

MINUTES OF COMMISSION MEETING

June 21, 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 Andrew O. Bunn; Commissioner Virginia Long (via telephone); Commissioner Louis N. Rainone; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner Ronald K. Chen; and Professor Edward A. Hartnett, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang.

Laura Tharney introduced the Commissioners to the legislative law clerks and interns working with the New Jersey Law Revision Commission during the summer of 2018. Chairman Gagliardi, on behalf of the Commission, welcomed Justin Reilly, Wendy Llewellyn, Rachael Segal, Eileen Funnell, and Nicholas Tharney, and advised each that the Commission is looking forward to hearing from them during their time with the Commission.

Minutes

The Minutes of the May 24, 2018, Commission meeting were unanimously approved on the motion of Commissioner Bunn, seconded by Commissioner Bell.

Suspended License

Samuel Silver discussed with the Commission a Draft Final Report setting forth modifications to the language of N.J.S. 2C:40-26(b). Mr. Silver noted that the issue presented to the Appellate Division in *State v. Torella* was whether criminal charges could be brought against a defendant pursuant to N.J.S. 2C:40-26(b) when the act of driving occurs beyond the determinate, court-imposed term of suspension, but before reinstatement, while the driver continued to be administratively suspended by the Motor Vehicle Commission (“MVC”) – commonly referred to as the “gap time.” He advised the Commission that the statute currently criminalizes the operation of a motor vehicle only if the operator is serving the court-imposed term of suspension and not thereafter.

In response to the direction of the Commission, Mr. Silver confirmed that the proposed statutory language in the Draft Final Report clarifies the penalty that may be imposed by a Court where the act of driving occurs beyond the determinate, court-imposed term of suspension, but before reinstatement of the driver’s privileges by the MVC. The proposed statutory language provides that a defendant who operates a motor vehicle under the aforementioned circumstances may be charged with being an unlicensed driver pursuant to N.J.S. 39:3-10.

Outreach was conducted by Staff to determine whether it would be beneficial to modify the statute. Comments were sought from the following organizations: the New Jersey Municipal Prosecutor's Association; each County Prosecutor; the Association of Criminal Defense Lawyers; the New Jersey State Bar Association; the Office of the Public Defender; the New Jersey Police Traffic Officer's Association; experienced practitioners; and Senator Christopher Bateman.

Mr. Silver noted that the County Prosecutors agreed that it would be appropriate to change the current statute but disagreed as to the type of changes. Support was split between the two offices that responded to Staff's inquiry into support for the revision suggested by the Commission, and support for the criminalization of the act of driving before reinstatement as set forth in S666, the legislation introduced by Senator Bateman.

Commissioner Long inquired whether Senator Bateman's Office issued a response to the Commission's Report. Mr. Silver advised the Commission that Staff had not yet received a reply from the Senator's Office on this topic. Chairman Gagliardi asked whether Senator Bateman's bill would criminalize the operation of a motor vehicle after the court-imposed term of suspension but before the reinstatement of the individual's driving privileges. Mr. Silver confirmed that under S666 the operator of a motor vehicle during the "gap time" would be charged with a crime of the fourth degree.

Chairman Gagliardi asked the Commission whether the criminalization of this behavior, as set forth in S666, leads the Commission to reconsider its position on this issue. In response, Commissioner Long asked whether the proposed recommendation involves a policy issue. Laura Tharney suggested that by addressing this issue, the Commission is operating within its mandate to address a perceived problem with a statute that was raised by case law. Commissioner Bell said that he does not believe that this is a policy issue beyond the purview of the Commission. Commissioner Long explained that the division among the prosecutor's offices gave her pause, and that she wanted to raise the issue for consideration by the Commission before the release of the Report. Ms. Tharney noted, from the Staff perspective, the challenge of interpreting limited feedback, and fact that after receiving responses from only two of the 21 county prosecutors, it was not clear where the balance of the support might lie. Chairman Gagliardi and Commissioner Bunn agreed with Commissioner Bell that this was not a policy issue and that this topic is within the Commission's statutory purview.

