

## **MINUTES OF COMMISSION MEETING**

**April 19, 2012**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioner Andrew Bunn, Commissioner Virginia Long and Commissioner Albert Burstein. Professor Bernard Bell of Rutgers University, School of Law attended on behalf of Commissioner John J. Farmer, Jr., Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs and Grace C. Bertone of Bertone, Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance was Jack Dalton of the Coalition of Ignition Interlock Manufacturers.

### **Welcome to New Commissioner and Minutes**

Chairman Gagliardi welcomed new Commissioner Virginia Long. The Minutes of the March meeting were unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Bulbulia.

### **Title 39 DWI**

Laura Tharney explained that she had prepared and distributed at the meeting a supplemental memorandum regarding the DWI issue to guide the discussion. She said that Staff had focused its work in this area of the law on S1750, sponsored by Senator Scutari and introduced on March 5, 2012. The bill makes significant changes to the current DWI law. It requires the use of ignition interlock devices (IIDs) by all offenders, including first offenders. Current law requires IIDs only for first offenders whose BAC is .15% or above. The bill also shortens the time for mandatory suspensions and imposes restricted use licenses, permitting the offender to drive only to work. The national office of MADD has indicated support for the bill's increased use of IIDs. The Coalition of Ignition Interlock Manufacturers (CIIM), which has experience with the laws in many states, has expressed interest in the bill and in the comprehensive approach taken by the Commission Memorandum.

Chairman Gagliardi asked whether Ms. Tharney had heard from law enforcement about the bill. Ms. Tharney said she had not but is planning to attend the next meeting of the New Jersey Police Traffic Officers Association (NJPTOA), scheduled for the first week of May.

Ms. Tharney has been in touch with Senator Scutari's office to bring to the attention of his Staff a potential drafting oversight in bill. As currently drafted, the bill

requires the use of IIDs by all offenders, including those who are drug, rather than alcohol, offenders. Doing so is of no benefit since the IID does not detect drugs and would not prevent someone from driving while impaired as a result of drug use. In response, Ms. Tharney recommended restructuring the first subsection of 39:4-50 to divide it into further subsections, so that the penalty provisions can be tailored to correspond to particular violations. Ms. Tharney also noted that she is not sure if a requirement that all offenders attend an Intoxicated Driver Resource Center (IDRC) is appropriate, and would like more information about the programs available for drug, rather than alcohol, offenders. With regard to the limited license, other states have allowed such a license to be used not only for work, but for attending school, for medical appointments, for mandated IDRC appointments, for bi-monthly downloading and maintenance of the IID and it may be appropriate to consider expanding its use in New Jersey. The bill also does not deal with the issue of drivers using an employer's vehicle at work. In addition, Ms. Tharney suggested that it may be appropriate to include provisions pertaining to repeat offenders who are underage drinkers and drivers, even though they may not have an alcohol level that exceeds the .08% BAC required for a DWI conviction.

The potential modifications to S1750 that are proposed by Staff were selected based on the available studies, statistics, and successes in other states. Ms. Tharney began drafting using the language of S1750, and then revised the existing language based on where the numbers led. She explained that the available information indicates that what works in the DWI area is: (1) increased IID use, even for first offenders without a high BAC, since the evidence indicates that first-time DWI offenders are more similar in their behavior patterns to repeat offenders than they are to non-DWI offenders and that first-offender recidivism drops as a result of IID use in the same way that recidivism drops for repeat offenders; (2) administrative suspension of licenses before conviction, used in 42 states to suspend a license immediately after an individual is deemed to be in violation of the DWI statutes and subject to challenge at an administrative hearing, which could be useful in combination with IID use; (3) imposition of consequences for offenders claiming to have no car; and (4) addressing the problem of repeat violators of the underage drinking provisions. Ms. Tharney said that the Legislature may not be aware of the most current studies in the DWI area and that including it in the Commission's report is one potential way to make the information available to Legislators. She also brought to the attention of the Commission some corrections that needed to be made to the draft language she prepared.

