

MINUTES OF COMMISSION MEETING

January 17, 2013

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 Virginia Long. Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Minutes

The Minutes of the December meeting were unanimously approved on motion of Commissioner Long, seconded by Commissioner Bertone.

Traffic on Marked Lines

Uche Enwereuzor said that, as the Commission had directed at the last meeting, this revised draft included language generally consistent with that found in Title 39. Mr. Enwereuzor asked the Commission to release the report as a Tentative Report. The Commission agreed to do so.

New Jersey Declaration of Death Act

Chairman Gagliardi explained that this was a project on which the Legislature was ready to move before the Commission issued its Final Report. Because of the extensive research that had been done on the NJDDA, it appeared that releasing the Report to the Legislature might be useful. Chairman Gagliardi explained that he had proposed providing the Report to the Legislature and explaining that the Commission had not yet considered it. Chairman Gagliardi asked, for future reference, whether this procedure was acceptable to the Commissioners and all present agreed that it was.

Marna Brown explained that a hearing on A3586 occurred on Monday, January 14, 2013 in the Assembly Health and Senior Services Committee. The bill incorporated the changes to the NJDDA that were suggested by Christina Strong at the Commission's November meeting. In advance of the hearing, after obtaining authorization from Chairman Gagliardi, the Draft Final Report was given to Assemblyman Conaway's Chief of Staff along with a memorandum which explained that the Commission: (i) supported removal of the statutory authority of the State Board of Medical Examiners and the Department of Health to regulate brain death standards; (ii) supported a revision of the statute that has the support of the medical community; and (iii) supported a revision of the statute that does not include references to standards that may, in time, become outdated or obsolete; but that the Commission had not yet considered the specific language recommended in the most recent Draft Report and would be meeting on January

18th to consider it. The Assemblyman's Chief of Staff expressed appreciation for the Commission's work and for the provision of the Draft Final Report.

Prior to the Committee hearing, Ms. Brown received a letter from William Roeder, the Executive Director of the Board of Medical Examiners, in response to her request for the Board's views of the legislative proposal to remove its statutory authority to regulate brain death standards. Ms. Brown also asked for the Board's views about the AAN guidelines on brain death determination. Ms. Brown received a letter from the Board in response to her request which said that the Board unanimously decided that "it did not perceive a continuing need to be legislatively required to promulgate regulations defining the criteria for brain death" and therefore did "not oppose the legislative proposal to divest the Board from continuing to have that responsibility." The Board said that it did not want to comment on the AAN guidelines because it had not had the opportunity, through committee, to consider the 2010 changes to those guidelines. The Board did state that it took the "general position that any established criteria must include adequate and sufficient safeguards to ensure that a declaration of brain death could not be made on a patient who is not in fact brain dead." With the prior approval of the Board of Medical Examiners, Ms. Brown provided copies of the letter to Assemblyman Conaway on the hearing day and read from the letter as part of her testimony.

Prior to the hearing, Ms. Brown consulted with the Assemblyman's Chief of Staff and Christina Strong regarding proposed amendments to the language of the bill. The amendments made to the bill adopted all of the Commission's proposed changes, as set forth in the Draft Final Report, except for one aspect. One amendment was suggested by Christina Strong but not recommended in the Draft Final Report. It was a change to subsection b. that provided that the regulations setting forth requirements for physicians "should not require the use of any specific criteria, test, or procedure in the determination of death by neurological criteria." Staff expressed concern that the proposed language appeared to prohibit something that it did not need to prohibit.

Christina Strong and the sponsor of the bill wanted this language in the statute to clarify that regulations of physicians who may make brain death declarations may not require the use by the physician of any *specific* test or procedure in the determination of death by neurological criteria. The final language of the bill included alternative language suggested in the Commission's Draft Final Report, with a modification suggested by Ms. Tharney. Since the word "criteria" was used repeatedly in that section of the statute, Ms. Tharney suggested removing the word so the phrase referred to a "test or procedure".

Both Christina Strong and Dr. Halperin testified at the Assembly Committee hearing. The Medical Society of NJ supported the bill without testimony. The bill was released by the Committee.

Ms. Strong expressed a concern prior to the hearing that even though the statute would be changed to eliminate certain regulatory authority, the current regulations would continue to exist. Ms. Brown researched this issue and found case law that said that any regulation or rule which contravenes a statute is of no force and effect and the statute will control. Ms. Brown provided this information to Ms. Strong, and Ms. Strong can still petition for repeal of the regulations in accordance with the Administrative Procedure Act.

Chairman Gagliardi asked how Staff wished to proceed with the Draft Final Report in light of the Legislature's activities. Ms. Brown said that unless the Commission preferred otherwise, she believed that the Report should be released with updated information regarding the events that had just occurred. The Commission agreed.

Commissioner Long expressed concern about the change to include a reference to a physicians' "best" medical judgment, since it might be interpreted to mean that "best medical judgment" and "medical judgment" were somehow different. Ms. Brown explained that she had added this to the draft because she had discovered its use in other statutes. Commissioner Long indicated that she found the addition acceptable in light of the use of such language elsewhere.

