

MINUTES OF COMMISSION MEETING

June 20, 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 Professor Bernard Bell of the Rutgers School of Law, on behalf of Commissioner John J. Farmer, Jr.

John Joergensen, Associate Dean and Director of the Rutgers Law Library, and Susan Lyons, Document and Reference Librarian and Curator of Special Collections and Archives of the Rutgers Law Library, also attended.

Minutes

The Minutes of the May meeting were approved on motion of Commissioner Bunn, seconded by Commissioner Bell.

New Jersey Electronic Legal Material Act

Laura Tharney explained that she wanted to provide some brief background information before identifying the issues on which she was seeking Commission guidance. Ms. Tharney said that the Revised Draft Tentative Report of the New Jersey Electronic Legal Materials Act (NJELMA) was based on the Uniform Legal Materials Act (UELMA), which was designed to provide for the authentication, preservation, and accessibility of electronic state legal material. The American Association of Law Libraries and the New Jersey Law Librarians Association support consideration of the uniform law. Liaisons from the Seton Hall Law School library and the Rutgers School of Law library asked that the Commission review the UELMA for possible introduction in New Jersey and enactment by the Legislature.

To date, the UELMA has been enacted in eight states and introduced in five other states and the District of Columbia. The states that have enacted or introduced the UELMA have largely left the language of the uniform act untouched, but Ms. Tharney does not know exactly what those states currently make available in the way of electronic legal materials.

The NJELMA draft proposes changes to the act for implementation in New Jersey. The UELMA, as drafted, is less detailed and comprehensive than other uniform acts with which the Commission has worked and it functions as more of a framework on which the states may build. The uniform act, as drafted, does not require that a State make legal material available to the public electronically.

Changes were made to the introductory section of the Report to include additional references to the State Library in response to a request to reflect the State Library's status as a

depository library and to briefly mention the materials it makes available to the public at no charge.

The first substantive change made to the uniform act is the expanded definition of legal material found in Section 2. As drafted, the uniform act identified only four items as legal materials: state constitution, session laws, codified laws and administrative rules with the effect of law. States have differed in their approaches to the items they have included in act. The list proposed for New Jersey, which was recommended by the New Jersey Law Librarians Association, is more expansive than that provided by other states, but the legal materials available online right now are more extensive even than the listing. Since it is not yet clear if there is any objection to any of the items currently listed, Ms. Tharney would like to see the project move forward with the more expansive list.

To this time, the only commenters on the project have been librarians. Ms. Tharney explained that there are a number of other entities she would like to hear from, including: the Administrative Office of the Courts, the Executive Branch, DRES (the Division of Revenue and Enterprise Services, formerly the Division of Archives and Records Management), the Office of Information Technology and, ideally, every one of the entities that serves as a source of material identified in Section 2 as covered by the act.

Ms. Tharney indicated that she was seeking guidance from the Commission regarding the legal materials to which the act would apply. Commissioner Bunn expressed concerns about the scope of the act as drafted. He asked why the scope of the Act was limited to just the State 1947 Constitution and suggested that the Minutes of the Constitutional Conventions and predecessor constitutions should be included along with other forms of legislative history. Ms. Tharney agreed that those items certainly could be included, but said that she was concerned about the scope of the act, and the implications of broader applicability.

Ms. Tharney explained that a key issue was the scope of the act, generally. She said there were a number of approaches that could be taken by the Commission.

One approach would be to recommend enactment of the UELMA as drafted and simply accept that it will likely have no discernible impact in the state for many years. New Jersey already has a great deal of legal material available online. The act, as drafted, would not apply to any of the legal materials already available to the public electronically because it applies to legal materials first published after the date of enactment (or such other date as established by the act).

