an alleged incapacitated person, at any time. The UAGPPJA includes a mechanism by which a court can determine the state with primary jurisdiction over the allegedly incapacitated person addresses the issue of whether a guardianship proceeding in one state will be recognized in another state and provides a registration procedure to facilitate recognition of out-of-state orders. The Act empowers courts in differing jurisdictions to communicate with each other and to allow the parties to participate in the communication.

As the Commission's work on this project progressed, the Commission received the cooperation and comment of the Alzheimer's Association as well as attorneys experienced with New Jersey guardianship practice. The Final Report recommends adoption of a New Jersey version of the uniform law with the revisions suggested by those who participated in the drafting process.

I. Uniform Limited Liability Company Act

The Commission released its Final Report on the Uniform Limited Liability Company Act in December of 2011. The Report recommends enactment of the Revised Uniform Limited Liability Company Act (RULLCA) which was first promulgated by the Uniform Law Commission (formerly NCCUSL) in 1996, and was revised and amended in 2006. The Act permits the formation of limited liability companies (LLCs), which provide the owners with the advantages of both corporate-type limited liability and partnership tax treatment.

An LLC is generally characterized as a business organization which looks like a partnership or limited partnership in terms of internal structure and

relationships among members, or members and managers, but with the additional characteristic of a liability shield from vicarious liability for members and managers. The LLC originated in the desire to have a full liability shield while retaining the so-called “pass-through” qualities of a partnership. This means that the company itself pays no federal income tax, leaving any tax liability to members receiving taxable distributions from the company.

New Jersey first promulgated LLC laws in 1993. *N.J.S. 42:2B-1 et. seq.*, “New Jersey Limited Liability Company Act” (NJLLCA). Since 1993, the definition and business utility of the LLC has changed significantly. In order to have the state law reflect national business trends, the New Jersey Legislature continuously amended NJLLCA to reflect these changes. While the amendments to NJLLCA are progressive in nature and reflect current business perspectives, they have inevitably created a “patch-work” structure. The Revised Uniform Limited Liability Company Act (RULLCA) is similar in substance to the NJLLCA; it would modify the LLC law in New Jersey only slightly. However, RULLCA would benefit New Jersey law by providing a comprehensive guideline for LLC operations while streamlining the current “patch-work” provisions already in place.

There are some areas of difference between the RULLCA and the current NJLLCA. The most important differences are that the RULLCA eliminates the default (and often overlooked) rule that LLCs have a limited life. As is the case with corporations, RULLCA provides for LLCs to have perpetual duration, and that under RULLCA, it is possible to have any type of management structure the LLC members want, including a corporate-style board of directors and officers.

The New Jersey Law Revision Commission found that RULLCA represented a significant advancement in this area of law and recommended its enactment.

J. Uniform Partition of Heirs Property Act

In February 2011, the Commission issued a Final Report which did not recommend adoption of the Uniform Partition of Heirs Property Act (UPHPA) that was released by the Uniform Law Commission (formerly NCCUSL) for adoption in all states in 2010.

The UPHPA focuses on problems resulting from the sale by court-ordered partition of real property owned by family members who hold title as tenants-in-common. Recognizing the rights of each cotenant to secure his or her share of the current market value of the property and to consolidate ownership of the property, the Act seeks to protect the interests of family member cotenants from the adverse consequences of a partition action where one cotenant wishes to remain in possession of the land and another cotenant wishes the property to be sold. The stated primary aim of the act is to ensure that each cotenant “is treated in a fair and equitable manner.”

After deliberation, review of New Jersey partition law, and consultation with land title professionals, the Commission decided not to recommend adoption of the UPHPA in New Jersey. The Commission recognized that New Jersey law already protects tenant-in-common property owners -- including family members who share ownership of family-owned property -- from the forced partition sale of their real property and from heir hunters. The equitable concepts in the UPHPA already are an integral part of the fabric of New Jersey jurisprudence. Property title experts also did not believe that the concerns with heirs property were prevalent in New Jersey. Heir hunters have not generally been tolerated in New Jersey and over the course of almost 40 years, our Supreme Court has repeatedly imposed constructive trusts on the interests of heir hunters in favor of the innocent claimants seeking to exercise their rights in these disputed properties.

K. Uniform Real Property Transfer on Death Act

The Commission issued a final report in May of 2011 that does not recommend adoption of the Uniform Real Property Transfer on Death Act (URPTODA) in New Jersey. The Act was approved by the Uniform Law Commission (formerly NCCUSL) in July of 2009 and recommended for enactment in all states. It is derived from the Uniform Probate Code and provides for a form of transfer on death deed that is non-testamentary, meaning that the transfer contemplated by the deed occurs by operation of law and outside the probate process. Basically the deed must contain the same elements and formalities as are required for a properly recordable inter vivos deed under state law, except for the present intention to convey.

