

MINUTES OF COMMISSION MEETING

September 18, 2014

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, Commissioner Anthony Suarez, and Commissioner Virginia Long (participating by telephone). Professor Bernard Bell, of Rutgers School of Law - Newark, 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.

David McMillan, Esq., of Legal Services of New Jersey, Ronald LeVine, Esq., and Edward Eastman, Esq. were also in attendance.

Minutes

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

Revised Uniform Law on Notarial Acts/N.J. Notaries Public Act

Jayne Johnson presented a Draft Final Report recommending a comprehensive revision of the New Jersey Notaries Public Act, based on a modified version of the Revised Uniform Law on Notarial Acts (RULONA). Ms. Johnson stated that Staff modified the Draft Final Report, as presented at the Commission meeting, to incorporate the recently signed legislation prohibiting notaries public from falsely representing themselves as attorneys in advertisements. Bill A1423 was signed on September 10, 2014 and will take effect on December 9, 2014. Ms. Johnson added that in order to incorporate the language added by the bill, the modified Report adds new sections to the existing statute currently found in N.J.S. 52:7-10 to 52:7-21, and preserves the existing statutory numbering and language of the bill.

Ms. Johnson introduced Edward Eastman, Esq. who was in attendance to address the course of study provision in the Report, particularly the option for online instruction for notary public applicants. Before Mr. Eastman spoke, Ms. Johnson explained the rationale for adding the online option in the Draft Final Report, stating that the National Notary Association (NNA) commented on the September 2013 Tentative Report, which did not include the online option, and requested inclusion of an online course of study to avoid creating too great a burden on notary public applicants.

Ms. Johnson noted that Staff revisited the issue to determine how to best balance the need for increased safeguards to deter abuse and misconduct, with the burden a classroom-only requirement may place on notaries. Ms. Johnson added that during the pendency of the project

before the Commission, additional states adopted the RULONA, including Pennsylvania – and each state that adopted the RULONA failed to add a classroom-only requirement. Ms. Johnson noted that in light of these considerations, Staff added the online instruction component to the Report.

Mr. Eastman then addressed the issue, stating that notaries public are afforded great discretion when performing their duties, and as a consequence, the ethical responsibilities of each notary public must be effectively conveyed. Mr. Eastman stated that notaries should understand the letter of the law and the spirit of the law. Moreover, they should know and understand their responsibilities, because they are the “keepers of the gate” with regard to a variety of transactions. Mr. Eastman suggested that local notary associations are not adequately providing training for notaries and that many notaries are not aware of the statutes and regulations governing their practice.

Mr. Eastman emphasized that his main concern is that notaries will not receive the proper training if the course of study is conducted online. He added that, although the courses will address the ethical decisions notaries public must make, an online course will not adequately convey the gravity of those decisions and effectively communicate the vital role notaries public hold in our personal and business transactions. Mr. Eastman encouraged that the initial training should be a six-hour in-classroom requirement, along with a three-hour in-classroom continuing education requirement. He noted that his proposal was in keeping with the similar requirements for other regulated positions, and only the requirements to operate a motorcycle are higher.

Commissioner Bunn asked whether any existing regulations would preclude this proposal for classroom-only training. Mr. Eastman stated that there are regulations involving training in the banking and insurance sectors, but notaries public are regulated by the Department of Treasury, which has not issued regulations involving training or course of study for notaries public. Commissioner Bell asked if training sites for classroom instruction had been identified, to which Mr. Eastman responded that many providers are standing by. Commissioner Bell noted that online testing is a way of reducing the inconvenience of getting to physical sites and that, perhaps, there are effective online methods. Mr. Eastman conceded that some of the training could be online, but indicated that at least the initial course of study should be in-person. Commissioner Long stated that while she personally prefers classroom instruction, precluding an online course of study defies global trends. Chairman Gagliardi pointed out that some classroom instruction may be important, but the continuing education course does not need to be conducted in person. Classroom instruction for the initial course of study may ensure that the ethical requirements and the new provisions required by A1423 are presented in a setting optimal for active learning and retention.

Commissioner Bunn moved to release the Draft Final Report, seconded by Commissioner Long. Commissioner Bunn moved to amend the Report by deleting the words “either online or”

from proposed section N.J.S. 7-13.1e.(2) of the draft. Commissioner Suarez seconded the motion to amend, which passed by unanimous vote.

