

MINUTES OF COMMISSION MEETING
April 17, 2008

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioner Albert Burstein, and Commissioner Andrew O. Bunn. Professor William Garland of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs and Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLC, attended on behalf of Commissioner Rayman Solomon.

Guests

Also in attendance were John Malaska, Esq. and Erin O’Leary, Esq. Director, Office of Legal Affairs, from the New Jersey Department of Children and Families who expressed an interest in the Commission’s Title 9 project.

Minutes

The Minutes of the meeting of March 20, 2008 were unanimously accepted as submitted.

Construction Lien Law

Marna Brown advised that Staff had received feedback from the American Arbitration Association (AAA) and both Charles Kenny, Esq. of Peckar & Abramson (representing contractors) and Ed Callahan, Jr., Esq. from Clancy, Callahan & Smith (representing subcontractors) and incorporated their comments into the current draft. Both attorneys asked if they could use the Commission’s draft tentative report as part of their annual ICLE seminar on Construction Lien Law. Ms. Brown expressed the hope that this would lead to significant feedback from a diverse group. The Commission agreed that the seminar feedback was important and directed Ms. Brown to attend the April 30th ICLE seminar.

Ms. Brown advised that there was a significant typo in Section 10 of the draft on pp 12-13. The underlined language should have been stricken as it changes the entire meaning of the section (although the comment to that section makes clear the language was to be deleted and all earlier versions were correct on this point.). This will be corrected on the next draft report.

In its comments, the AAA indicated that the definition of “residential” is not an issue for them as long as the definition is consistent and clear to claimants. AAA was more concerned with the filing requirements for residential construction liens and wanted to make sure that (1) separate deadlines be created for filing the Notice of Unpaid Balance (NUB) and the demand for arbitration and that (2) sufficient time exists for claimants to file the NUB and the demand and *still* have time for the arbitration before the 90-day window for lien claim filing concludes.

In response to the Commission's direction at a prior meeting, Ms. Brown was able to obtain a 50-state survey that had been collected by Mr. Callahan. Although her review of the survey was not completed at the time of the meeting, she had learned that most states do not distinguish between residential and commercial lien claims. In states that make the distinction, most define residential as having 4 units or fewer rather than the 3 or fewer currently included in the draft.

Commissioner Burstein noted that on p 4, as part of the "residential unit" definition, it would be useful to include a generic statement to make it clear that the definition includes new forms of residential development that may arise. Professor Garland suggested that one of the problems with the arbitration requirement is that some aspects of the arbitration process, such as the scheduling of the arbitration itself, are outside of the claimant's control. Ms. Brown pointed out that the current statute provides for a 30-day time limit for the arbitration to take place and AAA does not seem to have a problem with the scheduling of arbitration hearings. The problem, according to AAA, is that claimants file demands for arbitration far too close to the end of the 90-day period within which the lien claim must be filed. Staff included language in the draft that would allow sufficient time for the claimant to file the NUB, serve the demand for arbitration, participate in the arbitration and still be able to file the lien claim. Professor Garland advised that he will forward proposed language modifications to Staff.

Commissioner Bunn inquired about the consequences of missing a deadline along the way. Ms Brown explained that the filing of the NUB is a condition precedent to filing a lien claim in a residential construction context and that if you miss the NUB deadline, you cannot proceed.

Commissioner Gagliardi asked whether Staff has obtained feedback from a variety of interested parties. Ms. Brown explained that most of the comments received to this time came from AAA, an entity that represents individual claimants, and from attorneys who represent general contractors, subcontractors and claimants. Staff has not yet heard from developers, property owners, lenders or consumer groups. Commissioner Gagliardi asked that Staff broaden the pool of commenters on this project by reaching out to other groups. The Commission will wait to give its substantive comments until it obtains additional feedback.

Title 9

Mr. Cannel explained that the current Title 9 definition of "child abuse" is deficient because it does not distinguish between civil and criminal cases. Mr. Cannel explained that he had located and reviewed a website that gathered all of the American jurisdictions' definitions of "child abuse".

Chairman Gagliardi asked Ms. O'Leary from the New Jersey Department of Children and Families (DCF) whether DCF had department discussions regarding how precise the definition of child abuse is or should be. She replied that because the current definition was cumbersome,

because DCF worked with it definition daily, DCF Staff had grown accustomed to it in its current form. She expressed a desire on behalf of DCF to assist with the revision process, but added that she had no specific suggestions at the time of the meeting. Commissioner Gagliardi asked whether, like the universal agreement that “residential” should be clarified in the Construction Lien Law area, there was agreement that the definition of “child abuse” in Title 9 should be revised. Ms. O’Leary responded that well-established case law has defined child abuse and neglect over the years and DCF Staff are comfortable using the definitions that have evolved.

Mr. Cannel advised that Staff had received a number of telephone calls in the several days before the meeting regarding the Title 9 project and that these calls had confirmed that a distinction between the criminal and civil definitions of child abuse is needed. Mr. Cannel also spoke with representatives from Court Appointed Special Advocates for Children (CASA), the Law Guardian office and the Attorney General’s office and anticipates a broad range of input although it is not yet clear if consensus will be achieved.

