

MINUTES OF COMMISSION MEETING
March 18, 2010

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 Andrew Bunn and Commissioner Albert Burstein. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr., Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon and Timothy J. Prol, Legislative Aide to Senator Nicholas P. Scutari, attended on Senator Scutari's behalf.

Minutes

The Minutes of the February 2010 meeting were approved subject to corrections suggested by the Commission. On page 3, in the largest paragraph that begins with Judge Fast's comment, on the third line from the bottom of the paragraph, the word "effected" should replace "affected". On page 1, in the first full paragraph pertaining to Commissioner Pressler, on the sixth line from the beginning of the paragraph, the word "were" should be "was". With those changes, the Minutes were approved by the Commission on motion by Commissioner Bunn seconded by Commissioner Burstein.

New Commissioner

The Commission formally welcomed new Commissioner Edward J. Kologi, Esq., an experienced attorney from Linden who was recommended by Senator Scutari to the Senate President. Chairman Gagliardi spoke highly of Commissioner Kologi, who unfortunately could not attend this meeting as a result of an illness, and the Commission members look forward to meeting him in April.

Title 39

Laura Tharney began the review of the Title 39 project by summarizing some of the history and the goals of the project for those on the Commission who were not present for the initial phases of this long-term project. She explained that, in advance of the meeting, she had received the balance of the chapters from MVC with comments and, at this point, had a draft that had been completely reviewed by MVC.

In Title 39, the statutory text alone, exclusive of comments and case law annotations, exceeds 500 pages. The statute presently includes sections enacted in every decade since the 1920s. The scope of the Title is broad. It includes the organization and structure of the Motor Vehicle Commission, the powers and duties of counties and local

entities with regard to traffic regulation and the requirements regarding licensing, registration, equipment and the operation of vehicles. It also includes traffic regulation, enforcement, interstate operation of vehicles, pedestrians, bicycles, insurance, inspections, transfer of vehicles, junk yards and driving schools. Due to the size and scope of the Title, changes made throughout the years have resulted in duplicative and inconsistent language. Ms. Tharney said that in recent years, there have been more than 200 changes to the statute in a given year, and there were 30 changes made to the statute in January of this year alone.

Ms. Tharney explained that as the body of law has grown, it has proven more difficult to determine where new sections should be added when enacted and to find those new provisions. Also, language is added frequently, but removed very infrequently. As a result, statutes that no longer have practical application still remain, as do sections of the law that have been superseded or rendered superfluous.

This project was begun because Title 39 is less accessible than it should be in light of the large number of residents of New Jersey and other states on whom it has an impact. Ms. Tharney said that the statute should be clear and easily understood and when the project began it was neither of those things. As a result of reorganization and consolidation, the statute is more accessible now. From the beginning of the project, the Commission was clear in its position that the focus of the revision of this Title was not substantive change, although some substance was changed. Instead, the focus was to consolidate the language, eliminate duplication and inconsistencies, and group related provisions together.

With limited exceptions noted in the Memorandum distributed in advance of the meeting, the Motor Vehicle Commission (MVC) has not objected to the consolidation, the grouping of provisions, or the elimination of duplicative or inconsistent language. While expressing some concerns about the chapter concerning Permits, Licenses and Identification Cards, the MVC did not object to the Commission's separation of the licensing and registration provisions which are currently jumbled together in approximately 120 sections of the statute, mixed together with provisions pertaining to commercial driver's licenses, touring privileges, tires and other subjects in no ascertainable order.

In the draft, efforts were made to streamline the language so that related provisions are easier to find and understand. Subsection lettering and numbering were added to lengthy sections for ease of location of review. Repetitive language was removed or limited. Stylistic differences, reflecting the era in which the sections were enacted, were modified to make the language more consistent. Efforts were made to remove or clarify confusing language. References to "this Act" or "this chapter" were clarified since, in some cases, new sections have been inserted between provisions

comprising an earlier “Act”. The language was modified to make it gender neutral. References to outdated titles and entities were removed or revised. Ultimately, when it came down to issues of specific language, if the MVC expressed a strong preference for certain language, Staff generally incorporated their requests. Ms. Tharney explained that, for clarity and ease of review, any time she did not follow a recommendation made by the MVC, she noted it in the comment to the section and explained why so that anyone reviewing the project would be aware of any such deviations from MVC recommendations.

