

MINUTES OF COMMISSION MEETING

April 19, 2018

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Commissioner Andrew O. Bunn; Commissioner Virginia Long (via telephone); Commissioner Louis N. Rainone; Professor Bernard W. Bell, of Rutgers Law School, attended 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.

Also in attendance were Joanne Rajoppi, Union County Clerk; Steve Peter, Somerset County Clerk; and Allen Weston, the Legislative Director for the New Jersey Association of Counties (NJAC).

Minutes

The fifth sentence in the first paragraph on page five, after the word “license” was clarified with the following additional language, “...pursuant to N.J.S. 39:3-40 as held by the *Zalta* Court.” With this language the Minutes of the March 15, 2018, Commission meeting were unanimously approved on the motion of Commissioner Hartnett, seconded by Commissioner Long.

Partnership and Trade Name Statutes

Samuel Silver discussed a Draft Final Report relating to modifications to New Jersey’s partnership and trade name statutes. This project, according to Mr. Silver, originated after the anachronistic term misdemeanor was noted during a review of the New Jersey partnership statutes. A Draft Tentative Report presented at the Commission meeting on December 21, 2017, recommended the removal of the anachronistic term and suggested modifications to the existing statutes based on the limited liability statutes. With guidance from the Commission, a Revised Draft Tentative Report was discussed during the Commission meeting of January 8, 2018. This Report recommended modernization of the partnership statutes while maintaining the purpose of the statute – the protection of creditors.

Mr. Silver confirmed that Staff reached out to each of the 21 County Clerks and had solicited comments about this project from the Department of the Treasury, the Division of Commercial Recording, and the Business Law Section of the New Jersey State Bar Association. The Constitutional Officers Association of New Jersey (COANJ), met on March 15, 2018, and furnished Staff with written comments on April 5, 2018. The New Jersey Association of Counties (NJAC) issued written comments to the Commission on April 19, 2018. Mr. Barry

Gartenberg, Esq., kindly provided the Commission with comments on April 3, and April 16. On behalf of the Commission, Mr. Silver thanked each organization and individual for taking the time to provide thoughtful comments to the Commission on this topic.

Mr. Silver took an opportunity to summarize the comments that had been received from the various organizations and individuals. The COANJ response did not recommend any modifications to the present statute that removed the Clerk's from the process of registering partnerships or trade names at the county level because it explained that they provide personal service, notarial services, and proof of filing to new businesses. Mr. Silver noted that the Department of the Treasury now offers a business records search service on its website, which allows individuals to search for business names without the need for assistance in a way that was not previously possible. Mr. Silver observed that the New Jersey Association of Counties echoed the personal service portion of COANJ's opposition to the proposed statutory change. In addition, he noted that the NJAC set forth in their written submission a concern that the statutory modifications would impact the county's annual revenue.

Barry Gartenberg, Esq., is an attorney and a member of the New Jersey State Bar, Business Law Section Board of Directors. Mr. Silver received correspondence from Mr. Gartenberg and had the opportunity to speak with him on the telephone. Mr. Gartenberg suggested that the modifications to the partnership statute that are inapplicable to corporations should also be extended to limited liability companies and limited partnerships. Further, Mr. Gartenberg suggested that a partnership whose sole act of business involved a decision to change its corporate form, be exempt from the requirements of the proposed statute. Mr. Silver advised the Commission that he recommended these changes and had incorporated them into the proposed statutory sections.

Mr. Silver advised the Commission that on April 5, 2018, Senator Patrick Diegnan, Jr., introduced S2440 entitled, "An Act Concerning Partnership Trade Name Certifications and Revising Parts of the Statutory Law." This legislation appears to be based upon the work of the Commission but it does not reflect the latest proposed modifications to the statutory language suggested by Mr. Gartenberg.

Joanne Rajoppi, the Clerk of Union County, attended the meeting as a representative of COANJ. Somerset County Clerk, Steve Peter, was also in attendance. Ms. Rajoppi began by thanking Mr. Silver for his outreach to each of the County Clerks regarding this project. She advised the Commission that COANJ does not support the modifications to the partnership statute that have been proffered by the Commission. She explained that the County Clerk's Offices provide local businesses with accessibility and personal assistance that cannot be found at the state level. This level of personal service, she said, was the reason that the Legislature left partnership and trade name filings with the counties. Ms. Rajoppi pointed out that unlike

statewide business organizations; partnerships register only in the county in which they are transacting business.

Commissioner Bunn asked Ms. Rajoppi whether COANJ had any opposition to the removal of the term misdemeanor from the partnership statutes. Ms. Rajoppi replied that the COANJ position did not address this issue. Commissioner Bunn observed that under the present statutory scheme, as a business grows, the statute requires that it file in each county in which the business operates. Commissioner Hartnett commented that he was disturbed by the penalty provision contained in the current statutes. He then asked Ms. Rajoppi whether the Clerks would object to keeping the County filing requirement if it allowed the filing to serve as the statewide registration of the partnership or trade name. Ms. Rajoppi said that the search of the name would still have to be performed by the Clerk's Office.