Although the Commission found merit to the uniform law, it questioned whether a transfer on death deed was necessary considering the ability in New Jersey to convey real property in a number of ways. For example, an owner of property may provide in the real property owner's will for the conveyance of the property at the time of the owner's death. The property may be transferred to a real estate trust or a living trust. If an owner holds real property with a spouse as a tenant by the entirety or with a co-owner as a joint tenant with a right of survivorship, the property will be transferred by operation of law to the named survivor at the time of the death of the owner.

In addition, unlike some other states, New Jersey does not have a TOD deed statute and thus a key purpose of the uniform law – providing uniformity among state TOD deed statutes – is not relevant. The probate process is relatively simple and efficient in New Jersey and, after deliberation, review of current New Jersey law and other state law, and consultation with New Jersey real property, trust and estate law attorneys, the Commission saw no reason to create a new mechanism to avoid that process.

V. TENTATIVE REPORTS

A Tentative Report represents the first settled attempt of the Commission to revise an area of law. It is the product of lengthy deliberations, but it is not final. A Tentative Report is distributed to the general public for comment. The Commission considers these comments and amends its Report.

In 2011, the Commission published nine Tentative Reports.

A. Causes of Action (Title 2A)

As part of the broader revision of Title 2A, Staff undertook a revision of Subtitle 6 of Title 2A, which contains the civil causes of action established by the Legislature. Subtitle 6 is a collection of widely varying causes of action, some of which were drafted relatively recently, while others were drafted over a century ago. This goal of this revision is to modernize the statutes by eliminating language that is no longer viable and updating the remaining language.

The language pertaining to alcohol servers' liability was not recommended for change but the Commission brought to the attention of the Legislature the fact that this statute does not cover a number of situations in which coverage may be appropriate. Significantly, the statute is not readily applicable to the service of alcohol at mass gatherings, like sporting events or concerts at stadiums. Since the statute specifically states that it is the exclusive civil remedy for personal injury or property damage resulting from the negligent service of alcoholic beverages, the Commission noted that Legislature may wish to revisit this area in light of the case law developments subsequent to its enactment. The Commission likewise recommended no change to the section pertaining to liability for damage to a fire alarm system.

The seven sections of the law known as the "heart balm" statutes were

eliminated with the exception of a single sentence. The section pertaining to a change of name application was likewise proposed for elimination except for a single sentence that refers to the procedures for a name change set forth in the Rules of Court.

The two sections pertaining to injury or losses resulting from mob violence or riots were recommended for repeal in their entirety as were the sections pertaining to the recovery of money or property from a municipality or school district and the four sections pertaining to naturalization.

The language pertaining to debts or obligations fraudulently incurred was modified in a conservative manner after a detailed review of the case law in an effort to clarify its provisions.

The section pertaining to the arrest or detention of mentally incapacitated persons was modified to make it clear that its provisions did not apply to a commitment proceeding and the statutory language pertaining to proof of lost or destroyed instruments was modified slightly for clarity and to include the applicable standard of proof.

A Tentative Report was released in the spring of 2010 followed by a revised report in May 2011 and no comments have been received to this time. The release of a Final Report is anticipated in early 2012.

B. General Repealer

In July of 2011 the Commission approved a Tentative Report recommending the repeal of certain anachronistic statutes. The Commission is directed by statute to identify anachronistic and redundant provisions in the law (*N.J.S 1:12A-8(a)*). It has been more than 20 years since the Commission published a report identifying anachronistic or invalid statutes and recommending

their repeal.

The Legislature acted on the Commission's last report identifying statutes for repeal, enacting four statutes of repeal. See L. 1991 c. 59, 93, 121 and 148. The new report continues to recommend repeal of statutes which the Legislature did not previously act on, and adds others identified by the Commission, the Office of Legislative Services and interested groups.

The reasons that particular statutes should be repealed vary, but fall into several categories. Some statutes are invalid because they have been found unconstitutional or have been superseded. See, for instance, *N.J.S. 56:7-1 to 7-17*, declared unconstitutional in *Lane Distributors v. Tilton*, 7 N.J. 349 (1951) and *N.J.S. 2A:82-8*, one of a number of statutes superseded by the New Jersey Evidence Rules as provided by *N.J.S. 2A:84A-40* (Official footnote to *Evid. R. 70*).

A larger number of statutes recommended for repeal in this report are those which may well be legally enforceable but which have ceased to have any operative effect with the passage of time. Some are anachronistic because they relate to offices or institutions which no longer exist. See, *N.J.S. 46:27-1 and 46:27-2* relating to the Surveyors General. Others are anachronistic because they deal with problems which were important at one time but which have ceased to be relevant to modern society so that, in the modern context, they amount to unnecessary regulation. See, *N.J.S. 45:20-1 to 20-3* regulating millers of grain. Still others deal with problems which have continuing relevance, but do so in a way which has become totally unacceptable due to the passage of time. See, *N.J.S. 8-14* which limits the amount to be spent on food for a prisoner to \$0.50 a day.