The opposite of that limited approach could involve recommending a statute that mandates the provision of legal materials electronically and the application of the act to all such materials. Ms. Tharney said that is arguably a worthy goal, and may be where the State is headed in the future, but there are costs associated with the application of this act to legal materials. Accessibility, authentication, preservation, and security all have costs. Ms. Tharney explained that she did not yet know how much it would cost in New Jersey. Other states have looked at

potential costs and have come up with a wide range of numbers. California, for example, considered the costs associated with authentication software about a year ago and came up with a range of hundreds of dollars to hundreds of thousands of dollars. Authentication is only one aspect of the potential costs associated with compliance with the act, and those numbers did not include development, integration, hardware or employee/contractor time. Ms. Tharney said that the Commission faced an issue that it has faced in other contexts. It has to decide whether it will pursue an expansive approach and risk that the project will stall as a result of the accompanying costs imposed on State entities who can legitimately claim that they are not in a position to bear those costs.

Ms. Tharney explained that she tried to chart a middle course in drafting. The current draft encouraged, but did not mandate, the provision of legal materials electronically, and the application of the act to those materials. She drafted the act to apply to all material designated as official and first published electronically on or after 1/1/15 based on the standard UELMA provision. Then, she created a default provision, resulting in the application of the act to certain legal materials currently available electronically. Any State entity that currently publishes legal material identified in Section 2 of the act and makes them available electronically must take affirmative action before December 31, 2014 if it does not want to be required to comply with the provisions of the act. If the State entity takes no action, the legal material currently available electronically will be designated as official and the State entity must comply with this act. The draft also created two “opt-out” alternatives. The State entity may: (1) clearly identify the legal material that it publishes electronically as unofficial and indicate to the public – at the point of access to the electronic material - where the official version of the material may be found; or enter into an agreement with Rutgers, the State University, or the Rutgers School of Law, or the State Library, for one of those entities to be the “official host” of the material and required to comply with the act. The selection of Rutgers and the State Library was not a policy choice, it reflects the status quo (since those entities maintain databases containing a substantial amount of legal information that they currently makes available to the public). The goal was to allow a State department, agency or other entity to transfer the responsibility for compliance with the act, thereby avoiding compliance costs.

Commissioner Bell confirmed that if an official, non-electronic copy of the legal materials is available, then the material is not covered under the Act. He also questioned why the process of preservation and authentication is cost prohibitive if compliance with the provisions of the Act is voluntary. Ms. Tharney explained that the costs could be a factor if a State entity complied with the act since it was not clear that even the entities that currently make material available electronically authenticate the material in any way, or have procedures in place to deal with preservation or security of the records (all of which would be required by the act).

Commissioner Bunn asked why the Commission was considering the uniform law if it calls for voluntary participation but does not mandate response. He asked whether any other states have enacted mandatory provisions or changed the default language. Ms. Tharney replied

that they have not. Chairman Gagliardi asked if Ms. Tharney discovered in her research a proposal to take the default language and convert it into mandatory language. Ms. Tharney said that she had not. Chairman Gagliardi asked what would be the advantage of adopting the uniform law in New Jersey. Ms. Tharney said that the costs and maintenance of non-electronic versions of legal materials have led many states to discontinue print materials. Consequently, members of the public experience increasing difficulty accessing print materials. Many members of the public do not have ready access to, or are deterred by the cost of, pay-for-access services (third party providers like Westlaw or Lexis-Nexis). She added that authentication and preservation of materials offered by the few free providers of online materials is a concern. Chairman Gagliardi related that in his private practice he had encountered the inaccessibility of administrative decisions in print or electronic form to the public, noting that for many years, the only print materials were housed in a single library and were not indexed.

Chairman Gagliardi asked what the consequences would be if state entities do not respond to the provision “opt-in, opt-out” provision drafted by Ms. Tharney. Commissioner Bunn said that he anticipates that there will not be any response if it is not mandated. Ms. Tharney explained that, as drafted, if the entity did not opt out, it was deemed to have opted in, but agreed that the act does not currently contain any penalty provisions to address an entity’s failure to comply. Commissioner Bell mentioned a federal model which provided that if an agency does not have a mechanism to make its decisions available to the public, then the agency decisions are not binding, but he acknowledged the repercussions of such a mandate.

Sue Lyons, one of the two commenters present to discuss the issue, stated that law librarians are looking for a framework on which the state can build in light of the diminishing access to non-electronic legal materials. Such a framework would allow the Rutgers Law Library to coordinate with the State Law Library, and other entities, to operate on a level playing field and work together to maximize public access. She added that the Rutgers Law Library, which works to provide accessible forms of decisions to the public, currently preserves the administrative decisions to which Chairman Gagliardi referred.