Mr. Cannel asked that the Commission please give some attention to the redraft of the criminal law definition at this point since that was the only section of the draft that was far enough along for comment. Mr. Cannel explained that he had separated out any sexual component from the working definition to make the process easier. The Commission expressed the view that the Geneva Convention definition is vague and may pose constitutional issues but added that a combination of the Northern Marianas definition and the New York definition seemed promising. It was also agreed that a concept of “knowledge” or “recklessness” should be incorporated into any definition, and the phrase “allowing to be inflicted” was important language. Commissioner Burstein suggested that the word “protracted” be replaced. A revised draft will be provided for the next meeting.

Pejorative Terms

Mr. Cannel advised that Staff had adopted Commissioner Pressler’s approach in this most recent draft, which was that the Commission must not only eliminate all pejorative terms, but also clean up the language of the statutory sections containing those terms so that it is readable and current. When asked whether Staff felt all pejorative terms had been addressed, Ms. Brown explained that Staff had attempted to do so and had searched variations of the pejorative terms “insane” and “idiot”, including “feble-minded”, “imbecile”, “stupid”, etc., in order to cast a wide net in searching for terms that should be replaced. Commissioner Burstein asked whether all of the search terms that Staff used focused on the mental element and Ms. Brown explained that they did.

Professor Garland noted that on p. 8, in section 17:4-9.1, there was a reference to “lunatics” that should be removed. Chairman Gagliardi also noted that in section 30:9-6, the words “board of chosen freeholders” had been removed and should be reinserted. Professor

Garland noted that section 3B:13-26 refers to heirs of an individual that is still living, which should be corrected and that section 19:4-1(8) refers to laws of states, but not other jurisdictions of the U.S. Mr. Cannel said that the word “territory” would be added. Commissioner Burstein also noted that the term “committeeman” right before the “estates of lunatics” then also should be changed to make it gender neutral.

The Commission determined that when Staff modifies a statutory section, it should do so thoroughly, changing all language that is incorrect, outdated or superfluous. Staff will review the selected statutory sections again to make sure that all pejorative terms relating to the constitutional amendment are addressed and that all of the language in those references is also made gender neutral, clear and contemporary. It was agreed that change of references to “mental retardation” will not be included in this project and will be dealt with separately at a later date.

Title 22

Laura Tharney explained that the current Title 22 revisions were not forwarded to the Commission as planned because Staff had received more detailed informal comments from the AOC than anticipated. She explained that the comments received were very helpful and that she would incorporate the comments, add new sections and rearrange old sections as necessary in advance of the May Commission meeting.

Uniform Trade Secrets Act

Ms. Brown said that she had received very thoughtful feedback from James Flynn, Esq. of Epstein Becker in Newark and Joseph P. Scorese, an Intellectual Property Professor at Rutgers Law School. Mr. Flynn provided very detailed and useful information and proposed changes to the current uniform law. He was in favor of adopting the uniform law, but was concerned with preserving what was good in New Jersey law common law, specifically the *Lamorte* decision.

Chairman Gagliardi asked whether Staff needed any input from the Commission at this time. Mr. Cannel asked whether the Commission believed this was a viable project and that Staff should go ahead and prepare a tentative report, including any proposed modifications to the current uniform law. The Commission agreed that the project was viable and Staff should proceed with a tentative report.

Title 39

Ms. Tharney updated the Commission regarding the status of this project, explaining that she has received helpful comments from county and municipal engineers and from police officers. She advised that one of the presiding municipal court judges had contacted her with comments and agreed to answer any questions. She also mentioned that she had attended meetings of the Intoxicated Driver Program (IDP) and the Intoxicated Driver Resource Centers

(IDRC). She explained that she had been advised of some suggestions for revisions in the DWI area.

Ms. Tharney also conveyed two requests made for extensions of the May 15th deadline for public comment. The first request was from the MVC in the form of a detailed e-mail explaining the time they have allocated to this project, the level of their review and their commitment to the project. The Commission was pleased to hear of the attention being given to the project and agreed that an extension of time for the comments of the MVC was appropriate so long as the Commission has the comments by August to allow time for Ms. Tharney to incorporate them into a final draft in time for its September meeting. The Commission expressed a preference for receiving the comments in an ongoing fashion so that Ms. Tharney has the opportunity to work with them in sections rather than being receiving all comments shortly before the deadline for the completion of the entire final report. The League of Municipalities also requested an extension of the comment period, explaining that the League had established a committee including municipal engineers, police chiefs and municipal attorneys to review this project. The Commission agreed to this request as well, asking Ms. Tharney to work with the League to structure the receipt of comments as with the MVC.

Annual Report

The Commission accepted the draft Report. Staff will give the Commissioners the entire report on disks at the next meeting.

Miscellaneous

Mr. Cannel advised that the draft tentative of the Poor Law was in its final stages and would be on the next agenda.

Ms. Tharney addressed the materials that had been forwarded to the Commissioners directly by a member of the public, explaining that the proposed law was not promulgated by NCCUSL, but by a private group. She briefly summarized some of the provisions of the proposed law. The Commission declined to take any action regarding this proposed law at this time.

A motion to adjourn was made by Commissioner Bunn and seconded by Professor Garland.

The next meeting of the Commission is scheduled for Thursday, May 15, 2008.