The particular sections proposed for repeal are not all of the anachronistic or superseded sections in the New Jersey statutes. The 2009 Commission Report on the Public Assistance Law recommends the repeal of

many anachronistic sections in the context of a comprehensive revision of Title 44 of the Statutes. The recent Report on the Unconstitutional Flag Salute Statute recommends repeal of *N.J.S.18A:36-3*. Those recommendations are not repeated in this report. There are also some statutes that have been held unconstitutional but proposal for their repeal engenders political controversy. See, *N.J.S. 9:17A-1.1 et seq.* on Parental Notification for Abortion. This Report also does not discuss situations where only part of a statute is invalid.

C. Landlord Tenant Law

In 2009, the Commission began compilation and revision of all of the statutes pertaining to landlord-tenant relationships, some of which date back to the 1870's and earlier. Current law consists of overlapping, contradictory and inaccessible provisions. Many, but not all, of the landlord-tenant provisions are contained in Title 2A, but they are not contained within the same chapter and are not in sequence. Currently, different aspects of the same topic are discussed in more than one statutory provision.

Both the Anti-Eviction Act and the Summary Dispossess Act are found in chapter 18 of Title 2A. Archaic provisions pertaining to distraint and landlord's liens are in chapters 33, 42, 19 and 44 of Title 2A. Provisions pertaining to receivership and regulation of multiple dwellings appear in chapter 42 of Title 2A. Another large part of the law is found in chapter 8 of Title 46, which contains provisions pertaining to Leasehold Estates, the Truth-in-Renting Act, the Security Deposit Act and the New Jersey Safe Housing Act. Other miscellaneous provisions are scattered throughout the statutes, including Titles 38, 40, 52, and 54.

The lack of organization makes the law difficult to find. The conflicts, inconsistencies and anachronisms make it difficult to determine what the law is. In this area, where parties frequently represent themselves, it is especially

important that the statutes be consistent, understandable and easy to locate.

The Commission undertook a landlord-tenant revision project that, while preserving current legal concepts and causes of action, seeks to:

(1) consolidate in a single place all statutes pertaining to the legal relationship between the landlord and tenant;

(2) update all statutory language and remove anachronistic provisions;
and

(3) make consistent the various statutory provisions, and cross reference them, as appropriate.

After several years of revision and the participation of commenters, including both landlord and tenant representatives, the Commission issued a Tentative Report on landlord tenant revision in October of 2010 and a revised Tentative Report in September of 2011. The Report puts all of the relevant law in one place and eliminates or replaces archaic terms (such as the term “removal”, which is replaced with the term “eviction” in every instance where the term refers to the removal of a tenant from rental premises). The Report further eliminates inconsistencies and confusing provisions. For example, in some cases, current provisions are inconsistent because they pre-date the Anti-Eviction Act and the Summary Dispossess Act but these provisions have not been repealed nor have they been modified to reflect the changes made as a result of those acts.

Where appropriate, the Report updates the law by incorporating the holdings of key New Jersey State court determinations. This has only been done where the Commission concluded that the cases clarified an ambiguous issue, made a reasonable determination of legislative intent or encouraged further legislative clarification.

Because, in the view of many tenants and tenant representatives, the

Anti-Eviction Act is the most comprehensive and progressive law regulating eviction in the nation, the Commission made every effort to update and consolidate the Anti-Eviction Act and the Summary Dispossess Act while preserving their significance.

D. New Jersey Debt Management Services Act

A Uniform Debt-Management Services Act (“UDMSA”) was approved and recommended for enactment by the Uniform Law Commission (formerly NCCUSL) in 2005, and was revised and amended in 2008, and then again in 2011. It provides the states with a comprehensive Act with the goal of national administration of debt counseling and management in a fair and effective way. The purpose of the Act is to “rein in the excesses while permitting credit-counseling agencies and debt-settlement companies to continue providing services that benefit consumers.” After the federal Bankruptcy Reform Act of 2005, in order to file for a Chapter 7 bankruptcy, an individual is generally required to show that consumer debt counseling/management has been sought and attempted. Greater transparency and accountability are needed to prevent excesses and abuses of the new powers of debt management services.

One of the most significant changes to New Jersey’s statutes if the NJDMSA project is enacted is the authorized participation of for-profit entities in the State. New Jersey does not currently allow for-profit entities to engage in debt relief activities within the State. The available information suggests, however, that for-profit entities are currently operating in New Jersey, or serving New Jersey consumers from other states, in violation of the law. For-profit entities are generally associated with a type of debt-management known as debt-settlement. Debt-settlement involves a reduction of the principal amount of the debt and a payoff of the reduced debt in a lump sum or over a period of up to three years. Traditional debt-management, on the other hand, involves creditor

concessions such as reductions in the interest rate, finance charges, late fees, and the like, and a payoff of the full principal balance after concessions over a period of five years.

In an attempt to maximize the protections for New Jersey residents, the Commission draft incorporates and expands upon the changes to the Federal Trade Commission Telemarketing Sales Rule effective in 2010. Staff incorporated the language of the FTC Rule pertaining to the fees that may be charged by certain for-profit entities but applied it more broadly than the FTC did. As a result, the draft applies the limitations imposed by FTC Rule to all entities that engage in debt settlement, not only those whose business model involves at least one interstate telephone call. This was done to address, among other things, Commission concerns about entities that operate solely via the internet.

