

MINUTES OF COMMISSION MEETING

July 21, 2011

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 Edward J. Kologi. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Minutes

Chairman Gagliardi suggested a change to the comment in last month's minutes regarding the repealer section. Commissioner Bunn also noted a typographical error on page 4 – the word “statute” should replace the word “statue” in the third paragraph. Subject to those changes, Commissioner Bunn made a motion to approve the minutes, seconded by Professor Bulbulia and the minutes were unanimously approved.

N.J.S. 14A:5-28 – Books and Records

Keith Ronan explained that he had contacted the Chair of the Business Section of the State Bar Association, Gianfranco Pietrafesa, for comments and that he thought the Commission should have the benefit of the Bar Section's comments before this report is released in final form. He expects to hear from Mr. Pietrafesa in September on recommendations for purposed language, especially the section that makes the law applicable only to companies that are incorporated in New Jersey. He asked if the Commission would refrain from releasing the final report at this time and the Commission agreed to wait until after the SBA comments are received. Commissioner Bunn noted that on page 5, it is not clear what is the antecedent of the word “its” in the underlined phrase, “meeting of its”. He suggested the word “corporation” or “corporations” be inserted there.

General Repealer

Chairman Gagliardi noted that the changes had been made from the last meeting. Commissioner Bunn questioned whether the Commission would want to repeal the law regarding low flying air shows over crowds that endanger the public. Chairman Gagliardi asked how this particular statute ended up on the list. Mr. Cannel said that this statute was raised by OLS – it regulates not dropping anything from an airplane other than loose sand and water. Although the law dates back to the 1920s, that does not mean that it necessarily should be repealed. Chairman Gagliardi stated that this statute did not seem anachronistic on its face and he suggested that Staff find out why OLS felt it should be included before finalizing the report. Mr. Cannel said he would flag this provision for comments by people in transportation. Commissioner Kologi moved to release the report

as a tentative, which was seconded by Commissioner Bunn. The report was released by the Commission as a tentative report.

Title 39 - Driving While Intoxicated

Christopher Cavaiola reviewed with the Commission a chart that he prepared comparing certain aspects of New Jersey's DWI law with the laws in the other 49 states plus the District of Columbia, Puerto Rico and the United States Virgin Islands. Commissioner Kologi questioned the purpose of putting an ignition interlock device (IID) on a vehicle during a license suspension period since the person who has the primary use of that vehicle is not able to operate it pursuant to the statute. Ms. Tharney stated that this was an issue that Senator Scutari had raised and introduced a bill. She explained that the law posed real practical problems since an IID requires that the vehicle be taken to the IID installer every 60 days for a download of the information from the IID's computer. It is not at all clear how an individual with a suspended license can comply with this requirement.

Commissioner Bunn asked whether anyone followed this law. Ms. Tharney said that based on information supplied by IID installers, there are some people who do. Commissioner Kologi noted that there is no clear enforcement of it. Ms. Tharney agreed that there is not currently any monitoring of the information generated by the IIDs in New Jersey and noted that while there are an increasing number of interlocks being ordered, the number is substantially less than the number of DWI convictions for which these devices may be appropriate. Commissioner Bunn asked whether IIDs are ordered by the Court and then not installed. Commissioner Kologi said that in some cases, the device is just not ordered, the file is closed by the Court, and that is it. If there has to be follow-up, the municipal court would have to keep the file open. Ms. Tharney explained that the information that she has received is inconsistent – some individuals have said that IID providers supply certifications which are required to be provided to the MVC before a license can be restored, while other commenters have suggested that the MVC does not check this information.

Referring to the chart distributed to the Commission, Mr. Cavaiola explained that 47 jurisdictions criminalize DWI offenses (at least at some level, some, for example, criminalize only second or third and subsequent offenses) and only five jurisdictions (including New Jersey) that do not criminalize DWI offenses under any circumstances. Twenty-eight jurisdictions criminalize DWI for the third and subsequent offenses and 15 jurisdictions criminalize for the fourth and subsequent offenses. Ms. Tharney explained that there may be support for some level of criminalization in New Jersey, but that this is an issue that must be carefully considered. One potential benefit of criminalization is that probation provides a mechanism for monitoring which New Jersey now lacks (as far as

Staff has been able to determine, all other states that use IIDs monitor the information generated by the devices).

Commissioner Bunn said that if DWI offenses are criminalized, then the alleged offenders would get a trial in the Superior Court with a jury. Commissioner Kologi said that the defense would be aided by criminalization since things now prohibited in municipal court, including pre-trial intervention, would be available. Ms. Tharney pointed out that if DWI were criminalized, there would also be collateral consequences that need to be considered, including consequences for immigration, for example. In addition, there are associated costs to consider.

