

## **MINUTES OF COMMISSION MEETING**

**December 20, 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., and Commissioners Andrew Bunn, Albert Burstein, and Virginia Long. Professor Bernard Bell of Rutgers School of Law attended on behalf of Commissioner John J. Farmer, Jr., and Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

### **Minutes**

The Minutes of the November meeting were unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Bulbulia subject to the correction of a typographical error.

### **Uniform Interstate Depositions and Discovery Act**

Marna Brown said that since the Tentative Report was released, Arizona, Pennsylvania, and the US Virgin Islands have adopted the UIDDA. She said that the Pennsylvania adoption is significant because of Pennsylvania's proximity to New Jersey and the interplay between the two states. Ms. Brown said some stylistic changes had been made to the report. She explained that John Cannel had been informed by the Administrative Office of the Courts that the Judiciary was considering the Commission's recommendations and a subcommittee had been formed for this purpose. Mr. Cannel said that the Civil Practice Committee was considering the report. Ms. Brown sought Commission release of the Final Report, which was unanimously approved on motion of Commissioner Burstein, seconded by Commissioner Bulbulia. Chairman Gagliardi said that the Supreme Court Rules Committee and the Civil Practice Committee should be advised of the Commission's work on this project.

### **Equine Activities Liability Act**

Uche Enwereuzor explained the revisions to the Draft Tentative Report that had been made in response to Commission recommendations. Those revisions include a more comprehensive mandate that operators maintain and inspect equipment before allowing participants to engage in equine activities, and a requirement that the duties of operators and the assumed risks of participants appear on the same sign that now only advises participants of the operator's liability.

Mr. Enwereuzor informed the Commission that he had been doing some outreach and had been in contact with the president of the New Jersey Horse Council (NJHC), Ms. Shelly Liggett and the director of the NJHC, Ms. Patricia Ratner. He said that Ms. Ratner

had expressed doubt about the effectiveness of the Act if adopted, suggesting that it was unlikely that operators or participants would read the statute. Mr. Enwereuzor said that Ms. Ratner had indicated support for the changes to the language in section 3 regarding the inherent risks associated with horse riding. With regard to section 9, Ms. Ratner expressed concern that the proposed language imposes a burden on operators and is inconsistent with the assumption that participants ride at their own risk. She suggested that there was no need to change the language since responsible operators already maintain and inspect equipment. Ms. Ratner also said that specifically identifying the duties of the operators and participants on warning signs could promote litigation.

Commissioner Bell said that he saw no harm in specifying the duties and responsibilities of operators, especially if those requirements were already implied. The Commission did not share Ms. Ratner's concern that the proposed changes to section 10 would create additional litigation.

Commissioner Bunn commented that the phrasing of section 9(b) appears to create operator liability without requiring a causal connection between the operator's actions and a participant's injury. He said the elements required to establish negligence and liability should be spelled out clearly. Commissioner Bunn also said that "liabilities" should be removed from the last sentence that was added to section 10 and that the phrase "duties and obligations" would be more appropriate in this context.

Responding to Commissioner Burstein's question as to whether there have been problems in this area of the law, Laura Tharney said that since the Commission began work on this project, there has been additional case law. She said that it appears that the courts continue to struggle with the circumstances under which liability is properly imposed on operators and that clarification of the law could be useful.

The Commission unanimously approved the release of the Tentative Report, with the changes discussed, on motion of Commissioner Long, seconded by Commissioner Bunn.

### **Traffic on Marked Lines**

Uche Enwereuzor summarized the issues addressed in the New Jersey Supreme Court case *State v. Regis*. Mr. Enwereuzor explained that in the *Regis* case, the court ruled on the issue of whether the first and second clause of subsection b. of N.J.S. 39:4-88 identified two separate, independent, offenses or describe a single offense. He explained that the Court determined that the statutory section in issue consists of two separate and independent clauses, each of which addresses a distinct offense. In response, Mr. Enwereuzor proposed a project that would revise N.J.S. 39:4-88 subsection b. to reflect the Court's decision.

Commissioner Bell suggested that the Commission consider updating some of the language in the statutory section in question. After discussion, the Commission opted to retain the existing language for consistency within Title 39 and since no cases had yet suggested that the language was problematic. Despite the fact that “as nearly as practicable” may be difficult to understand in the abstract, the Commission agreed that it may be useful in the context of wide-load trucks and other larger vehicles that are incapable of driving within the confines of a single lane.