Commissioner Hartnett recognized that Staff's recommendation would essentially overrule *State v. Zalta* and its progeny. To ensure that an individual is not criminally charged under N.J.S. 2C:40-26(b), however, he suggested further modification to the proposed statutory language. Commissioner Hartnett suggested that the language in question be amended to state that operating a motor vehicle beyond the determinate sentence of suspension for the violations

set forth in the statute, but before reinstatement of one's license, is not a violation of this subsection. Commissioner Bunn agreed with the language proposed by Commissioner Hartnett. He also added that he would prefer to do away with the "gap period" and would automatically reinstate a defendant's license after the court ordered period of suspension, reasoning that the requirement that fines be paid prior to the reinstatement of one's license has a disparate impact and financially burdens individuals for sentences that have already been completed. Commissioner Bell concurred, adding that the issue of unpaid fines preventing the reinstatement of a person's driving privileges and possible incarceration merits attention.

With the addition of the language recommended by Commissioner Hartnett, along with reference to the observations made by Commissioners Bunn and Bell regarding the impact of administrative suspensions on economically disadvantaged drivers, and on the motion of Commissioner Long, which was seconded by Commissioner Bunn, the Commission unanimously voted to release the project as a Final Report.

Misdemeanor and High Misdemeanor

Samuel Silver discussed a Draft Tentative Report recommending modifications to the New Jersey statutes that make a specific reference to the term "misdemeanor" or "high misdemeanor". He said that this project came to the Commission's attention during a review of the New Jersey partnership statutes, and noted the prevalence of the term misdemeanor outside of the Code of Criminal Justice.

The Code of Criminal Justice ("the Code"), Mr. Silver noted, was enacted to forbid, prevent, and condemn conduct that unjustifiably and inexcusably inflicts serious harm on individual or public interests. It embodies the constitutional precepts of fundamental fairness and due process that are designed to provide the citizenry with fair warning of prohibited conduct and the sentences authorized to be imposed by the State of New Jersey. In addition, the Code recognizes the existence of "non-Code" offenses and a method to translate these offenses into the sentencing scheme set forth in the Code.

Pursuant to the Code, a misdemeanor will generally be treated as a fourth-degree offense that is punishable by up to eighteen months in prison and a \$10,000 fine. Similarly, a high misdemeanor will be treated as a third-degree offense punishable by up to five years in prison and a \$15,000 fine. Mr. Silver stated that the New Jersey statutes contain a combined 284 references to the terms "misdemeanor" or "high misdemeanor," spanning 44 titles and 1 appendix. A list of the titles that contain the term misdemeanor, according to Mr. Silver, are set forth in the Appendix to the Report.

The Commission was advised that Staff reviewed the statutory references to the term misdemeanor and placed each reference in one of six distinct categories. The categories are: no action; conform language; remove penalty; substitute degree of crime; reference the Code; and repeal the statute. A quick reference guide to the proposed modifications is also set forth in the Appendix. Mr. Silver advised the Commission that a review of each statute, along with proposed changes, is also contained in the Appendix. Ms. Laura Tharney added that the larger Appendix is available on the NJLRC website. Finally, Mr. Silver acknowledged the breadth and depth of knowledge that John Cannel brought to this project, reviewing each of the 284 statutory references and providing insight and direction with respect to the treatment of each one.

Commissioner Bunn inquired whether this project would be presented as an omnibus bill. Laura Tharney responded that, unless the Commission objected or some reason developed during the course of the work moving forward, it could be done that way. Doing so, she added, would be similar to the manner in which the projects involving pejorative terms were handled, since those involved the modification of statutory terms across numerous titles. She also advised that each proposed statutory amendment is contained in the larger Appendix on the NJLRC website, and that it was anticipated that Staff would use the Appendix to engage in targeted outreach to interested shareholders, sending each potential commenter the statutory sections within their area of knowledge and experience. Ms. Tharney requested authorization from the Commission to proceed in this manner and the Commission approved Staff's proposed method of outreach.

The Commission engaged in a brief discussion regarding the classification of each statute into the six categories. Commissioner Bell asked how Staff determined the degree of crime to substitute in place of the term misdemeanor or high misdemeanor. Mr. Cannel answered that the Code recognizes that high misdemeanors are equated to third degree crimes, while misdemeanors are the equivalent of fourth degree offenses. Each statute was therefore reviewed and cross-referenced with the Code, and the appropriate substitution was made for each reference. It was noted that an individual review of each statute was required since there were instances in which Staff's recommendation departs from this default method of replacement, and those instances would be specifically brought to the attention of commenters for feedback.