While the NJDMSA project is based on the ULC's draft, it was tailored to reflect New Jersey practices, such as licensing, rather than registration. The ULC document was further modified by the Commission to incorporate additional statutory protections for New Jersey consumers. The additional protections were based on the statutes of other states and concern things like the prerequisites for entering into an agreement, mandatory agreement language, marketing and advertising requirements and remedies in the event of a violation of the act.

In addition, the language of the ULC Act was modified to eliminate certain automatic exemptions from the law (for attorneys, CPAs and financial planners, for example) and to otherwise adjust the exemption language to afford more consumer protection. As currently drafted, the Act is applicable to attorneys and CPAs engaging in "high-volume" debt-management practices.

The project was released as a Tentative Report in July of 2011 and a Final Report is anticipated in spring of 2012.

E. NJEVHPA – New Jersey Emergency Volunteer Health Practitioners Act

UEVHPA was drafted by the Uniform Law Commission (formerly NCCUSL) in an expedited manner after hurricanes Katrina and Rita which struck within weeks of each other in 2005. Prior to that time, a number of states had enacted emergency management laws that permitted the waiver or modification of licensure standards for health practitioners. The vast majority of the states had also enacted the Emergency Management Assistance Compact (“EMAC”). EMAC allows for the deployment of licensed health practitioners employed by state and local governments to jurisdictions in which they are not licensed and allows them to provide emergency services there.

The federal government supplemented state law provisions with language allowing licensed health practitioners that it employs, on either a permanent or temporary basis, to respond to disasters and emergencies without complying with the state professional licensing requirements. Federal law also established two systems to facilitate the use of private sector health practitioners in response to emergencies. Unfortunately, neither of those federal programs necessarily results in interstate recognition of licenses issued to volunteer health practitioners. The response efforts associated with hurricanes Katrina and Rita demonstrated that, in the absence of national standards, the federal and state systems available were inadequate and complicated that use of volunteer health practitioners for both the receiving and the deploying states.

The goal of the Commission is a law that facilitates the use of out-of-state health practitioners in New Jersey when they are needed here while providing appropriate protection to all parties. The Commission was fortunate to receive helpful comments from various individuals on an informal basis. A Tentative Report was released in November 2009, after which additional revisions were made to the draft, and a Final Report is expected to be released in mid-2012.

F. UCC Article 9

The Commission approved a Tentative Report recommending revisions to Article 9 of the Uniform Commercial Code in April of 2011. The Report adopted revisions approved by the Uniform Law Commission and the American Law Institute in 2010. The ULC recommends a uniform effectiveness date of July 1, 2013, with the hope that legislatures in all states will have an opportunity to consider the revisions before that time.

Article 9 governs security agreements where the property is not real estate. These arrangements are the basis of an important part of commercial finance. Many of the commercial security arrangements under Article 9 are interstate transactions, and it is important that the state laws governing them are as nearly uniform as possible. In reviewing the proposed changes, the Commission was aware of the need for uniformity and is disposed to accept the revisions proposed by the ULC and the ALI unless there is a significant reason to deviate from them.

The most significant change proposed concerns specification of the name of debtors who are natural persons. The current Article 9 was found to be insufficiently specific as to the debtor's name as it was to be included in a security filing. The proposed amendments use the driver's license as the source for the "official" version of a person's name. The creditor uses the license to determine the debtor's surname and first personal name. Any other names on the license would be inserted under "additional names." If the debtor does not have a drivers license or non-driver state identification card, the situation is unchanged from that under current law, no rule for "official" name is provided.

In comments to the draft, the ULC raised the question of whether the space available for the entry of a name on a state's license is too limited to allow the license to be a good source for an accurate full name. The Commission has been informed by MVC that while there is a problem in New Jersey now, the

space for the name should be increased by June of this year. As a result, there should be no problem with reliance on the name on a driver's license on the uniform effectiveness date of July 1, 2013.

The proposed Article 9 amendments offer two approaches to the problem. The first alternative makes the use of the name as it appears on the driver's license a requirement. The second, the "safe haven" alternative, does not require the use of the driver's license version of the name, but specifies that if that version is used, it is sufficient. Nationally, banking interests appear to be supporting for the first, stricter, approach. The position of the banks is of special importance because the burden of complying with a strict standard will fall on lenders. Informal discussions with the New Jersey Bankers Association seem to indicate that they also support the first approach. Versions of the Article 9 revisions pending in other states' legislatures overwhelmingly have opted for the first, stricter, approach. For these reasons, the Commission has chosen to support Alternative A as presented in the report of The Uniform Law Commission and the American Law Institute.

The amendments also clarify that, for a financing statement to be sufficient, the name of the registered organization debtor on the financing statement is the name reflected on the "public organic record" of the registered organization. Accordingly, if a corporation has a name on its publicly available charter document that is different from the name on the state's publicly searchable data base, the debtor's name on the financing statement should be the one reflected on the charter document.

