

MINUTES OF COMMISSION MEETING

October 16, 2014

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were 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, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were: Andrew P. Bell, Esq., of Locks Law Firm; Alida Kass, Esq., of the N.J. Civil Justice Institute; Paul Matacera and Ellen Stein of MBI Gluckshaw; Henry Wolfe, Esq., of the Wolfe Law Firm; David McMillin, Esq., of Legal Services of New Jersey, and Professor Penny Venetis, of the Rutgers University School of Law - Newark.

Minutes

The Minutes of the September meeting were approved on motion of Commissioner Bulbulia, seconded by Commissioner Long.

N.J.S.A. 39:3-10 Sentencing

Shani K. Sarjeant explained that a potential project for the Commission, which concerns a penalty provision contained in N.J.S. 39:3-10, came to light as a result of Staff's review of *State v. Carreon*. In that case, the defendant was convicted of driving without a license, and the municipal judge imposed a ten-day jail sentence and a fine. The Law Division affirmed.

The Appellate Division, however, reversed the decision of the Law Division and remanded the case for resentencing. The Court agreed with the defendant that the statute allows for a fine or imprisonment, but not both, even for drivers who have never been licensed. The Court noted that there was no dispute over the penalty for those already holding a license – they may either be fined or imprisoned, but not both. The ambiguity lies in the second clause of that statement that addressed unlicensed drivers. The question the court wrestled with is how the first clause related to the penalty provided in the second clause. The Appellate Division found that both interpretations of the statute were “plainly reasonable.”

In light of the absence of case law pointing in one direction or another, a modification of the statutory language, in keeping with the judicial determination in *State*

v. Carreon, could enhance the clarity of the statute and the outlined penalties. Staff was authorized by the Commission to undertake a project in this area.

Human Trafficking

Susan Thatch summarized the background of this project concerning the Uniform Act on Prevention of and Remedies for Human Trafficking (UAPRHT). She explained that the Rutgers School of Law's International Human Rights Clinic (the "Clinic") had identified areas in which New Jersey's anti-trafficking laws could be strengthened. Specifically, the Clinic suggested: (1) Amendment of New Jersey law immunizing human trafficking victims, particularly minors, from prosecution for prostitution-related offenses (including creation of a human trafficking diversion part of New Jersey criminal courts); (2) expanding N.J.S. 2C:13-8(2) to more strongly establish business entity liability for human trafficking; (4) expanding the New Jersey Human Trafficking Commission's duties to include oversight of a broader anti-trafficking public awareness campaign; and (5) clarifying some inconsistent language in the human trafficking and prostitution statutes.

Clinical Professor Penny Venetis, of Rutgers School of Law – Newark, the Director of the International Human Rights Clinic, described two memoranda submitted to Staff. The first, sent in May 2014 by the Clinic, recommended specific modifications to New Jersey law. A second memorandum containing additional analysis was provided on the day of the October meeting. Acting Chairman Bunn said that no action would be taken regarding the second memo until all of the Commissioners had the opportunity review it. Professor Venetis strongly recommended the incorporation of the Clinic's proposed modifications to New Jersey's law in order to improve an already good and comprehensive statutory scheme.

The Commission first heard from Professor Venetis on the issue of immunizing human trafficking victims from prosecution, after it was explained that New Jersey's law currently offers some protections to human trafficking victims. Presently, N.J.S. 2C:34-1(e) provides trafficking victims with an affirmative defense during prosecutions for prostitution and N.J.S. 2C:44-1.1 permits trafficking victims to move to vacate and expunge prostitution related convictions. It was noted that while the Uniform Act makes age-based distinction in its treatment of prostitution charges, New Jersey law does not presently distinguish between human trafficking victims who are minors and those who are of legal age in affording these statutory protections.

John Cannel pointed out that although New Jersey allows individuals charged with prostitution to assert human trafficking as an affirmative defense, there are problems

when minors have to go to court and there are differences between an affirmative defense and immunity.

With regard to the question of diversion, Commissioner Bunn asked whether there is empirical evidence regarding how many minors are picked up and not diverted from the justice system to be placed in appropriate services. Professor Venetis replied that the system doesn't work particularly well with regard to the identification of human trafficking victims, explaining that providing assistance to under-age human trafficking victims poses particular challenges. Professor Venetis said also that a number of adult individuals arrested for prostitution are trafficking victims. She added that the new domestic violence and drug courts demonstrate both the benefits of diversion and that the system understands the need to identify victims.

Professor Venetis spoke of her meetings with women who had been kidnapped and trafficked at the age of 12 and held for several years only blocks away from their homes, and consequently grew up without an understanding of their status when charged. The professor said that New Jersey should address this issue by offering immunity instead of the affirmative defense.

Ms. Thatch informed the Commission that the Office of Attorney General had not yet provided input, and Staff was encouraged to pursue comment from that office since they likely were involved in drafting the statute.