John Joergensen, Associate Dean and Director of the Rutgers Law Library, currently develops the digital collection for the Rutgers Law Library. He stated that, since 1997, the Rutgers Law Library has housed administrative decisions and works directly with the Office of Administrative Law, which directly delivers decisions bimonthly. Mr. Joergensen emphasized that many entities are delivering materials without a mandate but he stressed that a uniform system needs to be created. There are multiple ways to accomplish the goal, a sophisticated way will cost more money than a less sophisticated alternative, but a cost effective system can be created. Mr. Joergensen said the primary question involved in creating legal requirements for distributing electronic legal materials is what to mandate. An aggressive approach would be to make it a requirement for each branch of government. He added that the primary issue the law librarians face right now is the issue of “digital rot” – a term which describes the situation in which the format in which legal materials are preserved becomes outdated. Mr. Joergensen

emphasized that, in his experience, issues of digital rot are more pervasive than issues of hacking or authentication. He expressed concern about the haphazard conditions in which government entities and state agencies store decisions and other legal materials, and questioned what would happen to these documents in the future.

Chairman Gagliardi thanked the commenters for their input and asked the Commissioners for their thoughts regarding the project. Commissioner Bunn suggested tabling the project because the uniform law does not cure the problems it is intended to remedy. He added that the uniform law misses the mark and suggested that the Commission should respond to the issues apart from the uniform law so that the project is not encumbered by the architecture of the uniform law if it is a hindrance, rather than a help. Starting from scratch would allow the Commission to address the stated goals with a more comprehensive approach. Commissioner Bunn said that such an approach should consider: (1) identifying materials currently available electronically and requiring mandatory publication; (2) including a uniform manner of authentication; (3) emphasizing the preservation of materials in a digital form, rather than alternate forms; and (4) creating consequences for noncompliance or, in the alternative, creating provisions along the lines of the federal model mentioned previously. Commissioner Bell agreed that the current condition of the uniform law is unacceptable. He noted that under the current system government agencies rely on law that is inaccessible to the public.

The Commission considered the release of a Final Report stating that the Commission does not recommend UELMA to the Legislature, but ultimately requested that Staff provide the Commission with an approach other than the one taken in the current draft in an effort to achieve the important goals of the UELMA.

Uniform Principal and Income Act

This agenda item was tabled until the July meeting.

Uniform Certificate of Title for Vessels Act

This agenda item was tabled until the July meeting.

New Jersey Spill Compensation and Control Act

Jayne Johnson presented a memorandum seeking Commission authorization for a project to modify the language of the New Jersey Spill Compensation and Control Act, *N.J.S.* 58:10-23.11, et seq. (Spill Act). This project resulted from the determination made by the Supreme Court in *N.J. Dep't of Env't'l. Prot. v. Dimant*, 212 N.J. 153, 182 (2012), which held that in actions for damages there must be shown by a preponderance of evidence “a reasonable link between the discharge, the putative discharger, and the contamination at the specifically damaged site.”

The Court, in that case, noted that the Spill Act does not provide for a causation standard. The Court determined, after looking to the statute's legislative history, that a standard "must accommodate the Act's multiple forms of relief and must support and justify a range of relief available under the Act, which includes injunctive relief, and/or recovery of damages and those costs available under the Act." Upon "proof of existence of a discharge," the Court held that injunctive relief might be obtained under the Act. When seeking damages, the Court held that once the threshold nexus is satisfied, there must be shown by a preponderance of evidence "a reasonable link" between the discharge, the prospective discharger, and the environmental harm.

Staff sought authorization to draft statutory language in response to the Supreme Court decision in *Dimant* providing a causation standard based on proof of certain elements for claims seeking damages under the Spill Act. Mrs. Johnson referenced the legal articles published by members of the bar, which expressed the need for clarification of the causation standard.