Report containing the Commission's recommendations was released in December of 2011.

G. Uniform Military and Overseas Voters Act

As part of its mandate to review all uniform laws, in 2011, the Commission commenced review of the Uniform Military and Overseas Voters Act (UMOVA), approved by the Uniform Law Commission in 2010. UMOVA was promulgated to bring consistency and uniformity to state laws pertaining to military and overseas voting practices. In particular, UMOVA seeks to enhance current law by extending to state elections the assistance and protections for military and overseas voters currently found in federal law but now covering only federal elections. It focuses on giving voters adequate time to request, receive and return overseas ballots and voting materials. It also requires the availability of electronic transmission of unvoted ballots and voting materials in order to achieve this purpose.

The Commission examined this uniform law while giving great deference to New Jersey's existing Overseas Residents Absentee Voting Law, N.J.S. 19:59-1 et seq. (ORAVL). At the same time, the Commission was mindful of federal laws that govern military and overseas voters. Concerns of the military and of state voting officials also were considered. Although, at the time of this writing, only a handful of states have adopted UMOVA, the Federal Voting Assistance Program of the Department of Defense support UMOVA principles as do non-governmental voting assistance organizations, such as the Alliance for Military and Overseas Voting Rights and the Overseas Vote Foundation. Both the American Bar Association and the Pew Center on the States also support its adoption.

The Commission soon discovered that ORAVL, New Jersey's current law, already rectified some of the concerns addressed by UMOVA. For example, New Jersey law already fosters the use by overseas voters of electronic transmission methods to access election materials and apply for absentee ballots. New Jersey law also has been amended to comply with current federal law regarding overseas and military voting practices.

Since ORAVL is a well-integrated part of New Jersey voting practices and procedures, rather than replace it with UMOVA, the Commission recommends incorporating into ORAVL key UMOVA concepts that are not addressed in New Jersey law. These concepts include expanding the definition of “overseas voter” to include those voters who are eligible to vote in New Jersey but were not born here, as well as permitting the use of the Federal Postcard Application Form in order to register to vote in state and federal elections.

H. Uninsured Motorists

A Tentative Report concerning Uninsured Motorists was released in November 2011. The project originated with a Supreme Court case discussing whether the heirs of an uninsured motorist killed in a motor vehicle accident are barred by *N.J.S. 39:6A-4.5(a)* from pursuing a claim under the Wrongful Death Act and the Survivorship Act. The Court’s opinion in *Aronberg v. Tolbert*, 207 *N.J.* 587 (2011), held that when an uninsured motorist has “no cause of action for recovery of economic or noneconomic loss sustained as a result of his accident while operating an uninsured automobile [under *N.J.S. 39:6A-4.5(a)*],” his heirs consequently have “no ground for filing a wrongful death action.” *Id.* at 605.

The Court found that because the decedent lacked the required medical coverage under *N.J.S. 39:6A-4*, if he lived, he could not have “maintain[ed] an action for damages resulting from the injury,” *N.J.S. 2A:31-1*, because *N.J.S. 39:6A-4.5(a)* “would have barred his cause of action.” *Ibid.* The Court held that *N.J.S. 2A:31-1* provides an heir a cause of action “only if a claim could have been brought by the decedent had he lived.” *Id.* at 603. Because the decedent lacked such a right, his heirs also lacked a cause of action under Wrongful Death Act and the Survivorship Act. The statute at issue, *N.J.S. 39:6A-4.5(a)* was enacted as a powerful incentive for compliance with New Jersey’s compulsory insurance laws.

The Commission's Tentative Report incorporates the Court's interpretation of the statute, including the legislative intent to compel compliance with automobile insurance laws by barring recovery for uninsured motorists and their family. In the spirit of the Court's decision, the Report also contains the Commission's recommendation of language assuring that anyone acting on behalf of the uninsured motorist is also barred from maintaining a cause of action.

I. Workers Compensation Claims

A Tentative Report on Attorney's Fees in the Workers' Compensation statute was released in December of 2011. The project originated with an Appellate Division case *Quereshi v. Cintas Corp.*, 413 N.J. Super. 492 (App. Div. 2010) discussing whether a judge of compensation must award reasonable attorney's fees when a self-insured or uninsured employer or employer's insurance carrier unreasonably delays payment of temporary disability compensation when it has actual knowledge of the occurrence of the injury or notice that compensation is due. The court held that attorney fees are mandatory under N.J.S. 34:15–28.1, and not limited by N.J.S. 34:15–64(a), which governs “fee awards following an award of benefits.”

The court noted that the purpose of the statute was to ensure prompt payment to “ameliorate the economic disruption occasioned by a workplace injury and the loss of a regular paycheck.” *Id.* at 499. The specific language in question was the use of “shall” and “plus” in the phrase, “it *shall* be liable to the petitioner for an additional amount of 25% of the amounts then due *plus* any reasonable legal fees.” N.J.S. 34:15–28.1. (emphasis added). The court found that the word “shall” ordinarily denotes mandatory action and the preposition “plus” commonly means “increased by”, and determined that “the judge must award both the statutory penalty and a reasonable legal fee.” *Quereshi, supra*,

412 *N.J. Super.* at 498.