Commissioner Hartnett observed that the category "Remove Reference to Penalty" does not seek to "remove" the penalty; rather, the recommendations contained in this section appear to remove the classification of misdemeanor or high misdemeanor from each of these statutes. The Commission asked Staff to amend this heading in the Appendix to reflect the proposed heading recommended by Commissioner Hartnett.

With the amendment to the Appendix recommended by Commissioner Hartnett and on his motion, seconded by Commissioner Bunn, the Commission unanimously voted to release the project as a Tentative Report.

Standard Form Contracts

John Cannel discussed a Revised Draft Tentative Report relating to Unclaimed Property. In response to the initial Draft Tentative Report, Mr. Cannel received a detailed response from the Office of the Administrator of Unclaimed Property. In the response, the individuals responding on behalf of that office advised Mr. Cannel that it was their belief that the Revised Uniform Unclaimed Property Act (RUUPA) did not contain substantive improvements to the New Jersey law.

According to Mr. Cannel, the Office of the Administrator of Unclaimed Property found that the substantive provisions that had been added to the RUUPA by the New Jersey Law Revision Commission would, however, be useful additions to the New Jersey law. The first of those substantive changes simplifies the handling of the contents of safe deposit boxes as set forth in the Report. The second provides for the sale of abandoned real property and the transfer of the proceeds to the Administrator.

Mr. Cannel confirmed that the language that appeared in the initial Draft Tentative Report relating to safe deposit boxes and the sale of abandoned real property had been included in this Report. Commissioner Rainone asked Staff whether tangible, but not real, property was covered in the recommendations. Mr. Cannel confirmed that tangible property is not, and has never been, included in any variant of the Uniform Act with the exception of what is found in safe deposit boxes. Noting the language in the report regarding “unclaimed real property,” Commissioner Rainone mentioned to Staff that he would like to provide language to supplement the language set forth in the Report.

With the addition of the language proposed by Commissioner Rainone and on the motion of Commissioner Bell, seconded by Commissioner Rainone, the Commission unanimously agreed to release the work as a Tentative Report.

Definition of “Material” in the Insurance Fraud Statute

In *State v. Goodwin*, the New Jersey Supreme Court considered whether an insurance carrier was required to rely, to its detriment, on a defendant’s material misrepresentation of fact for criminal liability to attach under the insurance fraud statute. The term “material” is not, according to Samuel Silver, defined in the New Jersey Insurance Fraud Statutes. The lack of a formal definition of “material” in the Code of Criminal Justice (“the Code”) served as the impetus for the Commission’s involvement with this project.

During the May 24, 2018 Commission meeting, Commissioner Bell suggested that material should be defined *in relation to* each specifically enumerated criminal offense and should be material to those particular allegations of fraud. The recommendation of Commissioner Bell regarding the definition of material formed the basis of the Staff's Revised Draft Tentative Report.

Commissioner Long expressed her support for the language proposed by Commissioner Bell. She said that this language adds clarity to the statute. Commissioner Bunn concurred with Commissioner Long's assessment of the proposed language and asked whether the term "insurance company" was defined in the Code. Mr. Silver advised the Commission that the term is the first term defined in the insurance fraud statute. Commissioner Bunn stated that the definition of this term is important because it is essential for a party to be aware of potential criminal liability.

Commissioner Hartnett inquired about the necessity of defining "material" since the term has been defined by the New Jersey Supreme Court and is now the law. Commissioner Bunn answered that insurance companies are statutorily obligated to report behavior that they believe violates the insurance fraud statutes. It is, therefore, important to have legislative clarity when it comes to the terms associated with the criminal statutes because they are being interpreted by individuals associated with compliance who may not have legal training.

On the motion of Commissioner Bell, seconded by Commissioner Long, the Commission unanimously voted to release this project as a Tentative Report.

Meaning of "Harassment" in the New Jersey Code of Criminal Justice

Rachael Segal, a Legislative Law Clerk with the Commission, discussed a Memorandum analyzing the New Jersey Supreme Court's decision in *State v. Burkert*. At issue in *Burkert* was whether the creation of "lewd" flyers that seriously annoyed the subject it portrayed was constitutionally protected free speech, or whether it was criminal harassment pursuant to N.J.S. 2C:33-4(c).