Underground Facility Protection Act, N.J.S. 48:2-80, subsec. d.

Jayne Johnson presented a Final Report recommending proposed changes to the Underground Facility Protection Act (UFPA). Ms. Johnson noted that this project generated commentary from various utility companies as well as from the DSO. The utility companies suggested that the New Jersey Superior Court, Special Civil Part and Small Claims courts provide a more efficient and cost-effective resolution of claims under \$25,000. However, Ms. Johnson noted, the revisions favored by the utility companies creates a bifurcated scheme that exceeds the Legislature's intent to direct UFPA claims to the DSO for alternative dispute resolution. Accordingly, Ms. Johnson asked the Commission whether it wished to recommend the revisions favored by the utility companies who provided formal comment or the revisions which maintain the scheme contemplated by the Legislature.

Commissioner Long stated that statutory language preserving the DSO's involvement but still providing for a trial *de novo* is the better option rather than the fractured process of the alternative. Commissioner Bunn agreed that the Final Report should stay within the parameters of the Court's decision in *Jersey Cent. Power & Light Co. v. Melcar Utility Co.* Commissioner Bell noted that he thought the motivation for including a small claims court option was because the utilities thought it would better meet their needs. He questioned whether, all things being equal, if the parties using the process think it would be an improvement, why wouldn't the Commission accept that recommendation? Laura Tharney explained that those recommendations were used as a starting point but that the statutory framework was becoming more complex and Staff did not wish to make such extensive revisions without a basis in legislative intent. Ms. Johnson noted that the Legislature intended for the DSO to attempt to resolve these disputes and the project was departing from legislative intent.

Commissioner Bunn recommended that the Final Report include a footnote indicating the utilities' policy preference and preferred language but stated that the Commission's own narrow mandate is better served with fidelity to legislative intent as we understand it. Commissioner Bunn made a motion to release the Final Report with the aforementioned footnote and Commissioner Long seconded the motion. The Commissioners unanimously agreed to release as a Final Report.

Judgments and Enforcement

John Cannel pointed out that there are a number of open issues in this project. Mr. Cannel asked the Commission for further guidance with regard to exempt property. Commissioner Long stated that this is so deeply substantive that the best course of action is to lay out the language and allow for a Legislative determination, and Commissioner Bell agreed.

David McMillan, Esq., of Legal Services of New Jersey, stated that the proposal makes substantial changes in law. He explained that while there is no homestead exemption in New Jersey, the requirement that personal property be exhausted before real property is pursued currently functions as an indirect protection of the homestead. If this protection is going to be removed, Mr. McMillan urged the Commission to look at the Uniform Act concerning exemptions, which contains four categories of exemptions, and consider increasing the exemptions in New Jersey. In response to a question raised at a prior meeting on this topic, regarding whether there was any empirical evidence regarding the impact of exemptions, Mr. McMillan said that he had become aware of a study which found that higher exemption amounts seem to correlate with increased entrepreneurial activity.

Ronald LeVine, Esq., raised his concern that to remove the exhaustion requirement without changing the exemptions will harm low and moderate income considers. He suggested that creditors are fairly well-protected under our current system since we are a garnishment state, and encouraged the Commission to continue protecting against the sale of homes until personal property is exhausted. Mr. LeVine urged the Commission to consider the exemptions contained in the bankruptcy code as points of reference, suggesting that these represent a fair indication of what a family should be able to retain. Mr. Cannel reiterated that he does not know what the right course of action is and that making a recommendation in the alternative may not be a good idea. Chairman Gagliardi noted that, generally speaking, it might be most useful to come up with some specific recommendation since the Legislature is certainly free to vary from it as appropriate. Commissioner Bell suggested that Mr. Cannel try to identify a number for a homestead exemption. Commissioner Bunn asked if there is a uniform law that may be helpful. Mr. Cannel said that there is, but it is old and there has been inflation since it was drafted. Commissioner Long suggested that computing a Mid-Atlantic (NY, CT, MA, MD, etc.) average might be helpful. A mathematical multiplier to account for inflation was discussed, as was a reference to the bankruptcy code provisions. For the other categories of exemption, information for the consideration of the Legislature can be included in the comment section of the Report.