Having found attorney's fees mandatory, the court examined whether attorney fees granted under *N.J.S. 34:15–28.1* are limited by *N.J.S. 34:15–64(a)*. Subsection 64(a) provides that “[t]he official conducting any hearing under this chapter may allow to the party in whose favor judgment is entered, costs of witness fees and a reasonable attorney fee, not exceeding 20% of the judgment.” The court found the lack of a cap referenced in Subsection 28.1 dispositive. The court reasoned that the reasonableness standard in Subsection 28.1 “should reflect the actual cost to obtain the previously ordered benefits.” *Quereshi, supra*, 412 *N.J. Super.* at 502. In congruence with typical attorney's fees provisions, the proposed modification allows for reasonable attorney's fees and costs.

VI. WORK IN PROGRESS

A. Collateral Consequences of Criminal Convictions

In September 2011, the Commission authorized a thorough review of New Jersey's statutes and administrative code in order to compile a list of all collateral consequences of criminal convictions. The project was prompted by *In re D.H.*, 204 *N.J. 7* (2010), a case which struggled to harmonize the statute delimiting the effect of an order of expungement, *N.J.S. 2C:52-27*, with the statute mandating the forfeiture of public office upon a conviction for certain crimes, *N.J.S. 2C:51-2*. The *D.H.* Court held that the former had no effect on the latter.

Research is ongoing, and the Commission will ultimately assess whether any individual statutes imposing collateral consequences are in need of revision or, more broadly, whether there are sufficient opportunities for relief upon a convict's rehabilitation.

B. Equine Activities Liability Act

Beginning in 2011, New Jersey's Equine Activities Liability Act ("Equine Act") is being reviewed in light of the New Jersey Supreme Court's decision in *Hubner v. Spring Valley Equestrian Ctr.*, 203 N.J. 184 (2010) which found a latent ambiguity in the statute. The Legislature determined that equine activities are a significant contributor to the economy of the State, but are inherently dangerous. The goal of the Equine Act is to protect operators of equine activities from civil liability. The Act contains broad assumption-of-risk provisions for participants in equine activities with certain exceptions within which operator liability may be found. The Court in *Hubner* was required to reconcile the broad statutory language pertaining to inherent risks with the language providing exceptions to the protections available to operators. To do so, the Court considered other statutes involving the risks inherent in rollerskating and skiing.

In an effort to address the latent ambiguity found in the statute by the Court, research and drafting has begun on Section 9 of the Equine Act to consolidate related provisions and to modify it so that it more closely follows the structure of the Ski Act. Research continues and a Tentative Report is expected to be released in 2012.

C. Physical Force In Addition to Sexual Contact

In 2011, Staff began a project based on an Appellate Division case *State v. Triestman*, 416 N.J. Super. 195 (App. Div. 2010), which examined whether a conviction of criminal sexual contact in N.J.S. 2C:14-3(b) requires a level of physical force beyond that of the unauthorized sexual contact itself. The Court found that the unauthorized sexual contact alone was sufficient to uphold a conviction. After review, the Commission recognized a need to modify much of

the sexual assault statutes due to the growing number of common law interpretations since the last major change to Title 2C:14 in the 1970's.

Staff is continuing to research and draft a report to enhance the Commission's understanding of the sections of the current statute in need of revision. The report investigates the evolution of the sexual assault statutes through legislative reform and common law analyses. Staff expects a Tentative Report to be released in 2012, which will recommend modifications that reflect the manner in which the statutes are interpreted by New Jersey's courts.

D. Recording Mortgage Assignments

In 2011, the Commission began a project to examine the law regarding the recording of assignments of mortgages. The current law on mortgage recording provides a system for establishing the priority and enforceability of mortgages based on the recording of documents in the county land records. The system contemplates that each mortgage will be recorded shortly after it is executed, and that if the mortgage is transferred, each assignment will be recorded when it occurs.

Over the years, however, commercial practices with regard to mortgages have changed. Now, the entity that initiates the mortgage may well transfer it immediately and a typical mortgage will be transferred a number of times. Some mortgages become security for bonds and are held by a trustee for the bondholders. Others are held and traded through other investment vehicles. A mortgage is generally managed by a mortgage servicer that usually does not own the mortgage.

When practices in the industry began to change some years ago, banks tried to create a system that would obviate the need to prepare and file documents with each transfer. The system that developed works in many cases,

but it causes problems when it conflicts with traditional, chain of title, expectations. The most common example of such a problem arises in regard to satisfaction of mortgages. A property owner who seeks to pay off a mortgage gets a statement of the balance, and when it is paid, gets a satisfaction signed by a servicer. The land title records then indicate a mortgage held by one party and a satisfaction signed by another. This discrepancy causes an insecurity in land title that is foreign to the expectations of those with an interest in the land. A more severe problem concerns authority to foreclose a mortgage. Recent cases illustrate the difficulties associated with proving who holds the mortgage and has the authority to foreclose it.