Commissioner Rainone indicated that it is fairly common for an entity to file a trade name and then obtain a website to promote the business. In the past, he suggested, one would go to the Yellow Pages to look for a business but technology has now developed to the point where we are all connected via the internet. Commissioner Rainone asked Ms. Rajoppi whether New Jersey should move to a statewide registration system. Ms. Rajoppi responded that such a system serves as one possibility in this area of the law. Commissioner Bunn noted that the difficulty with having similar, or identical, trade names in different parts of the state is that it could lead to confusion and implicate other statutes.

Commissioner Hartnett recognized that a County may provide a business with personalized service. He suggested that a business likely only benefits, or benefits most, from this type of personal service the first time that it is provided. He reasoned that a business would benefit by having to visit only one county in order to accomplish multiple county registrations. Commissioner Bell concurred and added that a simple electronic search would enable someone to see whether the name they wish to use has been registered in any other county in the state. Ms. Rajoppi indicated that there could be problems with individuals who have previously filed. Also, she stated that if the Department of the Treasury has a database, it can be done; however, the County Clerks prefer providing local "hands-on" service.

Laura Tharney suggested that there must be a way to accommodate a business without requiring that it filing a trade-name or partnership certificate in each county. Commissioner Bunn inquired whether the Counties have done any studies on this issue or have numbers about how many such filings each county receives during a given year. Ms. Rajoppi said that she did not have any studies regarding registration. Commissioner Hartnett expressed his understanding about preserving local filing, just not the requirement of mandatory filing in each county.

Allen Weston, Esq., advised the Commission that on behalf of NJAC he was attending the meeting as the representative of each county in New Jersey. The primary concern of NJAC was that the elimination of local filing would have a financial impact upon each county. According to Mr. Weston, decreases in revenue are generally addressed by way of increased property taxes, reduction of services, or the downsizing of staff. He opined that given New Jersey's high property taxes, counties cannot afford to lose any revenue. Commissioner Bunn asked Mr. Weston whether he had any data regarding the revenue loss that would be experienced by each county. Mr. Weston advised the Commission that he did not have revenue loss data.

Commissioner Bunn asked Mr. Weston whether it would be practical to have an optional check box to allow a business to register in each county. Mr. Silver commented that the fee does not have to change because the filing fee could be tabulated for each county in which a business wishes to register their trade name. Commissioner Bunn stated that under such a model the fees would stay the same and the process would be handled more efficiently. Commissioner Rainone recognized that the fees are a big issue; however, there must be an acknowledgment that these processes can be made easier with the use of technology.

Commissioner Bunn summarized that there is a consensus that there is no reason not to change the penalty that is contained in the statute. The Commission directed Staff to explore the idea of "home-county" registration that provided a business with the ability to expand the registration to other counties in the State.

"Residence" for purposes of Sex Offender Registration

Timothy Prol summarized a Revised Draft Tentative Report discussing whether modification of N.J.S. 2C:7-2 is appropriate to clarify that individuals subject to registration must register a "secondary" residence with the requisite authorities. Mr. Prol advised the Commission that the *Halloran* Court concluded that the address of a secondary residence must be registered with the appropriate authorities and that the failure to do so is not a *de minimis* violation of the law

In response to Chairman Gagliardi's inquiry during the March 2018 Commission meeting, Mr. Prol provided the Commission with an update regarding possible amendments any other states' registration statutes. Mr. Prol advised the Commission that with the exception of adding new crimes to their statute or making non-substantive technical modifications, none of the states with registration requirements for secondary addresses have made proposals to change the statutory language concerning the registration of secondary residences. Mr. Prol also noted that Utah, the state upon which the Commission chose to model the proposed language in this Report, had no proposed modifications, technical or otherwise, to their registration statute.

The Appendix to the Report, according to Mr. Prol, reflects the addition of sections 2 and 3. Section 2 requires individuals to register a change in their primary residence, any secondary residences, place of employment, vehicle information, or educational information within three business days. Section 3 provides that a secondary residence includes those that the registrant owns or has a financial interest in; or, where the registrant stays a total of five consecutive or ten or more days in the aggregate during a 12-month period. Laura Tharney said that Staff used the word “days” in the proposed amendment, rather than “nights” in order to include any portion of one day, to more closely follow language used in other statutes and in the Court Rules, and to clarify that the language is not limited to evenings or overnight visits. Commissioner Bunn stated that he prefers the newly proposed statutory language. Commissioner Long observed that the proposed language removes ambiguity from the statute though advised the Commission that she was still struggling with the language on this topic.

