

## **MINUTES OF COMMISSION MEETING**

**February 15, 2018**

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); Commissioner Andrew O. Bunn; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner Ronald K. Chen; Professor Edward A. Hartnett, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attending on behalf of Commissioner Michael T. Cahill.

### **Minutes**

With minor modifications to adjust spacing between words on page 4, change “would” to “should” in the second paragraph on page 7, and to identify the Commissioners who moved and seconded the motion to adjourn the January meeting, the Minutes of the January 18, 2018, Commission meeting were unanimously approved on the motion of Commissioner Bunn, seconded by Commissioner Long.

### **Suspended License**

During the December 21, 2017, and the January 18, 2018, meetings of the Commission, Staff was asked to review N.J.S. 2C:40-26 and to provide the Commission with proposed language to ensure that a person who was arrested for driving after the end of their determinate sentence but before reinstatement of their driving privileges would not be charged under this statute.

Samuel Silver prepared a Revised Draft Tentative Report proposing a modification to the language of N.J.S. 2C:40-26(b). The proposed language directs that an individual who operates a motor vehicle beyond the determinate sentenced term of suspension, but before reinstatement, is charged with N.J.S. 39:3-40 and not N.J.S. 2C:40-25 subsection b. Mr. Silver advised the Commission that N.J.S. 39:3-10 subsection a. requires a driver with a suspended license to pay \$100 to the Motor Vehicle Commission for the restoration of any license that has been suspended or revoked pursuant to any law or regulation. In addition, he advised the Commission that he discussed the appropriate charge with a practitioner who specializes in this area of law. The certified municipal court law attorney confirmed that the appropriate charge for an individual driving prior to reinstatement of their driving privileges would be driving while suspended (N.J.S. 39:3-40).

Commissioner Long stated that she does not believe that the charge of N.J.S. 39:3-40 is the appropriate charge. She said that the statute provides that a person shall not operate a motor vehicle during the period of refusal or suspension. Once the period of suspension has concluded, she suggested that it would be more appropriate to charge the driver with a violation of a different motor vehicle statute. Commissioners Bunn and Hartnett concurred with Commissioner Long. Mr. Silver explained that currently, the suspension of the defendant's driving privileges continues until he or she pays the \$100 restoration fee. Commissioner Hartnett suggested that N.J.S. 39:3-29 might be a more appropriate charge. Under this statute, a driver's license shall be in the possession of the driver at all times when in charge of a motor vehicle. A person who violates this section is subject to a \$150 fine. The Commission expressed concern that once the court-ordered period of suspension concludes, the person should no longer be deemed to be suspended even if they have not yet taken the administrative step to reinstate their license.

Staff was asked to redraft the Draft Tentative Report to include a reference to N.J.S. 39:3-29 because although the current draft of the Report had proposed removing the criminalization of the failure to administratively reinstate the license, the Commission was concerned that the language did not go far enough to convey the position that a court-ordered suspension is finite, and once it concludes the person whose license had been suspended was in a position similar to someone who had inadvertently left their license home and was unable to produce it on the request of a police officer. The Commission suggested that, since such a person would be unable to produce a license valid on the date the ticket was issued, they would have to pay a fine of \$150, so the failure to reinstate the license would not be without a cost to the license holder.

Since the January 18, 2018, meeting of the Commission Staff had the opportunity to speak with a representative from Senator Christopher Bateman's Office. On February 06, 2018, Mr. Silver spoke with Ms. Rosanne Brown concerning S666. At the request of Ms. Brown, Staff sent a copy of the Revised Draft Tentative to Senator Bateman's office via electronic mail. As of the date of the meeting, Staff had not heard anything in response from Senator Bateman's office.

Staff will redraft the Report as requested by the Commission for the next meeting.

### **Revised Uniform Unclaimed Property Act (RUUPA)**

John Cannel discussed his Draft Tentative Report containing the Revised Uniform Unclaimed Property Act (RUUPA) as released by the Uniform Law Commission. This Report, according to Mr. Cannel, contains modifications designed to address issues specific to New Jersey law and update New Jersey's current statutes.

Mr. Cannel noted that four states have enacted RUUPA or have used parts of it in revising an older version of the Act. Every state has unclaimed property laws, which apply to all

businesses, nonprofit organizations, government entities and individuals who hold property owned by other persons. The key parties involved in the distribution and processing of unclaimed property, according to Mr. Cannel, are the apparent owner, holder, and the administrator. He noted that with a new Governor, there will likely be a new Administrator of Unclaimed Property.