Mr. Cavaiola said that with regard to the treatment of first offenders, the incarceration period ranges from no incarceration at all (in Maine and New Hampshire) to two years (in Vermont). Most jurisdictions (14 of them) require six months or (13 jurisdictions) require one year. For first offenses in New Jersey, the maximum incarceration period is 30 days, well below the maximum imposed by other states.

Mr. Cavaiola explained that, as with other aspects of DWI law, the number of days of suspension imposed for a DWI offense varies. Two days are required in Washington, DC, and one year is required in Georgia. In most states, the maximum is 90 days for suspension or revocation. New Jersey requires three months to one year of license suspension for a first-time DWI offense.

Mr. Cavaiola explained the ranges applicable to second and subsequent offenders in other states and in New Jersey. In New Jersey, for a second DWI offense that occurs within 10 years of the first offense, is \$1,000 with \$2,000 of additional fees, and 40 hours to 90 days imprisonment, plus community service and an additional educational component required through the Intoxicated Driver Resource Centers. Commissioner Bunn asked whether all of this is imposed or the Judge has some discretion. Mr. Cavaiola explained that fines and fees are required, as is the two-year license suspension and the educational component. The imprisonment is discretionary.

Commissioner Kologi said that if the IDRC determines you have a big drinking problem and you need help, they can impose an administrative extension of education hours, but that is not in the statute. Ms. Tharney noted that, in addition to the statute, there is also information in the regulations, but that there are instances in which neither the statute nor the regulations are an exact match for what actually happens. Commissioner Kologi asked what the enabling statute is to permit the IDRC to add on extra hours of IDRC time. Ms. Tharney said that Staff was not sure, but will review the issue to find out.

Mr. Cavaiola said that with regard to the ignition interlock devices, the period that they are required varies by state. Some jurisdictions set minimum interlock time that the

device has to be installed and some just set a maximum amount of time; the remaining states set a range between the two and other states provide judicial discretion and do not specify the amount of time that the device must be installed. Ms. Tharney added that some states have a system of compliance-based release from their programs.

Commissioner Bunn asked whether the person has to self-report regarding their experience with the IID. Ms. Tharney replied that all states require that the person go, generally to the IID installer location, every 30 or 60 days so that the information from the IID computer can be downloaded. This information contains detailed records regarding all attempts to start the vehicle, results of rolling retests, instances in which the individual is precluded from starting the vehicle, etc. With regard to vehicle starts, New Jersey's standard is the highest in the nation, allowing an individual whose blood-alcohol content registers .05 to still start the car. Ms. Tharney explained that in states that do compliance-based monitoring, some of them extend the period of required IID usage based on compliance – requiring, for example, a period of three consecutive months with no “lock-outs” and no measurable BAC readings before the IID will be removed from the vehicle.

Commissioner Kologi asked how the IID knows who is blowing into it and Ms. Tharney said that the old machines do not know but the newer (more expensive machines that are not routinely installed for first offenders), have cameras that photograph the person blowing in to the machine. The newer machines have a variety of features that the older machines do not, including GPS capability and the ability of the machine to be programmed to contact the police if the person refuses to blow into it or fails a rolling retest.

Mr. Cavaiola explained that 49 jurisdictions currently mandate installation of the IID for first or subsequent offenders; of those, only 11 mandate installation for a first offense but other states seem to be moving towards such a requirement. Twenty-one jurisdictions leave installation of an IID and its duration to the discretion of the judge.

In New Jersey, for high BAC offenders, the IID is mandated. When mandated, the IID is also required during the period of license suspension, before the license is restored. Ms. Tharney explained that such a requirement is a concern, particularly during subsequent offenses for which a suspension period could be 10 years, during which time the offender cannot legally drive the car but is required to pay the fees associated with the IID and appear every 60 days at the location of the IID installer for download of the device information. Ms. Tharney explained that she has heard that it is common for offenders to register their vehicles in the names of others so they do not have to comply with these requirements.

Commissioner Bunn asked whether if you bring a car into a parking lot, the

parking attendant must blow into the interlock device. Ms. Tharney said yes. She explained, however, that while there are inconveniences associated with the installation and use of the device, a number of studies available from NITSA and other entities indicate that the IID is more effective than long license suspensions. Chairman Gagliardi stated that he believed the Commission was only scratching the surface of the problems presented by the interlock device. Commissioner Bunn suggested that the array of penalties shows that there are too many cooks in the kitchen. Commissioner Kologi stated that the interlock punishes the family and others and Chairman Gagliardi stated that it is punishing everyone that drives the car. Ms. Tharney explained that the information provided at this meeting was intended to provide the Commission with background information as to what other jurisdictions are doing, and to let the Commission know that there has been a fair amount of activity in this area of the law.