Ms. Tharney reviewed for the Commission the list of entities to which the project was provided for comment, and the list of individuals and entities from whom comments had been received during the course of the project.

Ms. Tharney’s first request for guidance from the Commission was whether Public Law references that had been removed from the draft needed to be reinserted. The Commission indicated that they need not be reinserted.

In Volume I, Ms. Tharney explained that Staff was in the process of revising the chapter pertaining to Permits, Licenses and Identification Cards (PLI) to incorporate the comments from MVC. She said that MVC reviewers had serious concerns about consolidating source laws for unrelated items, like the two forms of permits (learners’ permits and examination permits) and that Staff was undoing the consolidation troubling to the MVC. She explained that Staff did not want to return the chapter entirely to its current form, and that there were 12 changes that Staff wished to retain.

The Commission authorized Staff to retain the inclusion of a “Definitions” section in the PLI chapter. Since the consolidation of the two forms of permits was problematic, the definition of “permit” will be removed, but the other two definitions (for “endorsement” and “supervising passenger”) will remain. Commissioner Burstein said that it would be useful to explain in the Comment why these terms are defined in this chapter, rather than in the definition section applicable to the entire Title.

The Commission also approved the inclusion of a new section entitled “Driving in New Jersey” which states that a license or permit is required to drive in this State unless the driver is participating in an approved driving course. The language of that section will be modified to reference both types of permits and to indicate that the driver must be in compliance with the conditions imposed by the permits.

The modification of the language pertaining to digitized pictures on permits to mirror the language pertaining to digitized pictures on licenses was also acceptable to the Commission. The language in question pertains to the requirement of a photo on the license or permit, the manner in which such records may be stored, the fact that a new photograph may be required if the individual has cosmetic surgery and substantially alters

their facial features, and other provisions pertaining to the safeguarding and use of the digital photograph.

The section consolidating the requirements for a provisional driver's license, and clarifying that the provisional license does not automatically become a basic license was acceptable to the Commission. Presently, the licensee has to go to MVC and apply for a basic license once he or she qualifies. If the licensee does not do this, he or she may be issued a ticket for violating the requirements and limitations of a provisional license even if they are entitled to a basic license. Chairman Gagliardi clarified that this new language simply articulated the current rule. Commissioner Bunn asked if a fee was required to be paid to change from a provisional license to a basic license, and Ms. Tharney said that there was a fee. Commissioner Prol noted that a registration could be renewed online, and Professor Bell suggested that if the Commission objected to the requirement that a licensee go to a MVC office to obtain a basic license, something could be included in the comment. Chairman Gagliardi suggested modifying the language and Ms. Tharney's proposed language reading "must receive from the MVC" rather than "must return to the MVC" was approved by the Commission as appropriate and technology neutral.

The Commission also approved the inclusion of a new section in the draft listing the available license classifications, which Mr. Cannel explained were not obvious in the current law.

The section consolidating the requirements for obtaining a basic license was approved by the Commission. Professor Bell expressed concerns regarding the removal, as executed, of the language calling for the written test to be revised to include language regarding alcohol, drug use, subjects relevant to youthful drivers and organ donation. In order to avoid any confusion caused by the removal of that language, the draft will be revised to say that the "exam shall include questions pertaining to the impact of alcohol, drug use and subjects relevant to youthful drivers" to dispel any impression that those questions should be removed from the exam. In addition, the Commission approved the language, taken from the CDL chapter, permitting the administration of oral, rather than written, knowledge tests if the applicant demonstrates an inability to comprehend a written test. Presently, this option is available only to students diagnosed with a deficiency or disability and the draft would expand the option to non-students as well.

The section pertaining to the issuance of a license was initially modified to remove in subsection (a) confusing language that suggested that an applicant had to surrender a license from another jurisdiction upon receipt of a New Jersey license but then said that if the applicant failed to do so, the MVC should refuse to issue the New Jersey license. The draft was changed to replace "upon receipt of" to "concurrently with the issuance of" to further clarify the language. Subsection (b) was changed at the request of the Commission to replace "may" in the last line with "shall" in response to

comments from the MVC.

