

MINUTES OF COMMISSION MEETING

May 19, 2016

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 Virginia Long (via telephone), and Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang.

Ms. Nomi Lowy, Esq., of Gibbons Law on behalf of the New Jersey Press Association, and Ms. Alida Kass, Esq., Chief Counsel, N.J. Civil Justice Institute were also in attendance.

Minutes

The Minutes of the March 2016 Commission meeting were unanimously approved on motion of Commissioner Long, seconded by Commissioner Hartnett.

Affidavit of Merit Statute

Jayne Johnson presented a memorandum discussing a recent New Jersey Law Journal article concerning the remarks of a federal judge, when ruling on a summary judgment motion in a medical malpractice claim. The judge called on the State Legislature to update the Affidavit of Merit (AOM) statute, N.J.S. 2A:53A-26 to -29, which requires a plaintiff to meet procedural requirements in order to maintain a professional malpractice action. Ms. Johnson noted that a decision in this area of law is expected from the New Jersey Supreme Court, after oral arguments were heard on March 15, in *Meehan v. Antonellis*, D-075265, A-45-14, where the plaintiff is appealing dismissal of a dental malpractice claim for failure to comply with the AOM statute.

Justice Long observed that the lines of cases decided by the New Jersey Supreme Court in this area of the law were aimed at cleaning up the AOM statute to allow for a more workable statutory scheme. She recommended awaiting the decision of the Supreme Court in *Meehan* before the Commission drafts language to further address the issues concerning the AOM statute.

Commissioner Hartnett observed that although the decision of the Supreme Court will inform the preparation of proposed draft language, the Court's decision will not impact federal review of the AOM statute. Commissioner Hartnett suggested that Staff contact the Lawyer's Advisory Committee for the District of New Jersey for comment and input, while the state decision is pending.

Chairman Gagliardi stated that the Supreme Court decision will offer further guidance and the Commission will consider this project, as Justice Long recommends, after *Meehan* is decided.

New Jersey Open Public Records Act

Susan Thatch discussed a memo regarding a potential project involving New Jersey's Open Public Records Act (OPRA). She advised the Commission that a member of the public expressed concern regarding the mandatory award of attorney's fees to the prevailing party in an OPRA dispute. She noted that OPRA is one of several statutes in which the Legislature has created an exception to the "American Rule" of allocating litigation costs. She further explained that some fee-shifting provisions provide for court discretion in making the fee award, while others, such as OPRA, stipulate that the court "shall" award attorney's fees.

Ms. Thatch stated that courts have maintained a role in implementing the statutory mandate both by determining whether a party is "a requestor who prevails" and by evaluating the reasonableness of the fee requested. She concluded that forty-five other jurisdictions have similar fee-shifting provisions in comparable public records acts, with some providing for a mandatory fee award and others providing for a discretionary fee award.

After Ms. Thatch summarized her Memorandum, she introduced Nomi Lowy, Esq., of Gibbons Law, who informed the Commission that the particular section of OPRA at issue is the teeth of the legislation, representing an incentive for document custodians to provide records timely if no exemption applies. Otherwise, the public has few options by which to obtain records.

Chairman Gagliardi asked the commissioners whether, based on previous discussions regarding policy and statutory authority, this project is within the Commission's scope. Commissioner Long articulated a concern that the present arguments are similar to those regarding fee shifting statutes, but the benefits outweigh the possibility of abuse. She acknowledged the potentially political nature of the decision but said it was possible to work in this area.

Commissioner Hartnett agreed with Commissioner Long, adding that he was not convinced that the Commission was precluded from working in this area and explaining that he was skeptical of frivolity as the basis for objection.

Laura Tharney noted an existing point of view that judges should have some discretion if there is a legitimate reason to withhold records. She said that the Commission could clarify the statute in this area.

Ms. Lowy informed the Commission that this language had been discussed in her previous work with the Legislature. Chairman Gagliardi pointed out that, because the policy vs. clarification issue is a close call, Staff should solicit input from the commissioners not present before investing additional time in the project. He advised Staff to look into the status of any pending legislation before moving forward. Commissioner Hartnett requested more information regarding the nature of the overarching controversy.

Special Needs Trust

Jayne Johnson presented the Draft Final Report proposing revisions to N.J.S. 43:16A-12.1a and a number of other statutory sections pertaining to the designation of pension beneficiaries for State-administered retirement programs, based on the Supreme Court's decision in *Saccone v. Bd. of Trustees of Police and Firemen's Retirement Sys.* She noted that, as Commissioners Hartnett and Bull suggested, the Report incorporates the language recommended by Mr. Vanarelli, Esq., counsel to the Saccone family.

After Ms. Johnson's summation of the Draft Final Report, Commissioner Long stated that while the draft language accounts for existing and successor statutes, rules, or regulations, it does not account for the possibility of a parallel statute. Commissioner Long raised the possibility that a new statute could be enacted that relates to, but is an orphan under the language presented in the Final Report. John Cannel offered the term "similar statute," which Commissioner Long said she had considered and rejected. At Ms. Johnson's suggestion to discuss the issue with the attorneys who provided comment, Chairman Gagliardi pointed out that the experts were already comfortable with the work thus far. Commissioner Long concluded that the language certainly covers existing and successor provisions.

On Commissioner Long's motion and Commissioner Hartnett's second, the Commission voted unanimously to release the project as a Final Report.

New Jersey Human Trafficking Law

Susan Thatch presented the Draft Final Report regarding the Uniform Act on Prevention of and Remedies for Human Trafficking. Ms. Thatch stated that the Draft Final Report recognized the significant and serious nature of the crime of human trafficking and lauded the New Jersey Legislature's substantial efforts to draft, implement, and enforce stringent anti-

trafficking laws. Ms. Thatch has attended meetings and events of the Human Trafficking Commission and has been working in conjunction with the newly constituted commission to provide the Law Revision Commission's research and reports on this matter for their continued consideration.