Mr. Prol advised the Commission that he received a comment from a member of the public who expressed his concern that Megan’s Law was fundamentally unfair to offenders and that the protective features of Megan’s Law have been replaced by Parole Supervision for Life (PSL) and the “Sex Offender Monitoring Act” (SOMA).

Commissioner Hartnett inquired whether some individuals, who are subject to these Acts, may currently have more limited restrictions, but that the proposed amendments may be adding additional burdens on them. In addition, he asked about the manner in which individuals who were subject to the Acts were classified. John Cannel replied that the individuals are evaluated based on their personal history and are classified using a tier system. Commissioner Hartnett asked whether the only people who would be impacted by the proposed changes were the least serious offenders. Commissioner Long stated that she did not know and asked that Staff obtain an answer to this question. Commissioner Bunn indicated that he would be troubled if these restrictions were being imposed solely upon the lowest-tier individuals previously not subject to these requirements.

Staff was directed to conduct research regarding the offenders affected by this proposed modification and to bring the project back at the May meeting and the Commission would then revisit the proposed language before releasing the Report.

Marital Status

Timothy Prol summarized a Draft Tentative Report relating to the definition of Marital Status within New Jersey’s “Law against Discrimination” (“LAD”) based on the 2016 New Jersey Supreme Court decision in *Smith v. Millville Rescue Squad*. The Court, in *Smith*, determined that the phrase “marital status” included those who are single, married, and those who are in transition from one state to another.

Mr. Prol advised the Commission that during the course of outreach, he spoke with Stacey Hawkins, an Associate Professor at the Rutgers School of Law in Camden. Professor Hawkins commented that *Smith v. Millville* is the law in the State of New Jersey. Codification, she observed, would make the law more accessible to *pro se* litigants. In addition, Mr. Prol heard from stakeholders from the New Jersey State Bar Association who concentrated in the area of labor and employment law. These individuals advised Mr. Prol that the holding in *Smith* is clear and did not require additional clarification. They further advised Mr. Prol that if the Commission was inclined to codify this language that they would be willing to contribute to any proposed changes.

Mr. Prol discussed with the Commission the proposed definition of marital status to be added to New Jersey's LAD statute. Commissioner Bunn suggested that the language in the latter portion of the sentence be amended to read, "... from one such state to another." Commissioner's Bell and Rainone concurred with Commissioner Bunn's recommended change to this portion of the definition. Commissioner Long suggested that the first conjunction, "or," should be removed from the definition.

Commissioner Hartnett questioned whether the current definition is limited to marital statuses that are currently imaginable. He pondered whether the proposed definition takes into consideration living arrangements such as "cohabitation", "communes", or "polygamy." Commissioner Rainone noted that no matter what the label it necessarily captures one's marital status. Commissioner Bunn concurred with Commissioner Rainone's observation. He also noted that lay individuals, such as compliance officers, require a definition of marital status. Commissioner Hartnett suggested that it may be beneficial to not define marriage and allow the definition to evolve by way of the common law. Commissioner Bell said that the proposed definition was a reasonable one that appears to comport with contemporary standards.

Commissioner Long suggested that the word "means" be removed from the proposed definition and replaced with the word, "includes." John Cannel noted that the use of the word "includes" would leave the definition open-ended. Commissioner Bunn stated that the term "means" could provide more useful guidance to lay people and that if the definition is not closed at both ends, the benefit could be lessened. Commissioner Rainone remarked that he preferred the word "means" in the definition because it is transactional. John Cannel suggested that both words appear in brackets in the Tentative Report to facilitate comments from stakeholders regarding which word they prefer.

With the modifications to the proposed definition, on a motion by Commissioner Bell, seconded by Commissioner Hartnett the Commission voted unanimously to release this project as a Tentative Report.

Standard Form Contracts

John Cannel discussed his Memorandum relating to standard form contracts. He noted that the Commission had published a Report on Standard form Contracts in 1998 that he believed was a good and innovative project. The 1998 Report recognized that the overwhelming majority of contracts are not negotiable and recommended the replacement of the current law applicable to those contracts with a statute that more accurately reflected their true nature. Mr. Cannel suggested that this topic is worthy of additional, updated, consideration by the Commission to support pending legislation in this area.

Commissioner Hartnett observed that the addition of Section 7.5, entitled “Primary Terms” is crucial to this project. He stated that it is important to make clear that the notions of contractual illegality still apply to these transactions. Mr. Cannel observed that comments on this section indicated that the section should apply to consumer transactions. Laura Tharney commented that additional comments from third parties would be sought by Staff.