Commissioner Bunn asked how S1750 fit in with the Commission's proposals and whether the proposals were modifying the bill or including the bill as part of the Commission's report. Ms. Tharney explained that work on this project had been ongoing, and that in light of the recently introduced bill, it seemed an opportune time to review the latest materials, examine what other states were doing, wrap up the project, release it and

provide the report to Senator Scutari for his consideration. She said that the draft language was based on S1750, and began with the language of that bill. Ms. Tharney explained that Senator Scutari was not waiting for Commission action, but is aware of the project. Ms. Tharney said that she did not anticipate that S1750 would not be acted upon until May 10<sup>th</sup> at the earliest. Chairman Gagliardi said that he had spoken with Ms. Tharney about the fast tracking of this project because of S1750 and he asked Ms. Tharney what she needed from the Commission that did not involve pure drafting. Ms. Tharney said there are four issues that she would like the Commission to focus on.

First is the increased use of the IID, as included in S1750. There are a number of ways in which an individual can be found to have violated 39:4-50. Pursuant to the bill, the IID is required for drug offenders and for individuals who allow others over the limit to operate their vehicles as well as for individuals whose BAC exceeds .08% or who are deemed to be DWI based on officer observation. Chairman Gagliardi asked the Commissioners whether the IID should be imposed in the case of someone convicted of 39:4-50 based on drug use and the Commission unanimously agreed that it should not if the IID does not work for drugs. Ms. Tharney asked whether the Commission believed a conviction for allowing someone else who is under the influence or over the limit to operate a vehicle should be a basis for installing the IID. The Commission agreed that imposition of the device in that situation was also inappropriate.

Ms. Tharney asked the Commission whether the IID should be imposed in the case of convictions based on officer observations and the Commission unanimously agreed that it should. Commissioner Bell asked what should happen if the intoxication is partially drugs and partially alcohol and whether in such a case the situation should be treated as if it were entirely alcohol and the other Commissioners agreed unanimously that it should be treated as entirely alcohol. The Commission also unanimously agreed that the IID should be imposed post-conviction if the BAC is .08 or above.

The second issue for consideration is administrative suspension. Commissioner Bunn asked what the circumstances were in which pre-conviction administrative suspension was currently allowable. Ms. Tharney explained that currently there were no administrative suspensions permitted in New Jersey. Commissioner Bell asked whether an administrative suspension would, according to the draft, be permitted if there is a conviction by officer observation alone and no breathalyzer evidence and he asked about the circumstances in which the conviction would be based on observation, rather than Alcotest results. Ms. Tharney said that there are a variety of circumstances in which that might happen. For example, some older people, particularly women, may not have the lung capacity to use the Alcotest device. A person may also have a medical condition that precludes them from doing so. In that case observation may be the only basis for the conviction. Also, in cases in which Alcotest results are challenged, the prosecutor may still rely on officer observation to obtain a conviction.

Commissioner Burstein asked whether there was any connection between the Alcotest and the IID results and whether there could be a conflict between the results of these tests. Ms. Tharney said that New Jersey has incorporated the National Highway Traffic Safety Administration (NHTSA) model specifications for the IID. It is required to prevent the vehicle from starting 90% of the time if the BAC is .01% or above. In New Jersey, which has a “lock-out” BAC higher than that used in other states, if the person’s breath measures a BAC level higher than .05%, a car with an IID will not start. Since the Alcotest is used to detect alcohol levels of .08% BAC and above, there should not be a situation in which the IID allows an individual to start a car when that individual would measure a .08% BAC on an Alcotest.

Jack Dalton explained that the IID and the Alcotest are two distinct pieces of equipment that function in a roughly equivalent manner. He added that if an IID fails, it is designed to fail in the “off” position, or in favor of the driver not being able to drive. Ms. Tharney said that while the Alcotest is designed to require a certain volume of air, it is her understanding that the IID can be customized to be used by a person whose lung volume is less than average.

Ms. Tharney explained that the draft provides for administrative suspensions, pre-conviction, for BAC of .08% or above. The administrative suspension kicks in pre-conviction but the person can prevent suspension by installing and using the IID. This is done in other states by the officer providing information roadside to the driver. Ms. Tharney said that New Jersey is one of eight states that do not permit pre-conviction suspensions. Commissioner Bunn asked whether there is anything on administrative suspensions in S1750 and Ms. Tharney said there is not.