With regard to lien perfection, Mr. Cannel suggested that the Commission permit immediate automatic perfection. He discussed addressed three options: status quo ante, which he stated was not optimal; automatic perfecting of liens, which has a minor defect and the middle ground option included in the document before the Commission. Commissioner Bunn recommended including a provision for automatic perfection of liens. Mr. Cannel indicated that he would have a revised document for an upcoming meeting incorporating the Commission's recommendations.

Multiple Extended-Term Sentences

Vito Petitti outlined the Tentative Report of May 23, 2013, which discussed *State v. Hudson*, a case in which the New Jersey Supreme Court held that the plain language of N.J.S. 2C:44-5 barred a defendant's two extended term sentences. The dissenting opinion in *Hudson*

argued that the Legislature's choice of language, "shall so far as possible," indicates an intent to defer to the discretion of sentencing judges. Mr. Petitti told the Commission about a more recent New Jersey Supreme Court case, *State v. Robinson*, in which two extended term sentences had similarly been struck down based on the plain language of the statute.

Mr. Petitti informed the Commission that Staff had reached out to the criminal bar for feedback, but the only substantive comments received strongly advised against revision. He then suggested that, in light of this feedback and the fact that only the dissent in *Hudson* found room to interpret the statute, it might be prudent not to proceed with the project.

Commissioner Bunn agreed with the staff recommendation, adding that if the revision was not advocated for, it may not be meritorious to pursue. Commissioner Long also agreed, recalling her statement from a previous meeting that the Commission should not proceed with this project. The Commission voted unanimously to conclude work on this project.

Newspersons' Shield Law

Susan Thatch began the discussion of this issue by referring to the Memorandum discussing New Jersey's application of the Newspersons' Shield Law and its applicability to novel mediums of communication. Chairman Gagliardi recognized the submission, after the Memo was filed, of a letter written by Thomas J. Cafferty, Esq., of Gibbons P.C. on behalf of the New Jersey Press Association. Ms. Thatch summarized the history of this potential project by stating that the Commission has discussed this area of law at a previous meeting, at which time it requested additional information on some of the issues. Ms. Thatch referenced an appendix, attached to the new Memo, providing an overview of newsperson shield laws in each of the fifty states. She discussed some of the differences between shield laws in New Jersey and other states. Ms. Thatch pointed out that there is no uniform act covering this issue although there is pending federal legislation pertaining to this issue. She further noted that New Jersey's laws presently give the courts flexibility to make fact based determinations as to what constitutes "news media." Ms. Thatch stated that Staff's conclusion is that it would be difficult to draft statutory language in this area because of the rapidly changing media/Internet environment; she suggested monitoring developments in this area to determine whether a project becomes appropriate in the future. The letter on behalf of the New Jersey Press Association drew the same conclusion.

Justice Long agreed with the Staff recommendation that this should not become a Commission project and that continued monitoring was the best course of action. Professor Bell also expressed hesitation about a project in this area. He noted that the appendix points to no states that have created a better solution and added that the federal statute is complicated and also not necessarily a better answer. Professor Bell did ask for confirmation that the current New Jersey law addresses dissemination of information over the Internet and Commissioner Bunn confirmed, based on his work in this area, that the current law in New Jersey does cover Internet

dissemination. Commissioner Bunn also agreed that monitoring for continued developments in this area was the best course of action.

Sales and Use Tax Exemption – The Definition of “Marine Terminal Facilities”

Susan Thatch briefly discussed the definition of “marine terminal facility” within *N.J.S. 54:32B-8.12* in response to the Tax Court of New Jersey’s 2013 decision, *Ironbound Intermodal Industries v. Director*. She explained that while this term “marine terminal facility” is undefined in the Sales and Use Tax Act, it is defined in at least four other areas of New Jersey statutes. In *Ironbound*, the Tax Court interpreted the phrase broadly and ultimately determined that Ironbound’s three locations met the Legislature’s intent behind the use of the phrase “marine terminal facility” and was therefore exempt from the sales and use taxes in dispute. Staff requested guidance from the Commission as to whether a project in this area could clarify the language of the statute consistent with the guidance provided by the Tax Court of New Jersey and more clearly effectuate legislative intent.

Before making a determination about whether or not to move forward with this proposed project, the Commission asked that Ms. Thatch seek comment from those knowledgeable about this area to assist in making the decision about whether a modification to the statute would be helpful, and advise the Commission of any feedback received at an upcoming meeting.