Consolidating the two short provisions pertaining to motorcycle licenses into one section met with Commission approval as did the consolidation of the two sections pertaining to agricultural licenses. The Commission also approved two changes to the provisions regarding agricultural licenses. The first change requires good cause to deny an agricultural license. The second says that an applicant may obtain a provisional license after an agricultural license without completing the requirements for such a license but must demonstrate sufficient experience and ability.

In the section pertaining to the imposition of restrictions or conditions on a license, at the request of the Commission the language will be modified to require notice and an opportunity to be heard, rather than notice and a hearing as appeared in the draft.

The consolidation of eight sections pertaining to the design of the driver's license and the addition of "Organ donor" in the title of the section were approved by the Commission. The Commission also approved the consolidation of the six sections of the current statute pertaining to the misuse of an identification card as well as making those sections applicable to a license or permit as long as Staff modifies the language of the section to specifically reference both types of permits for the sake of clarity.

The Commission approved the use of the language requested by the MVC in the purpose section of the CDL chapter, and will review the issue of the modification of the term "felony" since it does not comport with New Jersey's current criminal law.

Ms. Tharney reviewed the partial consolidation of the numerous license plate sections in the chapter pertaining to license plates and explained that the MVC had requested that the sections not be consolidated. Commissioner Prol explained that a bill had been drafted that would eliminate some of MVC's responsibility with regard to license plates which raise funds for particular entities. The bill would call for payments to be made to the group directly, eliminating the need for MVC to receive the funds and then pay them to the group slated to receive the funds.

Mr. Cannel explained that Ms. Tharney had grouped the license plates into categories to limit the number of statutory sections which require modification or addition to the statute each time a new license plate is added. Commissioner Prol noted that the statutory language regarding various license plate types was very repetitive. The Commission approved the consolidation of the license plate sections and Ms. Tharney indicated that the comment sections would clearly reflect what had been done and why.

Since there were questions about the need to include references to the federal regulations in the chapters pertaining to equipment, Staff will obtain additional information and present this issue to the Commission in April.

The Commission reviewed the classification system for offenses and penalties that is included in the draft. Ms. Tharney explained that presently, the statutory sections that specify offenses almost all include the penalty to be imposed in the statutory section as well. The Commission's new penalty classification system leaves the descriptions of the offenses in individual sections of the statute, but instead of including a penalty in that section, the statute identifies the offense by class (Class A through E). The penalty associated with each class is now contained in the "General Penalty" chapter. Commissioner Prol mentioned the Senate Judiciary Committee's recent consideration of issues pertaining to offenses and penalties. Chairman Gagliardi clarified that the Commission's work in this area was not simply an organizational issue, but that the Commission carefully considered the penalties and changed those that appeared to be inconsistent with those imposed for similar offenses. Ms. Tharney explained her understanding that the MVC position on this issue is that a change in penalties or their classification was a policy determination to be left the Legislature.

In Volume II, Ms. Tharney raised the issue of adding a reference to enforcement of the Title on quasi-public property in the "Application" chapter. She explained that the term was currently used but not defined in the Title, and that police officers had raised the issue with her in response to problems that they had experienced on college campuses, in supermarket and mall parking lots, and on roads not yet dedicated or accepted. Ms. Tharney explained that she was aware of 14 sections of the Title that apply not only on public, but sometimes on quasi-public or private property. Other than that, the Title is deemed to apply only to public property. She explained the case law determinations pertaining to quasi-public property, like parking garages.

Mr. Cannel said that it is his impression that this was an important and difficult area as there are more and more undedicated streets that function for every purpose as if they were public streets. Commissioner Bunn expressed concern about imposing an extra burden on police officers for areas not currently within their duty to control. Professor Bell said that as a presumptive matter, traffic regulation is desirable in places in which the public has access, but if the concept of "quasi-public" is not well-defined, then neither police nor citizens will know what a quasi-public area is and whether the law applies to any particular area.