Commissioner Long asked Professor Venetis whether the position of prosecutors was known. Professor Venetis replied that there had not been any outreach to prosecutors yet, but pointed out that there is a contradiction in the law since minors cannot consent to sexual relations so they should not be charged with prostitution.

Commissioner Bunn observed that it is a problem to pick minors up off of the street and have no place to put them. Ms. Thatch added that law enforcement groups might be interested in the project. Mr. Cannel informed the Commission that minors wait until they are charged to assert their status as trafficking victims. Professor Venetis suggested that if prostitutes are trafficked, we are bound by treaty to help them and it is preferable to bring them before special judges who understand the need to put victims in a diversionary program with immunity.

When Commissioner Long asked whether a *Winberry* issue existed, Professor Venetis offered to research further and provide additional information on that issue. Ms. Thatch pointed out that the Uniform Act does not include a diversion program. Commissioner Bunn asked how drug courts are created and Professor Venetis replied that the drug courts are created by statute and that persons should be diverted prior to sentencing. Commissioner Bunn stated that the Commission needed to hear from prosecutors and other stakeholders before moving forward. Staff was asked to reach out

to the Attorney General's Office, the Prosecutor's Association and law enforcement groups, as well as other individuals and entities who may wish to weigh in on this issue. The Commission expressed reluctance to make a recommendation on any of the relevant issues that would upset a balance that had been achieved during the earlier statutory drafting. With regard to the issue of diversion court, Staff was asked to determine whether there might be any consensus in this area and, if so, to potentially do some drafting after asking AOC to weigh in. Staff will work with Professor Venetis and the Clinic.

Regarding business entity liability, Ms. Thatch asked whether Staff should draft "knowing standard" language to match that contained within the business entity liability section of the Uniform Act. After a discussion concerning the limitations of using certain business terms and the state of mind of an entity, the Commission suggested that the proposed language must contain a knowing element and it was suggested that Staff look at the drug context for cases imposing entity liability and that Staff identify where any decisions in this area lead. Commissioner Bulbulia also suggested that Staff consider whose state of mind will be attributed to the business entity.

Regarding the anti-trafficking public awareness campaign, Ms. Thatch informed the Commission that the statute is silent as to posters and asked whether the statute needed such a provision. Commissioner Long observed that a requirement for posters could be too much detail. Professor Venetis said one issue is that no decisions have been made regarding allocation of resources, and that a group called Truckers Against Trafficking has used posters effectively. Commissioner Bunn directed Staff to conduct appropriate research and outreach, including a determination of the status of the Commission on Human Trafficking. Commissioner Bell asked whether studies provide conclusions regarding effectiveness. Professor Venetis replied that there is anecdotal, if not quantifiable evidence. Commissioner Bell suggested that if drafting is to be done with regard to specific outreach, room should be left for the Human Rights Commission's discretion since it may have specialized knowledge.

Ms. Thatch assured the Commission that Staff would conduct outreach to the various individuals and entities referenced by the Commission to obtain a better understanding of whether the Clinic's proposed changes should be implemented and, if so, how to best effectuate these goals within New Jersey's statutory scheme.

Staff was authorized to move forward with the changes to clarify the language of the statute to eliminate inconsistent language in the human trafficking and prostitution statutes.

Judgments and Enforcement

John Cannel presented a Draft Final Report incorporating the changes requested at the last Commission meeting, identifying the revised homestead exemption provision, as well as the subsection that establishes an automatic perfection of liens.

Mr. David McMillan, Esq., of Legal Services of New Jersey (LSNJ), applauded the most recent draft of the Report. He suggested that the proposal is on the right track in its handling of the four exemption categories: (1) homestead; (2) automobile; (3) household goods; and (4) bank account(s). He stated that the term “household goods” should be replaced because it will leave some categories of items unprotected unnecessarily and is too limiting. Items like a tractor, for example, although intended to be covered under the exemption, may be excluded. Mr. McMillan suggested that “all property” to replace the term “household goods” and a change will be made to identify that category as “household goods and other property” in the Report.

Mr. McMillan further stated that the LSNJ could not support the Report if it recommends a \$31,603 homestead exemption, explaining that he could not recall a single one of his LSNJ clients whose house is not in the mid-six-figure range since New Jersey is a high housing cost state. Mr. McMillan recommended that the Commission adopt the amount found in the federal bankruptcy code, \$125,000, which he maintained would be more appropriate based on the cost of housing in New Jersey (although the Bankruptcy Code relies on an all states CPI index). He noted that A2501 proposed a \$125,000 exemption.

Mr. McMillan also recommended adding a Consumer Price Index (CPI) or Cost of Living adjustment (COLA) rider to the Report to account for inflation. Without this type of rider, the Report, if enacted, will be obsolete in the near future. Mr. McMillan recommended a rider tailored to the cost of living in New Jersey and suggested the Home Owner Security Act as an example of a statute with a CPI rider.