While the existence of a problem is clear, the solution to it is not. What is needed is a system that will serve the purposes of the real estate recording system but is simple enough that lenders are likely to use it to record assignments. The Commission is consulting with a variety of knowledgeable persons involved in mortgage lending in the hope that a legislative solution can be devised.

E. Attorney Fees In Special Civil Part Actions

This project began in response to an Appellate Division decision in *Chase Bank USA, N.A. v. Staffenberg*, 419 N.J. Super. 386 (App. Div. 2011). In *Chase*, the Court examined whether attorney's fees are mandatory under N.J.S. 22A:2-42 in special civil actions, and if so, whether in-house counsel is precluded from recovering attorney's fees under N.J.S. 22A:2-42 by application of N.J.S. 17:3B-40 and N.J.S. 17:16C-42(d). The Appellate Division held that attorney's fees are mandatory under N.J.S. 22A:2-42, and that in-house counsel may receive attorney's fees because N.J.S. 17:3B-40 and N.J.S. 17:16C-42(d) are not applicable to N.J.S. 22A:2-42.

The project undertaken by the Commission is intended to clarify N.J.S.

22A:2-42, and reflect the court's reading of the statute in *Chase*. The project added language to clarify that attorney's fees are mandatory under *N.J.S. 22A:2-42*, and added language to clarify that attorney's fees under *N.J.S. 17:16C-42(d)* and *N.J.S. 17:3B-40* are qualitatively different than those awarded under *N.J.S. 22A:2-42*, and thus, do not prohibit the court from awarding attorney's fees to in-house counsel under *N.J.S. 22A:2-42*.

F. Title 39 – DWI

Various officials have asked the Commission to consider revising the provisions of Title 39 that pertain to driving while intoxicated, *N.J.S. 39:4-50 – 39:4-51b*. During the course of work on this project, Staff has undertaken a comprehensive review of the laws of all 50 states, Washington D.C., Puerto Rico, and the U.S. Virgin Islands to determine where New Jersey stands in relation to other states and territories on DUI/DWI policies, particularly with regard to the use of ignition interlock devices and the criminalization of DUI/DWI offenses.

New Jersey is one of the states that mandates the installation of ignition interlock devices for “high-BAC” first offenders (those with a blood alcohol content greater than .15). Currently, the New Jersey statute calls for the installation of the ignition interlock device in the vehicle principally operated by the offender if a driver is convicted of a first DWI offense with a blood alcohol level of .15% or greater. *N.J.S. 39:4-50; N.J.S. 39:4-50.17*.

There has been considerable modification of DWI law and policies in almost every state since the time that New Jersey enacted Ricci's Law (effective in January of 2010). According to the National Conference of State Legislatures State Traffic Legislation Database, the National Highway Traffic Safety Association, and the Governors Highway Safety Association, each one of the 50 states has either enacted or proposed legislation that modifies current impaired driving legislation since January 2010. In 2010, 61 bills were enacted in 28 states

that made changes to DWI laws. In 2011, approximately 50 bills were enacted in 23 states that made changes to the DWI laws.

Laws pertaining specifically to ignition interlock devices have recently been adopted in a number of states to mandate installation or to strengthen existing requirements for monitoring and installation practices. As of mid-2011, 49 states require the installation of ignition interlock devices for first or subsequent offenders (Alabama is the only state that does not mandate the installation of ignition interlock devices for any offenders). Eleven of those 49 states have mandatory ignition interlock device installation requirements for all DWI offenders, some of them include first offenders. Of the 28 states that made changes to DWI laws in 2010, at least 17 made specific changes to ignition interlock device requirements and of the more than 20 states that made changes to their DWI laws in 2011, at least nine states dealt specifically with changes to ignition interlock device laws.

Changes to the laws pertaining to ignition interlock devices (IIDs) vary considerably from state to state. Most recently-enacted legislation concerning ignition interlock devices deals with: increasing the length of time during which an IID must be installed; mandating installation for first-time or subsequent DUI offenders; modifying the reporting requirements for the IIDs, and “incentivizing” the installation of IIDs when their installation is not mandatory (for example, imposing a 90 day license suspension for a first-time DUI but offering the option of reducing the suspension to 30 days if the offender agrees to the installation of the IID for six months).

During the course of this project, the Commission has been asked to consider whether the criminalization of DWI would be useful or appropriate in New Jersey. Right now, New Jersey is one of only five states in the United States that does not criminalize DWI offenses under any circumstances. A 2010 National Council of State Legislatures report entitled “Criminal Status of State Drunk Driving Laws” was analyzed to determine New Jersey’s position compared

to the other states. When the laws of the fifty states, plus Washington, D.C., Puerto Rico and the U.S. Virgin Islands were considered, it was revealed that 47 jurisdictions criminalize drunk driving under some circumstances based on things like: whether the individual has prior DUIs; whether the individual has a prior criminal record; or the severity of the incident (was there an accident involving death or serious injury).