The Commissioner agreed that it is appropriate to revise the language to reflect the Court’s determination, and that the revision should use the language that appears throughout Title 39 and with which law enforcement officers are familiar. Commissioner Bunn noted that it would be better to keep the scope of the revision narrow by using familiar terminology than to broaden it by introducing new terminology.

Commissioner Bunn asked Laura Tharney whether this project would conflict with her older project involving Title 39. Ms. Tharney said that it would not and that any changes could be incorporated into her broader Title 39 revision.

The Commissioners unanimously agreed that they would like to see the proposed project next as a Tentative Report.

### **Uniform Principal and Income Act**

Laura Tharney said that she is asking the Commission not to release this project as a Final Report. Although she had hoped to receive comment in advance of the meeting, she had not. As a result, two essential questions remain unanswered. The Commission agreed to revisit this project at the February 2013 meeting.

Commissioner Burstein asked that Ms. Tharney provide him with a short summary of her outstanding questions since he might know of someone who could provide assistance.

### **Title 39 – DWI**

Laura Tharney summarized the developments with regard to the DWI bill pending in the Legislature. She explained that, since the release of the Tentative Report, she has not become aware of any new data, studies or comments that necessitate changes to the Commission’s report. She requested that the Draft Final Report, updated slightly to incorporate 2012 information as indicated in the accompanying Memorandum, be released as a Final Report, concluding the Commission’s work in this area. Release of the Draft Final Report as a Final Report was unanimously approved on motion of Commissioner Long, seconded by Commissioner Bell.

## Miscellaneous

Ms. Brown said that since the last meeting, she was able to speak with three representatives from the New Jersey Hospital Association, all of whom confirmed the views of the commenters who had appeared before the Commission. The Hospital Association representatives said that the regulations on brain death determination did lag behind the clinical practice for the reasons already discussed in the report on the UDDA, and that the regulatory authority of the Board of Medical Examiners and the Department of Health to set forth rules about brain death determination are counterproductive because they delay brain death determination and cause confusion among the medical community. They also said that they believed the elimination of the regulatory authority from the statute would make no dramatic difference because physicians who declare death are so specialized that they must now adhere to the most current standards of their specialties anyway and the removal of the regulatory requirements would give them more flexibility to use their judgment. They did not object to leaving the language open-ended, like the UDDA, which would mean that the provisions would state that physicians should make these determinations in “accordance with accepted medical standards.” They said that without the regulations, physicians would look to the AAN guidelines, medical literature and what other states are doing. Ms. Brown said she was given permission to use the commenters’ names in the report.

Ms. Brown also said that she had just spoken with the DAG for the Board of Medical Examiners who explained the procedure for requesting a public statement from the Board regarding the AAN guidelines and the proposals of the Commission. She was in the process of trying to obtain this information in time for the January 2013 meeting.

Finally, Ms. Brown said that since the last meeting on this project, a bill had been introduced that incorporated the language previously proposed by commenters to revise the current statute. Ms. Brown said she hoped to have a Draft Final Report for the Commission to consider for release at the January meeting so that it could be distributed to the bill sponsor before the bill was scheduled for a committee hearing.

On other legislative matters, Ms. Brown reported that the Assembly bill based on the Commission’s pejorative terms report had been passed by the full Assembly and that the Senate version had been released from Committee with a Senate vote hopefully scheduled for early next year. She also noted that the Commission project on the Overseas Resident Absentee Voter Law was the basis for a Senate bill that was recently released from Committee.

John Cannel reported that the Attorney General’s office had opposed a part of the bill that was based on the Commission’s adverse possession project dealing with tidal land.

Laura Tharney provided an update on the NJDMSA project.

Ms. Brown asked the Commission for guidance on the filial responsibility project. She said that the law in this area has changed a number of times, with changes dating back to 1904 and perhaps earlier. Given the piecemeal nature of these past changes, Ms. Brown recommended starting with a “clean slate” this time, pursuing a broader but more streamlined revision. The Commission agreed that this approach would be appropriate.

Regarding 2013 meeting dates, the Commissioners agreed that the January meeting would be held on January 17<sup>th</sup> at 4:30pm and that the times of the remaining meetings would be discussed at the January meeting.

The meeting was adjourned on motion of Commissioner Burstein, seconded by Commissioner Long.