Commissioner Bunn said that he was very uncomfortable with an officer taking a license without any review or supervision since this puts an awful lot of authority in the officer’s hands. Ms. Tharney explained that, as drafted, the administrative suspension provision only applies if someone blows a .08% or higher on an Alcotest or refuses the test. Ms. Tharney also indicated that there was a process included in the draft with several levels of appeal in the event of an administrative suspension. Commissioner Bunn replied that a license is not just for driving anymore. It is needed to fly, to cash a check, even to enter buildings and added that he thinks we are forgetting the “justice” part of “swift justice.”

Chairman Gagliardi asked whether any of the Commissioners thought there should be a pre-conviction administrative suspension. Commissioner Bell said that he did if the person were found to have been in violation of the statute by observation or blowing a .08% BAC or above on an Alcotest. He noted that he thought that there was a problem with the officer taking an individual’s driver’s license and said that the suspension should be applied another way. Commissioner Bell also said that the process

for challenging an administrative suspension would require a quick hearing if there is an interim suspension.

Chairman Gagliardi asked whether any Commissioner wished to make a motion to recommend that the draft allow an immediate administrative suspension if there is a BAC of .08% or more or based on officer observation. Commissioner Burstein said that the duration of the administrative suspension as drafted was troubling to him. Commissioner Bunn said that in his experience, ALJ hearings can take as long as four years to conclude, resulting in an unworkable standard and a terrible imposition without due process. Commissioner Bell made a motion for a pre-conviction administration suspension that could be avoided by agreeing to install an IID applicable to people deemed to be DWI based on officer observation or Alcotest. Chairman Gagliardi asked whether there was a second to Commissioner Bell's motion. In the absence of a second, the Commission requested the deletion of the administrative suspension provisions from the report.

The third issue Ms. Tharney presented for Commission consideration pertains to offenders claiming they have no car. She asked if the Commission wished to include in the draft language imposing a similar sanction, like ankle bracelets or an in-home IID as an alternative. Mr. Cannel said that because of increased costs if a person has a drunk driving conviction people often discontinue ownership of a car. Commissioner Bunn asked what Staff was trying to accomplish with this provision, especially if there really is no other car that the person drives.

Mr. Dalton said that the IID does not solve the drunk driving problem, but that the program implemented by the State can change behavior. He explained that, in his experience, people will find a way around everything unless you close the loopholes. DWI offenders who claim not to have cars are a problem. An offender will say to the judge that he has no car, but then will drive a relative's car drunk and cause a death. In order to address this issue, some states say where there is no car, the individual will be placed under house arrest. Other states have opted to use an ankle bracelet on the offender or put him or her in jail. Another alternative is the in-home version of the IID, which is approximately the size of the old "princess" phone. These devices have a camera and a GPS built in to them; the offender blows into the portable device and the camera takes a photo to confirm that it is the offender, not someone else, who is using the machine. The purpose of all of these options is to eliminate loopholes in DWI laws.

Commissioner Bunn asked for an explanation of the home IID, asking how, in the absence of a car and an IID, it would be of any use. Mr. Dalton explained that some states have discovered that if, instead of being able to avoid the IID altogether by claiming no car, the individual is required to comply with an alternative, then they acknowledge a car and install the IID. The portable device serves as a deterrent that takes away the excuse of

no car. Ms. Tharney explained that in New Mexico a pilot program was implemented in one county which required in-home arrest for individuals claiming not to have a car in which an IID could be installed. When in-home arrest was required as an alternative, the IID compliance rate jumped from 20% to 70%. When the pilot program ended, the IID compliance rate dropped to the state-wide average of 20% once again. Commissioner Burstein asked what then must happen in order to do away with the portable IID. Ms. Tharney said that the portable device remains in use for the period of time that an interlock would be required to be used.