Ms. Thatch noted that the proposed revision to N.J.S. 2C:13-8(a)(1) responds to forced sexually explicit performances in the most straightforward and least invasive method. An alternative approach, however, was taken by some state legislatures, defining the term "services" as "sexual activity, sexually explicit performances or the production of sexually explicit materials." This alternative approach further expands protection to those individuals forced or compelled to produce pornographic material. Ms. Thatch stated that the Human Trafficking Commission supports the narrow clarification proposed by the NJLRC and recommends prohibiting sexually explicit materials in the main text of the statute.

Chairman Gagliardi asked whether a state survey was conducted to identify which states took the broader approach described by Ms. Thatch. She stated that a state survey was conducted and she would be able to provide the analysis and results at the next Commission meeting. Chairman Gagliardi stated that the survey results will assist further consideration of the draft language.

Commissioner Hartnett noted that the language in the existing statute N.J.S. 2C:13-8a.(1)(f) was overly broad. He provided hypotheticals where possible, unintended offenders who are not participating in human trafficking, as defined by the statute, may violate this subsection. Similarly, Commissioner Hartnett observed that the language of subsection g.3 does not provide for a "closeness in age" exception, and as a result is also overly broad. Ms. Thatch stated that she has heard of others who have taken exception with subsection (a)(1)(f).

Mr. Cannel noted that the subsections identified by Commissioner Hartnett are current provisions of the New Jersey statute and Staff's recommendations reflect language proposed by the Uniform Law Commission. Ms. Thatch added that the State Legislature updated its human trafficking laws in 2014, by passing the Human Trafficking Prevention, Protection and Treatment Act, which amended and supplemented various portions of existing law. The Act was widely applauded for its expansive and tough stance on human trafficking.

Chairman Gagliardi requested that the comments of the NJLRC Report reflect that the Commission considered the breadth and scope of the provisions identified by Commissioner Hartnett and refrained from proposing revisions, in deference to the recent enactment of human trafficking provisions by the State Legislature. Chairman Gagliardi stated that the Commission will consider the Report at the next Commission meeting.

Collateral Consequences of Criminal Conviction

Vito Petitti informed the Commission that Staff had recently learned of pending legislative action squarely impacting the project. Senate Bill 1687, which would remove certain bars to employment for convicted offenders, had been introduced and referred to the Senate Law and Public Safety Committee. Mr. Petitti noted that although there has been other relevant ongoing legislative activity in this area being monitored by Staff, S1687 would substantially amend most sections of N.J.S. 2A:168A-1 to -16, the Rehabilitation of Convicted Offenders Act (RCOA).

Mr. Petitti reviewed for the Commission the recent A1999, “Opportunity to Compete Act,” enacted in 2014; A830, which would prohibit public and private employers from discriminating against ex-convicts based on moral character; and A1864, which addresses various concerns affecting post-release employment. He informed the Commission that, based on a preliminary comparison with the Commission’s proposed revisions, the Senate bill contained substantial similarities and differences. Mr. Petitti noted that there had been no other activity regarding the bill and requested the Commission’s approval of outreach by Staff to the respective bill sponsors after a more thorough comparison. He noted also that there is no Final Report for the RCOA project, and that Staff could make available the Commission’s work thus far regarding the structure and organization, as well as substantive content.

Commissioner Long suggested that a complete comparison between the pending legislation and the Commission’s proposed revisions would be useful. Laura Tharney agreed and stated that outreach to legislators regarding the statute’s structure might also be appropriate. Commissioner Long inquired whether the Commission ordinarily performs this type of outreach at this stage of the process. Chairman Gagliardi responded that it is within the Commission’s practice to conduct outreach and if a legislator has indicated interest, we will work to assist him or her. Ms. Tharney further noted that it might make sense to reach out sooner rather than later.

Chairman Gagliardi asked Mr. Petitti to report on his legislative outreach at the June meeting and to subsequently provide a comparison between the pending legislation and the Commission’s proposed revisions.

Property Tax

John Cannel discussed his preliminary draft revisions regarding real property tax. Mr. Cannel noted that the draft is ornate because of a reluctance to generalize detailed, specific provisions. However, the draft does combine existing parallel statutes which address the same issues and must be merged. Mr. Cannel informed the Commission that this draft includes new

sections added since 1998, but that he had not yet reflected upon legislative amendments to existing sections and will do so going forward.

Mr. Cannel further explained that the draft contains italicized provisions which may prove unnecessary, but the Commission should consider each before they are removed. Mr. Cannel stated that the tax section of the New Jersey State Bar Association is interested in the project and that he has also had preliminary conversations with the New Jersey League of Municipalities. He further explained that the most contentious issue in property tax law is how to deal with nonprofit entities that have profit-making activities on their property, but the law does address educational institutions.

Commissioner Long asked whether Mr. Cannel will address the issue of nonprofit entities in his next draft, and Mr. Cannel responded that he would consider that issue later in the project's process. Chairman Gagliardi suggested that it may make sense to incorporate the Court's holding in the recent Morristown Hospital case, and Mr. Cannel agreed.

Commissioner Hartnett commented that it would be useful to highlight areas that have changed. Chairman Gagliardi agreed and thought that a memo with bullet points would be helpful. Mr. Cannel noted that the comment sections are extensive and reference the source statutes. Mr. Cannel informed the Commission that he will have additional conversations with the Bar Association and the League of Municipalities and will provide a more complete draft at the June Commission meeting.

Miscellaneous

The Commission meeting was adjourned upon motion of Commissioner Long, seconded by Commissioner Hartnett.