Commissioner Kologi questioned whether the interlock device has more of a deterrent value than suspension, explaining that he does not believe that a most people drive with a suspended license. Mr. Cannel said that the point remains that driving drunk is a serious problem and we now have two solutions - suspension of the license or installation of the IID - and neither is a perfect solution. Commissioner Bunn said that he is not sure that anything the Commission recommends will make sense or will gain any traction in the legislature since he cannot imagine being able to say to legislators that they should lighten up on drunk drivers. Ms. Tharney said that in this legislative session, there were more than 20 bills introduced in this area of the law, suggesting that this is clearly an area of ongoing legislative concern. She indicated that an international symposium concerning IIDs is being held in California in September, and that it is hoped that Mr. Cavaiola will be able to attend and gather information on “best practices” for the consideration of the Commission

Commissioner Bunn asked whether the Commission’s focus is on the interlock or on the whole panoply of measures. Ms. Tharney indicated that Staff is focused on the statute in its entirety. Staff has researched ways in which New Jersey’s approach can be made more efficient, and has looked to see what other states have done and are doing. Chairman Gagliardi stated that perhaps the problems have been anticipated by others and they have figured something out we have not, and asked whether the Commission would carry this report until after September so that Staff can obtain and review the materials from the international symposium. Commissioner Bunn asked how this relates to the larger Title 39 project. Ms. Tharney explained that the larger Title 39 project has not yet been introduced in the Legislature but explained that she had spoken with Chief Administrator Martinez of the MVC about this matter, and will be in touch with the MVC again regarding the revision to the statute in the fall.

Commissioner Kologi raised the issue that the current DWI statute says that if a person goes 10 years between offenses, then, for sentencing purposes, the level of the

offense drops one notch. For example, if a person has a DWI offense and goes 11 years without a problem and then is caught again, that person is sentenced as a first offender. If this occurs again, and in year 11 the individual is caught again, they are again supposed to be sentenced as a first offender. Commissioner Kologi explained that a published appellate division case, State v. Burrows, said that an offender only gets one such reduction, but that this result does not comport with the language of the statute and asked Staff to add this issue to the list of problems to be addressed.

Code of Criminal Justice – Physical Force in Addition to Sexual Contact

Keith Ronan explained that Staff's ongoing review of case law directing the attention of the Legislature to areas of the statute that the courts have found to be problematic revealed an issue that the Commission may wish to consider. The issue is whether a conviction for criminal sexual contact requires physical force in addition to sexual contact itself. Mr. Ronan explained that the trend has been to lower the threshold requirement of physical force. He analogized this to the Supreme Court case that held that penetration without additional physical force satisfied the statute; that the crime is complete when the physical penetration is unauthorized and offensive.

Commissioner Bunn asked whether there is a lesser included offense that does not include physical force. Mr. Cannel said that the difficulty is that the entirety of the sexual offense statute is written to avoid the real issue, which is whether or not the touching was nonconsensual. If the Commission wants to take on this project, the statute can be rewritten, but it is not a small project and it is not without controversy. Commissioner Bunn asked whether the statutes in issue had been based on the uniform criminal code and Mr. Cannel said they had been based on an article in the Womens' Rights Law Reporter at Rutgers. Mr. Cannel explained that the project could encompass all of chapter 14 of the Criminal Code (Sexual Offenses). Commissioner Bunn asked who would object to this project and Mr. Cannel said that Staff would try to preserve the current line of cases and, if the Commission was able to do so, opposition may be limited.

Chairman Gagliardi said he is in favor of taking on this project because it originates with an appellate division case and if the Commission is going to do it, now is a good time. Mr. Cannel said that he will check with the prosecutors associations, women's rights groups, associations of defense lawyers and the public defender's office. Chairman Gagliardi advised that if Staff experiences substantial resistance to this project, the Commission may wish to reconsider at that point. Mr. Cannel asked the Commission to give Staff a couple of months to produce a very preliminary draft that can be circulated and the Commission agreed.