Commissioner Long said that what this means then is that a person who has a car and gets the IID can drink but not drive. But the person without the car cannot drink at all. Commissioner Bunn said that this was unfair to those who do not have the resources for a car and that he is concerned with the equal protection issue raised by the difference in treatment between people with cars and those without. Commissioner Bell asked whether, if someone has an ownership interest in a car, then the device must be put on that car unless there is clear and convincing evidence of your having truly transferred the car. Ms. Tharney said that in some states it is a violation of the law for a person to transfer title to a vehicle between issuance of the summons and the time of disposition/conviction.

Ms. Tharney asked for Commission guidance regarding alternative consequences available for people without cars. Commissioner Bunn said that interlock is an alternative to suspension and asked whether the person's license is suspended if they do not have a car. Ms. Tharney said that it was, but that suspending the license has not been shown to be adequate since up to 80% of people with suspended licenses continue to drive anyway and that an individual who claims not to have a car clearly had access to one since they were charged with driving while intoxicated. Commissioner Bunn said that the portable IID seems pointless. Commissioner Bell agreed that it may slightly change the incentives for people who are inclined to follow rules, but will have no affect on people who have no intent to follow rules. Chairman Gagliardi said that the only rational reason for the device is that it will lead some people to come forward with a car. Commissioner Bunn said that he did not know if imposing fines on people without cars actually works but he is interested in that provision. Commissioner Burstein said the money could be put into a fund. It was suggested that the draft could also include penalties for transferring the vehicle in order to avoid the IID.

Commissioner Bell said that one approach that could be taken is that if the individual says that he or she does not have a car and then is caught driving, whether drunk or not, there should be a severe punishment. Ms. Tharney said that, in some cases, the punishment is just more suspension, which is not terribly effective since the odds of being pulled over in the ordinary course are low. Commissioner Bunn said that there are no consequences for princess phone violations. He supported imposing fines equivalent

to interlock costs and suspension of license. Other members of the Commission agreed. Ms. Tharney said the IID cost was about \$90 a month.

Commissioner Long noted that some states have punishments for transfer of the car between the time of the event and the conviction and asked whether a provision could be crafted stating that if the offender transfers his or her vehicle to a relative who is a third-degree of kindred, there would be a presumption that the person has access to the vehicle and the IID would be required on that vehicle. Commissioner Bell said that you could also require an affidavit from the person regarding the ownership and access to that car. Commissioner Bunn said that relation to the transferee is a good start but added that leases are another issue because the vehicle registration will not show the name of the owner. Chairman Gagliardi suggested that Ms. Tharney look at what other states have done and create several alternatives in the direction expressed by the Commission.

Ms. Tharney said there was one last issue on which she would like Commission guidance, and that is the question of whether she should modify statute pertaining to underage drinkers and drivers. There is nothing in S1750 about this. Her concern is that under the current law, a first offense is subject to the consequences set forth in the statute, but that any subsequent offenses are subject to the same consequences as the first. The statute in issue pertains to cases in which the driver is under 21 years of age and the BAC is above .01% but less than .08%.

Commissioner Long asked whether the question was whether the consequences should be increased for subsequent offenders and Ms. Tharney said yes. Commissioner Bunn said that given the Title 39 structure, it might make sense to look at existing levels and impose increasing consequences for subsequent offenses. Commissioner Bunn asked Ms. Tharney to obtain information about the scope of the problem of underage drinking and driving so that the Commission can use that information to appropriately tailor the statutory language and asked for information about what other states have done.

### **Strict Liability; Environmental Claims**

Ben Hochberg said that at the February meeting there were questions raised by Commissioners regarding a project on the statute of limitations for environmental actions commenced by the state. Commissioner Burstein had asked about actions for contribution in real estate and whether the project would impact subsequent actions for contribution. Mr. Hochberg said that he did not think it would. Commissioner Bunn asked about the statute's use of the permissive word "may". Although this language appears to be compatible with other discretionary language found in New Jersey environmental statutes, a concern was that "may" language could be extended to inappropriate actions. Other problems arose in the context of specific statutes. For example, under the Spill Act it is not clear whether payment to a private party under the Spill Fund tolls the statute of

limitations.