Chairman Gagliardi asked for a motion to release the Final Report, subject to the modification discussed. The Commission approved the release of the report on the NJDDA, subject to modifications regarding recent events.

Pejorative Terms (Physical Disabilities)

Ms. Brown asked that the Commission allow the Report's unofficial release to a number of agencies that had expressed an interest in participating in the project *before* the report's release of a Tentative Report. Based on Ms. Brown's experience with the first pejorative terms project it might be best to get a head start on obtaining as much feedback as possible at an early stage.

Randy Thompson, Director of Public Affairs for the New Jersey Association of the NJ Association of Mental Health and Addiction Agencies (NJAMHAA), asked if references to "drug addict" and "drug addiction/ drug dependency" could be replaced with "person who has a substance use disorder" and "substance use disorders".

Commissioner Long asked about changing the caption for section 5:12-136. Since the titles or captions for the statutory sections are not enacted, Ms. Brown said that Staff could contact Westlaw if the Report is enacted to request that the language be updated. Chairman Gagliardi asked whether the Commission had already decided to leave references to "handicapped parking" alone. Ms. Brown said that was correct, but since the Legislature had proposed legislation making changes to existing handicapped parking

laws replacing “handicapped” with “persons with disabilities”, references to “handicapped parking” were included in the Report.

Commissioner Long said that on page 7, a reference to “blind person” had been removed, but page 13 included a reference to “blind person or persons who are blind”. Ms. Brown explained that Staff wanted to make sure that if the defined term, “blind person”, was missed in any place in the revision or used somewhere inadvertently, all bases would be covered.

Chairman Gagliardi said that the first pejorative terms project was remarkably successful and he thought that might happen again. Ms. Brown asked if the Commission would release informally the compilation as proposed, with the additions suggested by Mr. Thompson, and with other changes made by Staff in response to the discovery of additional language for which revision was appropriate. Ms. Tharney said that the Commission had done this in the past while making it clear that the release is informal and no determinations have been made by the Commission. Ms. Brown said that most of the changes were to include “person first” language, which was the direction in which most states and organizations (as well as the federal government) were moving when referring to persons with disabilities. Chairman Gagliardi said that he thought this was fine and the Commission agreed.

Ms. Brown said that the only remaining issue is the large number of legislative findings provisions containing pejorative terms. The tradition of the Commission has been not to make any revisions to legislative findings. Chairman Gagliardi said that although the Commission has not previously suggested revision to legislative findings, it could bring the issue to the attention of the Legislature. Commissioner Bunn said that he thought the Commission can include language that would suggest to the Legislature that findings should be updated, while not actually recommending specific updates. Ms. Brown will make the necessary changes to the Report and distribute an informal draft to the many groups interested in the project.

Legislative Updates

Ms. Brown explained that when the Final Report on the Adult Guardianship project (NJAGPPJA) was prepared, only about 20 jurisdictions had adopted the uniform law, but now 37 jurisdictions have done so.

Mr. Cannel said that the Residential Mortgage Satisfaction Act was released from committee in two bills. A representative of New Jersey banks asked whether changes to the law would make fraud more possible. Amendments may address the outstanding issues. Mr. Cannel also indicated that he was in contact with the Chair of the committee that is slated to consider the UCC bill and would make efforts to see if it can move before the uniform effective date contained in the bill.

Ms. Tharney explained that a recent unpublished opinion that was forwarded to her made reference to the Commission's Effect of Abstentions project, making it clear that this is still an area in which a change to the law could be useful. Mr. Cannel said that in response to the opinion, he did some outreach and hopes to have movement on a bill based on the project.

In the Title 39 DWI area, Ms. Tharney explained that an earlier bill, S1750, had been held, and that a new bill, S2427, was recently introduced.

Miscellaneous

Chairman Gagliardi said that during a conversation with an individual who works with recent parolees, he was made aware of the fact that the Department of Corrections identification card, although issued by the State, is not accepted by the State as an official identification for other purposes. It does not, for example, qualify as one of the six points of identification for obtaining a New Jersey driver's license. Staff will conduct some preliminary research to determine if this issue is based in statute or regulation and whether changes to the law could address this issue.

The February 21st Commission meeting was scheduled to take place at 10 a.m. and Ms. Tharney asked if any of the proposed meeting dates for the year presented a problem for any Commissioners. Commissioner Long said that the May date may conflict with the NJ State Bar Association convention and Chairman Gagliardi asked Staff to check.

It is anticipated that the draft annual report will be ready for distribution in advance of filing day and the consensus of the Commission was that it should be distributed by email as soon as it was ready. Ms. Tharney offered to distribute meeting materials by email, rather than regular mail, to anyone who might prefer that method.

Ms. Tharney also confirmed that that a panel of Staff members would be would be giving a CLE presentation regarding the Commission, its process, and its projects, on February 22nd as a part of the continuing legal education program sponsored by the Office of Legislative Services. OLS CLE presentations are open to OLS Staff, Legislators, and potentially other attendees.

The meeting was adjourned on motion of Commissioner Bunn, seconded by Commissioner Bertone.