Landlord Tenant

Ms. Brown said there were two remaining issues from the June meeting that needed resolution: the flood zone provision and the new ground for eviction. With regard to the flood zone provision, Staff had received approval of the current form of the provision from NAIOP. However David Gordon had also suggested that rather than just including FEMA's street address, it would be better to include the street address for the FEMA region in which the property is located. Ms. Brown pointed out that there appeared to be only one FEMA region for all of New Jersey, in New York. She thought it might be best to leave the language as it is and the Commission agreed. Ms. Brown also noted that Connie Pascale had recommended that the last sentence of subsection b. should be changed to state something like: "If the landlord learns of the flood zone determination described in subsection a. after the lease term has commenced, the landlord shall notify the tenant within two weeks." Staff found this acceptable and no one having objected, the Commission agreed.

Ms. Brown further noted that Nick Kikis told her it had been brought to his attention that one could apply to have a flood zone map amended after a flood zone determination has been made to remove a property from a flood hazard area. He asked that the Commission define "determined to be located in a special flood hazard area" to mean only after the appropriate appeals process has run its course in order to avoid unnecessary confusion that may result by sending notices to tenants of flood zone designations that might thereafter be rescinded. Commissioner Kologi asked how long the appeal process lasted and stated that if it is a couple of years that could be problematic. He said that once the flood status has been established, the appeal is an attempt to change the status and awaiting that flies in the face of everything else we are doing. The Commission did not agree to make this requested change.

Ms. Brown also asked whether it was acceptable to the Commission not to include language in this provision (as suggested at the June meeting) which would permit the landlord and tenant to agree that the tenant would not terminate a lease because the landlord had not given the proper flood zone notification. Ms. Brown explained that because of the way the statute was now drafted, the tenant would always have the option of not terminating the lease in any event so the language was probably not needed. However, more important, Staff feared that providing for this in the statute would just lead to landlords putting boilerplate language in a lease which the tenant would never know about. The Commission agreed that this language was not necessary.

Ms. Brown asked for Commission guidance regarding the options for 46A:15-1, subsection d. She advised the Commission that the New Jersey Apartment Association favors version A, and the tenants' groups preferred version B but wanted to add the word "intentionally" before the word "engaged". Judge Fast also preferred version A but

wanted the provision to stop at the word “vicinity”, which Staff believed defeated the purpose of what the Commission wanted to achieve. Ms. Brown said that a clarification was requested for version B which is to add the words “or is reasonably likely to create” after the word “creates” in subsection (1).

Commissioner Bunn said that he didn’t really see a difference between A and B. Ms. Brown said that there is a difference in the way the elements are broken out and there is no mention of catastrophic damage to property in version A. Mr. Cannel said that version B may be more precise in its details. Ms. Brown also said that version A may be read to leave more discretion to the judge. Commissioner Bunn said that in applying the ground, a court would break the standard out into elements anyway so he thought version B was preferable. The Commission agreed on version B with the requested change.

Ms. Brown stated that she intended to have a revised tentative report for submission to the Commission for the September meeting. There had been enough changes since the tentative issued in October of 2010, that Staff felt everyone should have an opportunity to review and digest all of the changes. Staff was then hoping that after a sufficient comment period, the final could possibly be released in December. The Commission agreed with this approach.

Ms. Brown also explained that there was a letter before the Commissioners which she had just received from the New Jersey Manufactured Housing Association asking the Commission to go back to using the term “mobile home park.” Ms. Brown asked the Commission how they wished to proceed on this issue and Commissioner Bunn and Chairman Gagliardi stated that the Commission should use the term the association now wants, but include in the definition of the term that it also means “manufactured housing community.” The Commission agreed. Chairman Gagliardi instructed Staff to please advise all commenters on the landlord tenant report that the meeting in September on this report is to be brief, and anything that the commenters want the Commission to consider should be submitted in writing well in advance of the meeting.

NJEVHPA

Benjamin Hochberg explained that this uniform law had been prepared in response to Hurricanes Katrina and Rita in order to create a response system for emergency medical health practitioners that allows healthcare practitioners licensed in one state to provide assistance in another state in the event of a declared emergency. Ms. Tharney said that at least 11 states had adopted the law so far.

Mr. Hochberg said Staff was seeking further Commission guidance on five issues. First, the definition of “volunteer health practitioner”. Initially, the Commission had considered distinguishing between volunteers who received some compensation (perhaps

a continuation of their salary) while volunteering in New Jersey and those that received no compensation from any source while volunteering here. So far, all states that have adopted the Act have included both paid and unpaid volunteers. Commissioner Bunn said he thought the Commission had already dealt with this issue. Ms. Tharney said that the issue was left outstanding in the working draft and Staff wanted to make sure that the Commission was satisfied with the current language. Mr. Cannel explained that the issue is relevant to a later issue of tort liability. Commissioner Bunn asked why a doctor in Philadelphia should be subject to tort liability if that doctor comes here to help us. The Commission determined that both paid and unpaid volunteers would be covered by the Act.