More than 20 bills were introduced during the last session of the New Jersey Legislature pertaining to drunk drivers or drunk driving. The proposals included in those bills included: (1) increasing the period of license suspension for certain drunk driving offenses; (2) requiring immediate suspension of the driver's license of an alleged drunk driver who causes a death; (3) criminalizing drunk driving at the level of the fifth or subsequent offense; (4) criminalizing DUI with a person 17 years of age or younger in the vehicle; (5) eliminating the downgrading of DWI offenses that occur more than 10 years after a previous conviction; (6) enhancing the penalties for drunk drivers with a BAC of .17% or greater; (7) requiring breath or a blood sample of drivers in motor vehicle accidents involving death or certain bodily injuries (another bill required breath or blood samples in accidents involving pedestrians); (8) requiring permanent driver's license suspension for a third drunk driving offense; (9) requiring mandatory jail time for certain DWI convictions involving a high-BAC offender; (10) requiring DWI offenders to wear an alcohol monitoring device; and (11) requiring that an IID be installed on a vehicle owned or leased by a drunk driver only *after* the period of suspension concludes.

There are other known difficulties with the current law that have not, to this time, been addressed by proposed legislation. These issues include the fact that, as a result of the way that the current law is drafted, some municipal court judges have said that they are constrained to order the installation of IIDs in cases where drivers who are multiple-time offenders were convicted of driving under the influence of drugs, not alcohol.

Staff continues its work on this project and, for its next draft of potential statutory language, seeks to incorporate the latest technological and legal developments as well as the recommendations of experts in this area. It is anticipated that a Tentative Report will be issued in 2012.

G. Uniform Collaborative Law Rules/Act

In 2009, the Uniform Law Commission (formerly NCCUSL), approved for adoption in all states the Uniform Collaborative Law Act (UCLA). The UCLA was amended in 2010 and re-titled the Uniform Collaborative Law Rules/Act (UCLR/A). The UCLR/A is intended to create a uniform framework for the use of collaborative law that provides important consumer protections and enforceable privilege provisions, including explicit informed-consent requirements which will enable parties to commence the process with an understanding of the costs and benefits of participation.

Collaborative law is a voluntary, non-adversarial settlement process, in which parties, with the assistance of their lawyers, negotiate mutually acceptable resolutions of their disputes without court involvement. In order to commence the process, the parties and their attorneys must agree, in writing, that they will collaborate in good faith and in a non-adversarial manner to settle their dispute, and that neither party will use the threat of going to court or withdrawing from the process as a means of forcing settlement or achieving a desired outcome. The hallmark of collaborative law is the lawyer disqualification clause whereby both parties agree that their attorney will be disqualified from court representation of the parties if the collaborative process should fail and the parties end up in an adversarial forum.

Although there is no New Jersey statute or rule pertaining to the collaborative law process at this time, identical bills proposing a collaborative law act for divorce proceedings were introduced in the New Jersey legislature in the 2004 and 2006 Legislative sessions. There are also at least six separate

organizations/associations of professionals who practice collaborative law in New Jersey as members of the International Academy of Collaborative Professionals. Collaborative law practice appears to be growing in New Jersey, especially in the family law field. The New Jersey Supreme Court Advisory Committee has made clear pronouncements regarding the limitations on the scope of the lawyer's representation posed by the disqualification clause in collaborative law agreements and the steps for determining whether such limitations are "reasonable" consistent with New Jersey practice. However, because of *Winberry v. Salisbury*, 5 N.J. 240 (1950) concerns, not all of the uniform law would be suitable for statutory enactment in New Jersey.

The Commission has directed Staff to draft statutory language that adopts useful portions of the UCLA while recognizing the *Winberry* concerns and ethical considerations. Staff anticipates that a draft Tentative Report will be available for consideration in March or April of 2012.

H. Uniform Principal and Income Act

Effective January 1, 2002, the New Jersey Legislature enacted a modified version of the Uniform Principal and Income Act as revised in 1997 by the Uniform Law Commission (formerly NCCUSL). The 2002 Act replaced the Revised Uniform Principal and Income Act adopted in 1991. See, *Assembly Banking and Insurance Committee Statement, N.J.S. 3B:19B-1*. The Act, as adopted in New Jersey, was very similar to the ULC Act, but differed in some respects.

The Commission briefly considered the Act in March 2008, when the State Bar Association asked that the Commission support its amendments (drafted by OLS) to the Act. The proposed amendments would have modified the language pertaining to the trustee's power to adjust between principal and income. A bill introduced in the 2008-2009 session incorporating those changes

was later withdrawn and the proposed changes were not enacted.

In 2009, the ULC recommended changes to the two different sections of the Act dealing with deferred compensation, annuities, and similar payments as well as income taxes and the adoption of a new section that includes transitional provisions. This project is a priority for the ULC. While the changes are small (in comparison to the size of the Act as a whole), they are recommended as important since they are designed to address tax problems caused by the version of the law currently in effect.

The State Bar Association recently indicated that it supports Commission work on the Act to incorporate those 2009 revisions and a Tentative Report is anticipated in mid-2012.