The Commission determined that the Report should include the federal homestead exemption limit – either \$125,000 or whatever the limit is now after calculating inflation since 2005. The Commission also decided that the Report should index the exemption amounts generally based on a northern New Jersey cost of living standard. Commissioner Bunn stated that a clause should be included in the draft language to indicate that the CPI rider applies to all of the exemption figures used throughout the Report.

Mr. Cannel indicated that he will prepare the revised Report for consideration at next month's meeting.

Truth-in-Consumer Contract, Warranty and Notice Act

Mark Leszczyszak explained to the Commission that as a result of a recent case (*Shelton v. Restaurant.com*) regarding the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), the New Jersey Supreme Court considered three different issues: (1) whether online restaurant coupons constitute “property” under the TCCWNA; (2) whether, if they were “property,” the coupons were “primarily, for personal, family or household purposes”; and (3) whether the sale of coupons by the website is a “written consumer contract” within the meaning of the statute.

Andrew P. Bell, Esq., of the Locks Law Firm, suggested that this project should not go forward because the court’s decision speaks clearly. He added that the Uniform Electronic Transactions Act was used to find that there was a consumer contract and that any changes made by the Commission in this area could cause problems with other acts and upset other areas of consumer fraud law. He also suggested that the Third Circuit found no lack of clarity and nothing remains to be said. Henry Wolf, Esq., of the Wolf Law Firm, added that the language had never been unclear and that the Electronic Transactions Act already covers this area and offers protection. Mr. Wolf agreed with Mr. Bell that this project should not go forward. Acting Chairman Bunn suggested that there was at least a perceived issue of clarity because the questions were certified to the New Jersey Supreme Court.

Paul Matacera, of the public affairs firm, MBI-Gluckshaw, representing the New Jersey Self-Storage Association, explained that he was not an expert in this area of the law but that it appeared that there was no harm in taking a look at the area to see if additional clarification could be of help.

Alida Kass, Esq., of the New Jersey Civil Justice Institute, pointed out that the outcome of the case that brought the issue to the attention of the Commission is an invitation for the Commission to take on the project, since the statute’s terms could have unanticipated results.

David McMillin, Esq., of Legal Services of New Jersey, told the Commission this is an issue that affects a client of Legal Services. He suggested that the Court’s decision was fairly simple. He added that the entire reason for UETA’s existence is to clarify that electronic contracts are as valid as those in writing. Mr. McMillin suggested that businesses that follow the law must not be out-competed by businesses not following the law, but added that there is really no role for the Commission to play in this area.

Acting Chairman Bunn asked whether the Commission wished to take up a project in this area, and the consensus of the Commission was that Staff should monitor for future developments, but not undertake a project at this time.

Uniform Asset-Preservation Orders Act

Jayne J. Johnson began by noting that the previous iteration of this act was known as the Uniform Asset Freezing-Orders Act but that in May 2014, the Uniform Law Commission amended the act and renamed it the Uniform Asset-Preservation Orders Act (the “UAPOA”). The primary substantive change replaces the term “freezing” with the term “preservation” in the title and throughout the body of the Act. Under the UAPOA, a party may obtain an asset-preservation order if it establishes that there is a substantial likelihood that the assets of a party against which the order is sought will be dissipated. The UAPOA has not yet been enacted in any jurisdictions but has been introduced in three states. Ms. Johnson indicated that she has conducted initial outreach with interested parties to discuss whether New Jersey law should be amended to incorporate some of the UAPOA’s provisions.

During the course of this outreach, some members of the defense bar expressed opposition to the UAPOA on the grounds that it is overbroad and burdensome. Ms. Johnson has also contacted the Uniform Law Commission and ULC advisor, Steven Richman, who expressed a desire to attend a Commission meeting during which the UAPOA is discussed. Acting Chairman Bunn suggested that any discussion regarding the UAPOA be tabled until Mr. Richman is able to attend and suggested that January might be the most realistic timeframe. Ms. Johnson added that the Administrative Office of the Courts will be providing formal comment regarding the UAPOA. Ms. Johnson stated that the commenters from the defense bar will be invited to share their concerns. She also noted that she has reached out to the New Jersey State Bar Association’s Business Section for comment.

Uniform Protection of Genetic Information in Employment Act

Vito Petitti reported on Staff’s progress regarding the project thus far, referencing the Commission’s approval in May 2014 to conduct further research and plan outreach, and the July 2014 release of a Tentative Report accompanied by outreach to potential commenters. Mr. Petitti informed the Commission of Staff’s intention to proceed with the reorganization phase of the project with a Revised Tentative Report anticipated for January 2015. He said also that Staff had received no substantial feedback from commenters thus far, but would endeavor to expand the potential list of commenters for the Revised Tentative Report.

Miscellaneous

Ms. Tharney advised the Commission that the Anachronistic Statutes bill had passed both the Senate and the Assembly unanimously and was sent to the Governor's desk. The Commission meeting was adjourned on the motion of Commissioner Long, seconded by Commissioner Bertone.