Ms. Tharney reviewed with the Commission the current applicability of the Title, and the non-public areas in which it is enforced. Commissioner Burstein said that there are safety issues that would be impacted by any change to this area of the law. Mr. Cannel agreed, suggesting that while there might not be general support for allowing signs and signals installed by private entities to have the force of law, there might be considerable support for general driving restrictions. Commissioner Prol asked if making the Title applicable to quasi-public property would mean that a motorist cutting across an empty parking lot in the middle of the night would get a ticket. Mr. Cannel suggested

that a ticket for careless driving is applicable on quasi-public property and is always discretionary with the officer. Commission members asked if the current statute contained provisions allowing a private owner to request police enforcement on private or quasi-public property and Ms. Tharney responded that there is a statute, 39:4-8.10 that allows non-profit entities to make an application to have Title 39 apply to semi-private roads, driveways, etc.

Commissioner Bunn said that the Commission should have guidance from the police on this issue. If there are areas not currently included in the statute that police officers deem essential to include, the Commission could consider only those areas so that the Commission did not set in motion something that does not have police support.

With regard to the chapter “Powers and Duties of the Commissioner of Transportation, Municipalities, Counties and Highway Commissioner”, the Commission authorized Staff to review the more streamlined language included in the Memorandum and then retain that language as long as it contained all of the critical components.

The Commission considered the appropriate penalty for careless driving in accord with the MVC comment that one be included in the relevant statutory section. After reviewing the penalties imposed for similar offenses and the new penalty classifications, the Commission determined that careless driving should be included with the Class D offenses.

In the “Accidents and Reports” chapter, the Commission had increased the monetary threshold for reporting in light of the fact that the dollar amounts in the current statute did not reflect substantial damage. The MVC comments suggested returning to the original numbers. Commissioner Bunn suggested that it was not realistic to expect motorists to know what these numbers are and Professor Bell asked if the numbers were ever indexed. Ms. Tharney said that the numbers in Title 39 were not indexed. Chairman Gagliardi asked Staff to revise both sections to eliminate specific dollar amounts and replace those amounts with a reference to “significant damage” or “substantial damage” or some other language that reflects the goal of the statute without including numbers.

With regard to the “Handicapped and Mentally Retarded Persons” chapter, the Commission authorized Ms. Tharney to use the language from the Commission’s previous Pejorative Terms project in lieu of the language presently included in the statute.

In the chapter pertaining to bicycles, rollerskates and skateboards, Ms. Tharney explained that there were two definitions of bicycle presently contained in the statute that are not identical, which appears to be unnecessarily confusing. She explained that she had attended a meeting of the Bicycle and Pedestrian Advisory Council and had obtained from the Committee a draft of a different definition of bicycle that differs from the one

currently included in the draft. The Commission authorized Ms. Tharney to draft a revised and improved definition of bicycle for the next meeting and Commissioner Bunn recommended that Ms. Tharney review the definition of bicycle used in other states for guidance. The Commission also authorized the inclusion of a definition of skateboard and a review of the statute to make sure electric wheelchairs are addressed.

In “Horses and Horse-drawn Vehicles”, the Commission authorized Ms. Tharney to retain the shortened chapter on this issue, but requested that she redraft section g. pertaining to the removal of equipment from a horse, for the next meeting.

In Volume III, the Commission authorized Ms. Tharney to retain the consolidated sections in the “Interstate Compact” and “Nonresident Violator Compact” chapters after the confirming that there were no changes to the statutory language other than the consolidation.

The Commission will consider a revised draft in April and will then be in a position to release Title 39 as a final report.

Title 2A – Causes of Action

Ms. Tharney explained that changes were made in response to the comments and requests of the Commission at the last meeting, and that the changes appeared on pages 3, 5, 9 and 11 of the revised draft. Commissioner Burstein said that the changes that appeared on page 3 of the draft in response to the issues that he raised at the last meeting were appropriate and adequate to flag the matter for Legislative consideration.

