

MINUTES OF COMMISSION MEETING
November 17, 2004

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Commissioners Albert Burstein, Vito A. Gagliardi, Jr. Professor Bernard Bell of Rutgers Law School, Newark, attended on behalf of Commissioner Stuart Deutsch and Grace Bertone of McElroy, Deutsch & Mulvaney, attended on behalf of Commissioner Rayman Solomon.

Minutes

The minutes of the September meeting were accepted as submitted. The minutes of the October meeting were modified to delete reference to a Pennsylvania homestead exemption, and accepted with that change.

U.C.C. 7

Chairman Burstein indicated that the Commission had reviewed John Burke's memorandum on the subject and requested that Staff prepare a tentative report for the December meeting.

Medical Peer Review

Judith Ungar advised the Commission that Staff had received a response to the Draft Tentative Report from Dr. Robert Coates raised two issues in his email. Dr. Coates' response was distributed to the Commission. Mrs. Ungar explained that the definition issue can be clarified and made more explicit. Staff thought the language was clear, but Dr. Coates was not sure that the coverage of the proposed statutory language is as broad as Staff intended. Staff will redraft the section which should address the issue he raised. Mrs. Ungar advised that she had not come up with an example of the second point raised by Dr. Coates, and noted that the language Dr. Coates questioned was deemed appropriate for inclusion by Staff. John Cannel said that Staff had tracked the language of the cases in New Jersey, but that the act of drafting had made it more specific.

Chairman Burstein noted that the real issue is whether or not it is necessary to have a statute in this area or whether courts can evaluate matters on a case-by-case basis. Mr. Cannel suggested that New Jersey is the only state that does not have such a privilege and that, as a result, the physicians do not feel as secure as they would like to with regard to participating in peer review.

In response to a question from Chairman Burstein, Staff indicated that it was not aware of the existence of any studies which suggest that peer review in New Jersey works less well than in other states. Chairman Burstein noted that the vulnerability of physicians to hospital affiliation may be one argument for such a privilege. Commissioner Gagliardi suggested that the individuals engaged in the profession seem to feel that the peer review process works better when there is a codified privilege. He said that it the individuals who

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are reviewed, and who do the reviewing, feel that there is a benefit to the privilege, then it was his opinion that this is a project that should be completed to the best of the Commission's ability, and forwarded to the legislature and subject to debate.

Chairman Burstein said that the Commission had no objection to the project going out as a tentative report to the public that might like to comment on it, including the New Jersey Medical Society. He noted that there are arguments on both sides, and indicated that if the Commission is going to put out a proposed statute, he would like to have a sense that it will have a beneficial impact.

Commissioner Gagliardi pointed out a typographical error.

In Section 1, Chairman Burstein requested that surplusage be eliminated including the first three words "In this statute". The Commission directed Staff to reverse the order of subsections (a) and (b).

In Section 2, Professor Bell asked if testimony from a fact witness at trial could be asked if the person's testimony was consistent with what that person said at a peer review committee. It was suggested that to do so would be the same thing as asking a witness if the information she was giving was consistent with that provided to her lawyer or doctor. After considerable discussion, the Commission determined that any effort to permit such questioning would erode the privilege. The language contained in 2(c) will be moved to Section 3.

In Section 3, Chairman Burstein and Professor Bell suggested expanding 3(a) and (b) to apply when a doctor raises the issue in a counterclaim or as a defense. Professor Bell also suggested that in 3(a), clarifying that the privilege does not apply "unless the hospital's action is subject to de novo review". The Commission expressed concern about a situation in which a doctor has been accused of incompetence, denied privileges, and then tries to defend himself. The question of how a doctor would do so without using the peer review committee materials was raised. Professor Bell also raised the issue of what constitutes a waiver for the purposes of 3(d). Is releasing the testimony of one witness sufficient? Professor Bell also asked if waiver always has to be explicit, and whether partial waiver was permissible. Commissioner Gagliardi observed that there is an issue in these cases of the assurance of not only the accused, but of the other witnesses, that the information will be kept confidential. He suggested that permitting a waiver pursuant to 3(d) seems a little arbitrary. Mr. Cannel noted that without that section, it is not clear who owns the privilege. Commissioner Gagliardi said that, unlike other privileges, this one has many stakeholders.

In Section 4, the Commission discussed replacing the language "for the proper functions of" with "by". Mr. Cannel suggested that doing so may be subject to two meanings, explaining that if Dr. Smith, who is on a peer review committee, shows a report to patients to get business away from Dr. Jones, using "by" may not be strong enough.

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Commissioner Gagliardi suggested deleting “for the proper functions of” and ending that sentence with “by the committee for the purposes expressed in Section 1”.

Chairman Burstein suggested that this project not be released as a tentative report, and requested that Staff obtain more information about how the medical societies and peer review committees handle exceptions to the privilege for peer review materials. The Commission will consider a new draft at the December meeting.

Title 39

Laura Tharney told the Commission that she had been in contact with Sgt. Michael Brunson of the Traffic Safety Officers Association and was invited to meet with him on December 1st.

Ms. Tharney discussed the fact that there are New Jersey statutes dating from 1937 and 1964 that predated the federal regulations pertaining to motor vehicle safety standards and are not identical to the current federal standards. As a result, according to the federal language regarding pre-emption, the New Jersey statutes are pre-empted. An example is the New Jersey statutory language pertaining to brakes and stopping distances, which are less stringent than the federal standards. A more complicated situation is the New Jersey statutory language pertaining to window glazing. Federal regulations on the subject date from 1996 and in 1999, New Jersey passed a law permitting the tinting of windows for individuals who suffer from one of several listed medical conditions.

The Commission requested that Staff prepare a new draft of the pertinent statutory sections eliminating the New Jersey statutory language that is clearly inconsistent with the federal language dealing with exactly the same issue, then highlight with explanations areas that require additional consideration by the Commission. Chairman Burstein instructed Staff to include much more commentary than usual and to give examples.

Enforcement of Judgments

Chairman Burstein said that because of the serious issues that have been brought to the attention of the Commission on this matter, it does no harm to hold the matter until Professor Garland is here to provide and explain his views.

Recompilation

Mr. Cannel indicated he had put together the most important provisions that would be included in a reexamination of Title 1 and had faxed everything to the Office of Legislative Counsel in advance of the filing day, but had received no response. Chairman Burstein indicated that he would follow up with the Office of Legislative Counsel to ascertain whether this project is perceived as a good idea or not. Mr. Cannel indicated that he would try to have the first three chapters of Title 1 ready for the next meeting.

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Meeting Dates

Chairman Burstein acknowledged the difficulty of planning a year in advance, but asked if there were comments on the proposed meeting dates. Commissioner Gagliardi asked if the dates for 2005 could be tentatively approved and confirmation deferred to the January meeting. The Commission agreed to do so.

Miscellaneous

The next meeting date is December 16, 2004.