Commissioner Bunn and Commissioner Bell agreed that the question of causation in this area of the law is very complex and raises difficult issues. Commissioner Bunn acknowledged the conflicting concerns and the balance between the desire for a clean environment and the draw of business into New Jersey. He noted that the issue was compelling and was pleased that it was brought to the attention of the Commission. Commissioner Bunn and Commissioner Bell agreed, however, that it would be best to let the application of the court's determination develop before moving forward with a project involving changes to the statutory language. Commissioner Bell suggested in the interim that Staff consult with Professor Steven Gold from Rutgers School of Law-Newark who is an expert in the field. Staff will monitor case law developments on the issue for at least a year to determine whether it should be brought to the attention of the Commission again.

Judgments and Their Enforcements

John Cannel presented a Draft Tentative Report that continues an effort begun by the Commission in one of its early projects to revise the Title 2A provisions concerning the enforcement of judgments. Many of the current 32 sections concerning the collection of judgments are outdated, unclear or superseded in practice by newer more detailed court rules. As a whole, they fail to reflect current practice. Mr. Cannel said that the current law does not give proper guidance to a party trying to collect a judgment and he proposed updating the earlier project, which contains a comprehensive set of statutes to detail the process of the collection of judgments.

In addition to clarifications brought about by changes to terminology, the report proposes substantive changes. The report proposes, for example, that the collection procedure be driven by written collection instructions from the judgment creditor to the collection officer. This innovation conforms the statutes to case law and practice. Mr. Cannel said that, at one time, a sheriff armed with a writ of execution might be presumed to know the nature and location of the

debtor's assets within the county. This obviously is no longer the case. Instead, the collection officer relies on the creditor for instructions, and the courts have held that the officer must follow the reasonable instructions of the creditor in satisfying a judgment. Mr. Cannel suggested formalizing transmission of these instructions to the officer and establishing the guidelines for determining priorities among claimants and the time within which the collection order must be returned. Mr. Cannel also raised the question of whether the current \$1,000 personal property exemption, the lowest of any state, should be adjusted.

Commissioner Bell inquired whether a specific occurrence precipitated revisiting this project. Mr. Cannel stated that there was no such occurrence but that the issues presented in the original report have still not been resolved. Commissioner Bunn acknowledged that the reasoning involved in raising the personalty exemption, but he stated that raising the personalty exemption is not a decision for the Commission to make and urged maintaining the status quo. The Commission agreed to steer away from substantive reforms and focus on clarifying and updating the statute. Mr. Cannel will present a Draft Report at the July meeting incorporating the Commission's recommendations.

UCC – Articles 3 and 4

John Cannel explained that Articles 3 and 4 of the UCC were extensively revised and amended in 1990 and 1991. In 2002, the Permanent Editorial Board of the Uniform Commercial Code approved changes to Article 3 (Negotiable Instruments) and Article 4 (Bank Deposits). These amendments have been adopted in only 10 states and the District of Columbia. Mr. Cannel stated that banking interests have never endorsed them, and there has been declining interest in their enactment over the years. The enactment of these changes is no longer a priority for the Uniform Law Commission. In addition, there is some concern that the changes that were intended to deal with new technology may now cause difficulties as a result of subsequent changes in technology. The Commission determined that the passage of time militate against consideration of the amendments at this time. Mr. Cannel will prepare for consideration at the July meeting a Draft Final Report recommending that the Legislature not enact the amendments to UCC Articles 3 and 4.

Uniform Electronic Recordation of Custodial Interrogations Act

This agenda item was tabled until the July meeting.

Miscellaneous

Ms. Tharney advised that: (1) legislation based on the Commission's Final Report involving UCC Articles 1, 4A, 7 and 9 was signed by the Governor on June 13, 2013; (2) Assembly bill 3357 based on the Commission's Final Report Relating to Pejorative Terms Regarding Persons who are Mentally Incapacitated passed both houses of the Legislature and was sent to the Governor on June 20, 2013; (3) Senate bill S2756, based on the Commission's

Report regarding the New Jersey Determination of Death Act, with an amendment, was released from Senate Committee on June 13, 2013 (it passed the Assembly on April 29, 2013); and (4) Senate bill S789, which pertains to Child Custody and Visitation and incorporates some of the work of the Commission, was passed by the Senate on June 20, 2013.

Commissioner Bell made a motion to adjourn the meeting, which was seconded by Commissioner Bunn.