Mr. Hochberg stated the second issue concerned criminal background checks. As far as Staff has been able to determine, New Jersey is the only state that requires background checks to be conducted for healthcare professionals. Commissioner Kologi asked how that can be done in a crisis. Ms. Tharney explained that Staff had included language in the draft that gave agencies the ability to waive that requirement. Commissioner Bunn asked what triggers this Act, and Ms. Tharney said that a declaration of emergency from the Governor did so. The Commission said that the current draft was satisfactory on this issue.

The next issue arose as a result of language found in section 6. As that language currently reads, the volunteer healthcare practitioner is not protected if any license held by the practitioner is suspended or revoked or any privileges restricted. Staff was concerned that the wording could be construed to mean that no protection would be afforded to a practitioner whose driver's license had been revoked. The Commission suggested adding the word "professional" before the word "license", but Commissioner Bunn noted that one could have a license to be an architect which is a professional license, so the word "professional" is not enough. Ms. Tharney said that Staff will draft language on this issue for next time.

Mr. Hochberg next explained that with regard to the protection from civil liability for volunteers, there are two alternatives provided by uniform act. Language from both has been included in the draft, as modified based on New Jersey's Good Samaritan Act and altered by the Commission when it last considered this issue. Commissioner Bunn said that the Commission had wrestled over this with Judge Pressler and there was no reason to change the current draft. The Commission concurred.

Finally, section 12 deals with the availability of workers' compensation to volunteers injured or killed while volunteering in New Jersey. Commissioner Kologi asked who provides the insurance policy and whether it was a governmental policy. Ms. Tharney said it would be provided by the State. Commissioner Bunn said then if a volunteer gets injured while doing this work, New Jersey taxpayers would pay worker's

compensation? Ms. Tharney said yes. Commissioner Kologi asked whether it really would be a drain to have workers compensation paid by New Jersey. Commissioner Bunn said it could be; if we consider the 9/11 situation and the first responders who are suffering from the consequences of that incident. Commissioner Kologi said that the workers' compensation should be secondary to any primary coverage that the volunteer has. Chairman Gagliardi said that this should be implemented; it says that New Jersey cares enough to provide you with coverage but only secondary to your own – if you do not have your own, we will provide it and there will then be coordination of benefits. Ms. Tharney said Staff would redraft to accommodate this change.

Recording of Mortgage Assignment

Mr. Cannel said that he has reached out to New Jersey banking organizations, but he has not heard back. Mr. Cannel feels that he needs to draft something first. Then the project can either be adopted as a tentative or the Commission can hold it.

Chairman Gagliardi said that anyone who has a mortgage knows the validity of the problems here. Mr. Cannel stated that he did not specify where the assignments would be recorded but they could either be recorded in Trenton with the office of commercial recording or recorded with the county clerks. Commissioner Bunn asked if this is a UCC issue and Mr. Cannel said no, but he copied the UCC form. Commissioner Bunn also asked about Larry Fineberg's reaction to the project and Mr. Cannel said that Mr. Fineberg said that either way of recording should not be burdensome. Commissioner Bunn asked what was done now and Mr. Cannel explained that very few assignments were recorded and when they are recorded, they are recorded in the county where the original mortgage is recorded.

Chairman Gagliardi asked whether the Commission believes that Staff should do the legwork to see if this is a project the Commission should pursue. The Commission concluded this was a project worth pursuing.

Uniform Principal and Income Act

Ms. Tharney said that the Commission had given Staff approval for this project. As a result, Staff prepared a new draft including the revised NCCUSL language in New Jersey's current statute. So far, no input has been received in response to inquiries made to the New Jersey State Bar Association. Ms. Tharney indicated that she will do additional follow-up. Commissioner Bunn said he has also spoken with the SBA about this project and suggested that the Commission wait until they have feedback before proceeding.

Miscellaneous

Chairman Gagliardi noted that the November meeting was scheduled during a time when there was a League of Municipalities meeting and asked the Commissioners whether the Commission meeting should be rescheduled. Commissioner Kologi said that he would be affected but if he is the only one, the meeting should not be changed. The Commission probably will not change the meeting date based on Commissioner Kologi's request. The Commission was reminded that the September meeting will take place at 10:00 a.m.

The Commission was updated on pending legislation, including that the Title Recordation bill had been passed by the Assembly, that Trade Secrets was awaiting action in the Senate Commerce Committee and that the Adult Guardianship Act was in bill form with the Assembly, waiting for a Committee assignment. John Cannel also advised that the Married Woman's Property Act had passed both houses and was awaiting signature by the Governor.