New Jersey has a statute that allows a bank to sell the contents of unclaimed safe deposit boxes. Mr. Cannel stated that RUUPA allows a bank to forward either the contents of a box or the proceeds after the sale of the contents to the Unclaimed Property Administrator. There is no need, under RUUPA, to forward anything to the Unclaimed Property Administrator other than financial instruments and money. Mr. Cannel observed that New Jersey could benefit from a similar requirement. Commissioner Long concurred with Mr. Cannel's observation. As a result of the New Jersey statute, there is no need to provide for forwarding the contents of the safe deposit box to the Unclaimed Property Administrator.

Commissioner Hartnett inquired about the amount of time an individual has to seek the return of their property. According to Mr. Cannel, there is no limit placed on the amount of time within which an individual must seek the return of their property. Commissioner Long remarked that the issues set forth in the Draft Tentative Report were discussed during the January 2018 meeting and appear to be accurately set forth in the Draft Tentative Report.

Commissioner Bunn recommended that the word "lack" on page three, paragraph two, in the third sentence be changed to the word "omission." Furthermore, he requested the removal of the introductory parenthetical expression "[i]n addition" from paragraph three on the same page. Chairman Gagliardi observed that in the same sentence the word "for" should be inserted between the word "provides" and the word "an" to complete this sentence.

A motion to release the Draft Tentative Report as a Tentative Report was made by Commissioner Bunn and seconded by Commissioner Long and the Commission unanimously voted to release the Tentative Report.

### **"Residence" for Purposes of Sex Offender Registration**

Timothy Prol summarized a Draft Tentative Report regarding whether modification of N.J.S. 2C:7-2 in light of *State v. Halloran* is appropriate in order to clarify that individuals required to register must register "secondary" addresses as well as their primary domicile or residence. The *Halloran* Court concluded that the address of a secondary residence must be registered and that the failure to do so is not a *de minimis* violation.

Mr. Prol noted that the term residence is not defined in the New Jersey statutes. For the purposes of voting and taxation the term residence is the equivalent of domicile, this is not so when discussing subjects such as venue and driver's licenses. Mr. Prol noted that New Jersey places great importance on law enforcement's ability to know the location of convicted sex offenders to prevent and promptly resolve incidents involving sexual abuse and missing persons and public policy dictates that the authorities must know where a defendant resides.

The federal Sex Offender Registration and Notification Act (SORNA), according to Mr. Prol, provides for federal registration requirements for sex offenders and imposes certain responsibilities on states regarding implementation. In the 2018-2019 legislative session, S1174 which aims to revise New Jersey's Megan's Law statutes in response to the requirements of SORNA (the bill has been introduced in prior legislative sessions).

Laura Tharney explained that in an attempt to clarify the statute, Staff provided the Commission with two options. The first option required a registrant to provide the authorities with any address at which he spends more than 14 days consecutively or in the aggregate, in a calendar year. The second option required an offender to register each address at which the person resides regardless of the number of days or nights spent there.

Chairman Gagliardi questioned whether the Commission should utilize words such as "regularly resides" or "consistently resides" at a given address. If the Commission recommended a numeric formula for residence, the judiciary would ultimately have to determine the feasibility of the formula. He stressed that Staff should be mindful of the ramifications of either approach on the various actors involved in the criminal justice system.

Commissioner Long concurred with Chairman Gagliardi's observation that requiring an individual to register every address in which stay, regardless of duration, might not be practical or feasible. Commissioner Bunn suggested that perhaps New Jersey should follow the federal statute. Commissioner Hartnett questioned whether the *Halloran* Court reached the correct decision. He continued that while there is no statutory framework that can cover all scenarios involving a person's residence, the use of numbers appeared to be a logical solution.

Chairman Gagliardi expressed concern about the difficulty in quantifying the amount of time an individual spent in one location. Commissioner Long suggested a hypothetical in which an individual spends the last 13 days of December and the first 13 days of January in one location. Technically, this individual has complied with the reporting requirements while spending 26 consecutive days at this locale. She suggested that Staff conduct additional research to determine how other states are addressing this problem.

Commissioner Bell suggested a hybrid approach to the registration of a residence using both numbers and words. Commissioner Hartnett suggested that if numbers are to be used that the aggregate number must be higher than 14. Laura Tharney noted that more aggregate time could pose a problem since it could result in a registrant spending months at a particular location without registering if he or she spent every weekend there, for example. Commissioner Bunn stated that Staff should not modify the statute in such a way that it would impose impossible administrative burdens on the registrant or on the law enforcement or other personnel who have to implement the registration. He suggested that an individual who spends 14 days in the aggregate at a particular address should be required to register that address with the authorities. Chairman Gagliardi suggested that outreach to police departments may help determine the appropriate wording of the statute. Commissioner Hartnett commented that Staff should remain mindful that a wide range of individuals are subject to the registration requirements.