Workers’ Compensation Act

Mark Leszczyszak informed the Commission that an issue concerning the term “control” in the Workers’ Compensation Act (“Act”) was brought to Staff’s attention by the Appellate Division’s decision in *Burdette v. Harrah’s Atlantic City*. In that case, Plaintiff Burdette was leaving work after she finished her shift when she was struck by another driver. Her car was still partially over Harrah’s driveway’s apron. The primary issue on appeal in *Burdette* was whether the Division of Workers’ Compensation judge properly applied the premises rule, which the Appellate Division agreed that it did.

When researching the history of the premises rule, Staff read that the Workers’ Compensation Act is humane social legislation designed to place the cost of work-connected injury on the employer who may readily provide for it as an operating expense. The original act did not contain a definition of employment, and the courts created the “going and coming” rule. In 1979, the Legislature amended the Act and defined employment to eliminate awards for minor partial disabilities, increase awards for the more seriously disabled, and contain the overall cost of workers’ compensation. The amendment effectively eliminated the “going and coming” rule and established the “premises” rule. The statutory definition, however, contained another undefined term, “control,” which may benefit from clarification.

Courts have established that the two pivotal questions under the premises rule are (1) where was the situs of the accident and (2) did the employer have control of the property on

which the accident occurred? According to case law, the “employer control test” is satisfied if the employer has the right of control, but it is not necessary to establish that the employer actually exercised that right; the definition of “control” should be dictated by the common-sense notion that the term implies simply use by the employer in the conduct of his business; control exists when the employer owns, maintains, or has exclusive use of the property; and an employee is compensable if it was forced to endure an added hazard by the employer and the employer gained a business benefit. There is, then, guidance provided by the case law in the event that the Commission chooses to undertake a project in this area.

Mr. Leszczyszak explained that during his work in this area, it came to Staff’s attention that Senator Scutari recently proposed a bill touching on this area that includes, as a part of a statutory revision, the word “directly”. Ms. Tharney added that as a result of Mr. Leszczyszak’s work in this area, it was of concern to Staff that the word “directly” may raise complex issues and Staff would like to reach out to Senator Scutari’s office as a result.

Chairman Gagliardi pointed out that whether the Commission takes up the project is a different question than speaking with Senator Scutari’s office. Before deciding whether a project in this area is appropriate, the Commission would like Staff to reach out to Senator Scutari’s office. Commissioners Long and Bell agreed that Senator Scutari’s bill is a change from current legislation and upends the status quo.

**Sewerage Authorities Law (N.J.S. 40:14A-8) and
Municipal Utility Authorities Law (N.J.S. 40:14B-22)**

Mark Leszczyszak briefly discussed the New Jersey Supreme Court’s decision in *612 Associates, LLC v. North Bergen Municipal Utilities Authority*. In that case, the Court was asked to determine which of two utilities authorities was entitled to collect connection fees from a property which is served by two different authorities. Mr. Leszczyszak noted that the Court held that legislative intent indicates that anyone servicing a given source may charge the connection fee. Commissioner Long questioned whether this is an area that needs a project as it does not really impact many people. Commissioner Suarez, who has experience in this area, noted that the issue isn’t clear. Chairman Gagliardi asked Commissioner Suarez if he believed this was a viable project, and Commissioner Suarez responded that he did not. Commissioner Long added that this case may very well be the first salvo and that subsequent litigation may occur in this area regarding how the fees will be divided.

Commissioner Bell stated that if there are further developments in this area, it might be prudent to craft a sensible rule rather than submit all such disputes the adjudicatory process. Commissioner Long expressed concern that the Commission isn’t equipped to determine how much each entity should receive in any given circumstance. Commissioner Suarez stated that he believes that should be handled on a case by case basis as a general rule would be difficult to apply. Commissioner Bertone agreed stating that the work involved in a sewerage connection might depend on size and the amount of compensation might vary in accordance with the amount

of work done by each party. The Commission determined that a project in this area seems premature at this time.

Miscellaneous

By way of legislative updates, Laura Tharney mentioned the enactment of the New Jersey Family Collaborative Law Act on September 10th and the movement of the Uniform Trust Code bill. Vito Petitti's planned attendance at an upcoming meeting of a working group of the American Law Institute was also noted. The Commission meeting was adjourned on the motion of Commissioner Bell, seconded by Commissioner Bertone.