Commissioner Bunn raised a question regarding 2A:32-1, Debts or Obligations Fraudulently Incurred. He said that the draft language was not clear regarding the remedies available to an injured party and whether the remedy is rescission of the contract and recovery of monies paid, or recovery of the money or property obtained as a result of the fraud, or suing on the contract to recover damages resulting from the fraudulent activities. The language does not specify whether an injured party is eligible to obtain contractual damages, the benefit of the bargain or out-of-pocket losses.

Ms. Tharney indicated that the language in question was taken from the current statute. Commissioner Bunn asked if it allowed for a double recovery and Ms. Tharney explained that it was her impression that it simply provided an option for the injured party, enabling the party to pursue alternate forms of relief. When Commissioner Bunn asked why the modification of this section of the language was necessary, Mr. Cannel pointed out that the federal courts had caused the underlying problem by interpreting the statutes differently than the state courts.

Commissioner Burstein asked about the adequacy of the body of case law on this

issue, questioning why the federal court decisions would be particularly significant in state courts.

Commissioner Bunn said that the last sentence in the first subsection is confusing since it seems to suggest that you are suing on the contract for damages sounding in fraud. Professor Bell suggested that eliminating the last six words in the sentence in question might solve the problem. Commissioner Bunn said that the language in issue should just say “sue for damages” without mentioning contract or fraud because the current phrasing is an invitation to mischief. Ms. Tharney explained that it was problematic that the state cases in this area predate the federal cases. Staff will redraft this provision for the next meeting after examining the case law to determine what the courts have said about alternative theories of damages.

On page 9, the comment to the statutory sections pertaining to injury or losses resulting from mob violence or riots was modified in response to a request from Professor Bell at the last meeting. Professor Bell will review the language once again and if he would like to see additional changes or explanation, he will advise Staff in advance of the next meeting.

The final change in the draft appeared on page 11 and concerned the question of field preemption for the naturalization statutes. Based on research conducted by Staff, Ms. Tharney explained that field preemption was not always clear, but that it seemed as though the field of naturalization had, in fact, been preempted by federal law. The Commission accepted that the field was preempted for purposes of the project and Staff will revise the language accordingly. The Commission will revisit the issue raised by Commissioner Bunn at the next meeting.

Durable Power of Attorney

Marna Brown explained her need for an additional 30 days to incorporate comments just received and also to give commenters an opportunity to review each other’s comments since the last version of the draft final report. She noted that she was pleased to have received a variety of comments in advance of the meeting. One issue that had arisen repeatedly is the question of how much formality should be required for the execution of a durable power of attorney. The majority of commenters have agreed that two witnesses and a notary should be required, the equivalent of the level of formality required for a self-proving Will. Other commenters have suggested that such a level of formality was too burdensome, especially for small law practice. Ms. Brown expressed her understanding that the Commission had directed that a greater degree of formality was appropriate and that she would retain that degree of formality in the next version unless the Commission otherwise directs. She did note that the current statute pertaining to execution of advanced health care directives provided an alternative: that the advanced

health care directive shall be signed and dated in the presence of two subscribing adult witnesses, or alternatively, acknowledged by the declarant before a notary, attorney or other person authorized to administer oaths. Perhaps an alternative option for execution could be considered here.

A further revised version of the act would reflect all comments already received as well as further comments which she anticipated receiving in the coming weeks.

Uniform Real Property Transfer On Death Act (URPTODA)

Chairman Gagliardi asked whether the Commission should embrace URPTODA or wait and not do anything at this time. Ms. Brown indicated that she needed feedback from commenters before going forward. Her sense was that other states might have better language than the uniform law and that the Commission may wish to follow other state statutes rather than the uniform law.

Miscellaneous

The next Commission meeting is scheduled for April 15, 2010.

In response to a question posed by Ms. Brown, Chairman Gagliardi indicated that the Landlord/Tenant project should not be listed on the agenda for the April meeting. The Commission was already scheduled to address Title 39 and release the Final Report on that project as well as consider release of Final Reports on Durable Power of Attorney and Title 9 (Parentage) and a Tentative Report on Title 2A (Civil Causes of Action). Chairman Gagliardi explained that in order to give each of these projects sufficient time and consideration, the Landlord/Tenant project would be addressed at the May meeting.