Chairman Gagliardi asked whether there were any thoughts about this proposed project. Commissioner Bunn stated that the statutory schemes involved are very complicated and environmental litigation takes a long time to resolve. As a result, the dimensions of the problems are currently unclear. The limitation period does not begin to run until the remedy is elected, which can be several years. Commissioner Bunn suggested that it is worth taking a look at this because sometimes these statutes have unfair consequences. He clarified that his concern with the “may” language was not about DEP discretion, but about the view that the period does not begin unless DEP is actually seeking a remedy.

Chairman Gagliardi said that the case that brought the issue to the attention of the Commission is not yet resolved and it seems problematic to craft language based on a case that is still alive. Commissioner Bunn said that we need input from someone with greater knowledge in this field. Mr. Hochberg said that he had contacted Steven Gold, a former attorney with the United States Department of Justice in the Environmental Department, and he expected to meet next week. Commissioner Bertone said that she thought this project is worth tackling but was unsure how best to do so.

The Commission agreed not to pursue the project at this time. However, Commissioner Bunn suggested that Mr. Hochberg meet with Mr. Steve Gold to see whether information received from Mr. Gold might change the Commission’s view or narrow the scope of the project.

### **Title 2C – Sexual offenses**

Keith Ronan presented a memo addressing the sexual offenses project and pertaining to lewdness, intellectual disabilities, and sexual assault. Mr. Ronan said that the Prosecutor’s Office expressed resistance to modifying the lewdness provisions, and the Commission has decided to refrain from doing so at this time. Additionally, Mr. Ronan presented the Commission with three options for draft language modifying *N.J.S. 2C:14-2(c)*, and was instructed to choose one of the options and prepare a draft tentative report for the May 2012 meeting.

Mr. Ronan also noted that at the March 2012 Commission meeting, the Commission expressed concerns about how persons with intellectual disabilities are treated under the sexual offenses statutes. Mr. Cannel said that there is a concern that the current language could limit ordinary sexual activity of those with intellectual disabilities. Mr. Ronan said that the Arc of New Jersey agreed with the concern and expressed interest in the Commission’s project. Mr. Cannel hoped that redrafting could solve the problem without removing the protections in predatory situations. Ms. Brown suggested that Mr. Ronan contact mental health professionals who commented on the pejorative



terms project for guidance.

### **Uninsured Motorist**

At Mr. Ronan's request, the Commission unanimously released this report in final form on motion of Commissioner Bunn, seconded by Commissioner Long.

### **Special Civil-Attorney's Fees**

Mr. Ronan said that the draft language in the project was changed to eliminate reference to the "taxed costs of suit," language which Commissioner Bunn acknowledged only added ambiguity. The Commission unanimously released this report as a tentative report on motion of Commissioner Bunn, seconded by Commissioner Bulbulia.

### **Collateral Consequences**

Alex Fineberg reminded the Commission of the impetus behind this ongoing project. In *In re DH*, 204 N.J. 7 (2010) a Monmouth County prosecutor's office detective was convicted of conducting an unauthorized search and was compelled to forfeit public office, pursuant to N.J.S. 2C:51-2. The Supreme Court held that expungement of a conviction did not necessarily remove certain collateral consequences arising from that conviction. That case inspired the Commission to authorize a significantly broader project of cataloging all collateral consequences of convictions and evaluating the available opportunities for relief. When completed, the project will serve to give defendants contemplating guilty pleas meaningful notice of the resulting consequences. Staff is now reviewing a list of about 1,051 statutes and regulations imposing collateral consequences that was compiled by the ABA.

A substantial problem is presented by the frequent use of the phrases "good moral character" and "moral turpitude", without definition. Very few statutes delineate the actual offenses that preclude people from obtaining licenses. Some of the statutes are anachronistic, e.g., an applicant for a license to determine butter fat content must have good moral character. The Rehabilitated Convicted Offenders Act requires a licensing authority to consider in a written statement whether a past offense is related to the license that is sought. The RCOA has limitations, but it does address the concerns raised by the Uniform Collateral Consequences of Conviction Act. Next month, Staff will provide additional information regarding the effectiveness of the RCOA.

### **Miscellaneous**

Mortgage recording was held for the next meeting. Ms. Brown advised that she expected soon to see a bill from OLS based on the Commission's pejorative terms report. The meeting was adjourned. The next meeting is scheduled for May 17, 2012.