In preparation of a Revised Draft Tentative Report, the Commission authorized Staff to conduct additional research, to draft language setting forth a third registration option setting forth Commissioner Bell's "hybrid" approach for the Commission to review, and to conduct outreach to stakeholders.

### **Consumer Fraud Act**

Samuel Silver discussed a Memorandum reviewing the status of determinations previously made by the Commission regarding the New Jersey Consumer Fraud Act (N.J.S. 56:8-1 – 195) ("CFA). Mr. Silver sought guidance from the Commission regarding a possible statutory reorganization of New Jersey's Consumer Fraud Act as well as the latest legislative initiatives involving New Jersey's CFA.

When originally enacted in the 1960s, the New Jersey Consumer Fraud Act contained five definitions and spanned twelve sections. According to Mr. Silver the Act now contains 254 statutes and covers twenty-eight subchapters. In addition, he noted that there are thirty separate and distinct definition sections that define 186 terms. He indicated further that these new sections frequently duplicate terms already defined by the Act.

Mr. Silver also noted several substantive issues that the Courts have addressed in the absence of extensive legislative history. These issues include pre-suit demand for a refund, the extraterritorial application of the Act to nationwide class actions, fee-shifting for technical violations, and mandatory treble damages. Mr. Silver indicated that recently, legislation has been introduced to amend or codify these issues.

Mr. Silver suggested that further research and outreach in this area could determine whether it is appropriate to modify some of the potentially cumbersome and confusing language and redundancies currently present in the CFA.

Commissioner Bunn voiced his support of the project. He mentioned that modifying the Act to create a single definition section would improve efficiency and is squarely within the Commission's purview. He added, however, that modifications to the substance of the Act falls outside the scope of the Commission's mandate and should be left to the legislature. Commissioner Bunn observed that section two of the proposed statutory structure is entitled "Merchandise." The term "merchandise", according to Commissioner Bunn, is a defined term in the Act. He suggested that Staff find another term for this category.

Chairman Gagliardi pointed out that Section 6 of the proposed structural revision to the Act contained a typographical error. He requested that the title "Employment and Conditions of" be amended to read "Employment and Conditions Thereof." The Chairman indicated that this project is both worthy and challenging.

Commissioner Bell noted that the current version of the CFA does not allow discretion for attorney's fees. He indicated that the theory behind this remedial measure is to encourage aggrieved consumers to pursue these actions. In addition, Commissioner Bell pointed to open issues regarding experts, noting that it is unclear in statute as currently written and that Courts are not deciding the issue with confidence. Commissioner Bell gave the example of suing someone who is able to be his or her own expert, which could put a Plaintiff at a disadvantage or could force the Plaintiff to hire his or her own expert.

Commissioner Long noted that Mr. Silver has identified difficult, substantive issues and that there may be some substantive areas where consensus already exists and that outreach to the Department of Community Affairs or the Administrative Office of the Courts might be a good place to begin to see if that is, in fact, the case.

Laura Tharney indicated that the project could begin to focus on the restructuring and reorganizing the Act to make it more efficient and that, as a part of the outreach associated with that restructuring, Staff could potentially determine if consensus is achievable on any of the substantive issues identified by Mr. Silver. The Commission authorized Staff to move forward with this work.

### **Affidavit of Merit**

Ms. Tharney discussed a Memorandum drafted by Erik Topp, a Legislative Law Clerk, examining the holding in *McCormick v. State*. The Court, in *McCormick*, addressed the issue of

whether an individual alleging negligence in a medical malpractice case may avoid the affidavit of merit requirement by suing only the public entity and not the professionals.

Ms. Tharney stated that the *McCormick Court* held that a litigant may not circumvent the affidavit of merit requirement by suing only the public entity, rather than the licensed individual alleged to have deviated from the standard of care.

Chairman Gagliardi said that this case appears to be one in which a litigant who failed to meet the filing requirements attempted to do an “end run” around mandatory pleading requirement. Commissioner Bunn agreed, saying that the Appellate Division’s decision was clear and appropriate because the affidavit of merit requirement applies to any person or entity who seeks to bring a cause of action.

It was the consensus of the Commission that no further action needed to be taken with respect to this area of the law.