With regard to Section 6 of the Report, entitled “Cancellation of Standard Form Contracts”, Commissioner Hartnett observed that consumer cancellation of these contracts may pose a problem when dealing with the purchase of computer software. Laura Tharney noted by way of example that an individual may download and use a computer tax-preparation program and then return it after its initial use. Commissioner Bunn suggested that a “substantial use” standard may ameliorate such problems. Mr. Cannel concurred and noted that it is necessary to formulate a standard for the cancellation of standard form contracts, including those for computer software.

Commissioner Hartnett commented that Section 9 of the Report, entitled “Secondary Terms: Arbitration Clauses”, may be pre-empted by the Federal Arbitration Act (FAA). Commissioner Bunn opined that the New Jersey Supreme Court’s decision in *Atalese v. U.S. Legal Services Group*, will not last. Commissioner Long concurred with Commissioner Bunn’s assessment of *Atalese*. Mr. Cannel advised the Commission that the Report was based on the most current language available to Staff.

In Section 11, pertaining to Secondary Terms, Commissioner Hartnett questioned the application in situations in which there is damage to real or personal property. By way of example, if a back-up power unit does not operate properly, the contractor who installed the device may be liable for monetary damages. Commissioner Hartnett also questioned why the Parole Evidence Rule should apply, suggesting that if a deal was made during the course of the contractual negotiations that this evidence should be admitted as part of the trial court record.

Laura Tharney advised the Commission that there are bills currently pending in both houses of the New Jersey Legislature which address standard form contracts.

Sidewalk Tort Liability

Laura Tharney asked that this matter be adjourned to the May 24, 2018 meeting of the Commission.

Definition of “Material” in the Insurance Fraud Statute

Samuel Silver discussed this project that arose from the fact that the term “material” is not defined in the New Jersey Insurance Fraud statutes. In *State v. Goodwin*, the New Jersey Supreme Court considered whether an insurance carrier was required to rely, to its detriment, upon a defendant’s material misrepresentation of fact for criminal liability to attach under the insurance fraud statute.

After discussing the facts of the case, Mr. Silver stated that at the trial court level the defendant was found not guilty of each crime with the exception of insurance fraud. The State appealed the trial court decision and the Appellate Division reversed the defendant’s conviction for insurance fraud, determining that because the insurance company did not rely upon the material misrepresentation proffered by the defendant, there was no actual harm.

The New Jersey Supreme Court focused on the meaning of the word “material.” The Court examined the definition of this word in the following contexts: dictionary definition, the perjury statute, the federal false statement statute and the model jury charge on this subject. Mr. Silver noted that the lack of a definition for the term material seems to be contrary to the legislative intent to aggressively confront insurance fraud and punish individuals who engage in such behavior. He advised the Commission that the Supreme Court directed all future litigants to the Model Jury Charge for clarification of the word material as it appears in the insurance fraud statute. The language of the model jury charge, therefore, is reflected in the proposed clarification to this statute.

John Cannel advised the Commission that he had qualms about the decision of the Court and opined that the words used for “material” are broader than those used in other statutes and do not include a reference to a fraud perpetrated to obtain a lower premium from an insurance company. Laura Tharney observed that the language used approvingly by the Supreme Court is based upon the model jury charge on this topic.

John Cannel set forth a hypothetical involving an insurance applicant who lives in one New Jersey County but advises the insurance company that he lives in another. This, according

to Mr. Cannel, is material and could affect the premium this customer is charged by the insurance company. He advised that he was not sure whether this type of behavior was covered by the present statute, but suggested that he should be. Commissioner Rainone commented that everything “might” affect an insurance company’s decision, but that in order for the statute to apply, the misrepresentation must be material. He distinguished a material misrepresentations regarding residence from a mistake made by a claimant regarding the color of the car involved in an accident – the former being material and the latter not.

Commissioner Bunn noted that New Jersey’s statutes concerning insurance fraud compel insurance companies to report instances of fraud. He continued that the statutes are designed to cover material misrepresentations made by a claimant. According to Commissioner Bunn insurance fraud is a public policy question because ultimately, the citizens of the State of New Jersey are the ones who must pay higher premiums as a result of the fraud perpetrated by others.

Commissioner Bunn observed that the issue of whether to pay a claim, the quantum of the claim to be paid, and the amount of the premium to charge were material issues. Commissioner Rainone suggested that this language be added to the statute. Laura Tharney advised the Commission that Staff would provide the Commission with some draft language that reflected the Commission’s guidance in this area.

Miscellaneous

Ms. Tharney stated that she completed her review of the bills introduced in the current legislative session. Presently, there are eleven Commission projects that are the subject of bills pending in the New Jersey Legislature.

Ms. Tharney also advised the Commission that she had a meeting with Assemblywoman Quijano’s Chief of Staff to provide information about the Commission since the Assemblywoman, as Chair of the Assembly Judiciary Committee, is now an ex-officio Commissioner.

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

The next Commission meeting is scheduled to be held on May 24, 2018, at 4:30 p.m.