### **Open Public Meetings Act**

Legislative Law Clerk Renee Wilson discussed with the Commission the Memorandum concerning the decision of the Appellate Division in the case of *Kean Federation of Teachers v. Morell*. Ms. Wilson indicated that in that case, the Court considered two issues. The first issue was whether Kean University’s Board of Trustees violated the Open Public Meetings Act (OPMA) when it failed to promptly make meeting minutes available to the public. The second issue was whether the Board failed to provide proper notice to a terminated employee, also in violation of the OPMA. Ms. Wilson also noted that there is no legislative history that provides guidance with regard to these issues.

Chairman Gagliardi began by expressing his enthusiasm for this project. As a preliminary matter, though, he asked whether the Kean Federation of Teachers sought certification from the New Jersey Supreme Court on these issues. He noted that stakeholders who work in the public sector would expect an appeal of this decision. Chairman Gagliardi cautioned that no further action should be taken by the Commission, or Staff, on these issues until that determination is made.

The Chairman continued by identifying several potentially problematic issues with the decision. For some entities, the decision in *Morell* might compel their boards to meet more often than is currently required by statute. In a variety of circumstances, it is impractical to expect completion of meeting minutes within 45 days. In addition, the Chairman questioned whether the Court in *Morell* correctly applied the holding in *Rice v. Union County Regional High School Board of Education*. He noted that the decision in *Morell* would require a *Rice* notice to be sent

in instances where there is any discussion involving employment matters. Since almost all school business involves employment matters, a notice would have to be sent to all employees for every meeting. He indicated that a *Rice* notice should be required only in instances where the board is set to discuss the termination or transfer of an employee. The League of Municipalities and various school boards, according to Chairman Gagliardi, would likely react negatively to the *Morrell* decision.

Commissioner Long suggested that the Commission revisit the issue at the next Commission meeting to allow Staff to determine whether certification had been sought in *Morell*. Commissioner Bunn agreed that the Commission should halt action on this project until it was determined whether the parties have appealed these issues. Additionally, Commissioner Bunn noted that this could be an area which the Legislature could have an interest in taking up the issues raised.

Chairman Gagliardi agreed and indicated that, in the event certification had not been sought, conducting outreach to the Legislature, the School Boards Association, and related interested stakeholders would be an appropriate course of action to pursue.

Ms. Tharney mentioned that before reaching out to the Legislature, Staff would determine whether certification had been sought and, if not, would conduct a search to determine whether any legislation had already been introduced dealing with this matter.

Commissioner Bell mentioned that it seems unwise to mandate extra meetings just to approve minutes, as the *Morell* decision appears to require. He inquired as to whether it is possible to have approval of the minutes without meeting, perhaps by notational vote. Chairman Gagliardi indicated that a recent ruling determined that draft minutes are not public records and that it likely would not be possible to approve the minutes without having a meeting since approval of the minutes requires the approval of the school board. Commissioner Hartnett then asked whether it would be possible or beneficial to modify the statute. Chairman Gagliardi indicated that doing so would result in a fundamental change to the structure of school board operations. Further work will await the determination of the status of the case.

### **Tax Exemption for Disabled Veterans**

Ms. Tharney addressed a Memorandum drafted by Erik Topp, a Legislative Law Clerk. In his Memorandum, Mr. Topp examined the case of *Galloway Township v. Duncan*, in which the Tax Court considered the propriety and interpretation of a statute allowing veterans suffering permanent disabilities to claim a property tax exemption. The Court determined that the exemption is valid under the state constitution. Furthermore, the exemption may be claimed by any veteran who was 100% disabled if they served in “direct support” of a military conflict.



Ms. Tharney explained that the Legislature has undertaken action directly addressing the issues raised in the case, and had crafted a solution that appeared to address the issue identified in Mr. Topp's Memorandum. Accordingly, no further action will be taken on this area of the law.

### **Annual Report 2017**

Ms. Tharney distributed printed copies of the NJLRC's 2017 Annual Report to the Commission. In keeping with the Commission's statutory mandate, the Annual Report was filed with the Legislature before February 01, 2018.

### **Miscellaneous**

Samuel Silver provided the Commission with an update on the Tentative Report regarding modifications to the partnership and trade name statutes. As of February 08, 2018, Staff has conducted outreach to the Department of the Treasury, practitioners involved in this area of law, the State Bar Association, and all 21 Superior Court Clerks. Eight County Clerks have responded to Staff's preliminary contact and the NJLRC Memorandum will be discussed at the March 15, 2018, meeting of the County Clerks.

Ms. Tharney indicated that she was continuing to review the more than 5,000 bills that had been introduced so far this legislative session, and had identified introductions based on the work of the Commission. She will update the Commission when this review is complete.

### **Adjournment**

The meeting was adjourned on the motion of Commissioner Bell and which was seconded by Commissioner Bunn.