Ms. Segal briefly explained that the defendant, Burkert, downloaded photos of a colleague and wrote "unprofessional, puerile, and inappropriate" dialogue on each photo and brought them into the workplace. Thereafter, the victim filed three complaints against the defendant charging him with harassment. The defendant was found guilty and the Appellate Division reversed the conviction. The Supreme Court granted the State's petition for certification.

Ms. Segal advised the Commission that the New Jersey Supreme Court determined that they must construe a statute that criminalized expressive activity in a narrow manner in order to avoid any conflict with the constitutional right to free speech. After reviewing the manner in which other jurisdictions addressed this issue, the Court held that the vaguely and broadly worded standard in N.J.S. 2C:33-4 did not put a reasonable person on sufficient notice of the kinds of speech that the statute proscribes and that its vagueness created undue discretion for prosecuting authorities to bring charges related to permissive expressive activities. She further noted that, in *Burkert*, the Court conformed the statute to the Constitution in a manner that they believed reflected the intent of the Legislature. To do so, the Court found that the legislative intent was to address harassment by action rather than through communication. According to Ms. Segal, such a reading required the Court to narrowly construe the terms “alarm” and “annoy.”

The Supreme Court construed the terms “any other course of alarming conduct” and “acts with purpose to alarm or seriously annoy” as repeated communications directed at a person that reasonably put that person in fear for his safety or security or that intolerably interfered with that person's reasonable expectation of privacy. Ultimately, the Court determined that the statute was never intended to protect individuals against common stresses, shocks, and insults of life that come from exposure to crude remarks and offensive expressions, teasing, rumor mongering, and general inappropriate behavior. Ms. Segal also drew the Commission's attention to (a) the fact that the statute, when passed in 1978, meant to cover, among other activities, the making of obscene telephone calls and (b) that the Model Penal Code section 250.4, on which the statute was modeled, included the language of “conduct serving no legitimate purpose of the actor.”

Commissioner Rainone commented that he found it unusual in an age of “social media” that this behavior was conducted through the distribution of a “flyer.” Commissioner Bell noted that transgressions that occur through use of the internet may be prosecuted using the cyber-bullying statutes. Commissioner Hartnett added that the statute would not be unconstitutional had the Court chosen not to insert their perspective on what the legislature intended in this statute. Commissioner Bell observed that the Court engaged in “judicial surgery” to arrive at a definition of harassment. Commissioner Bunn suggested that the Supreme Court construed the statute in a way that it was not written in an effort to save it. The task of clarifying this statute, he concluded, is therefore within the purview of the Commission; noting that this a difficult, but worthwhile, project.

Commissioner Bell questioned whether civil remedies might provide a claimant with relief from harassment while avoiding interpretations that might abridge a person's freedom of speech. Commissioner Bunn answered that civil claims, such as intentional infliction of emotional distress, require physical illness, expert testimony, and are governed by the statute of limitations. These types of claims, he continued, fail more often than they succeed. Commissioner Rainone added that civil actions require a plaintiff to quantify damages which

may be elusive or unquantifiable. Commissioner Bell asked whether the statute could be defined in a way to protect the First Amendment if it was limited solely to injunctive relief. John Cannel responded that injunctive relief, in the context of a criminal case, may result in the deprivation of an individual's right to own or carry a gun. Thus, according to Mr. Cannel, returning the Commission to the question of whether the speech was in fact protected by the First Amendment.

The Commission authorized Staff to conduct additional research and outreach in an attempt to define harassment against the backdrop of the Freedom of Speech set forth in the First Amendment.

Uniform Powers of Appointment Act (UPAA)

Justin Reilly, an intern with the Commission, discussed a Memorandum that both he and Eric Topp, a Legislative Law Clerk, had worked on during their time with the Commission. The Memorandum examined the applicability of the Uniform Powers of Appointment Act (UPAA) to the current New Jersey statutes.

According to Mr. Reilly, powers of appointment generally allow the owner of property to name a third party who can be given the power to direct the distribution of that property among a class of beneficiaries. This power of appointment is a long-standing method of estate planning that allows an individual to pass the authority to distribute property to another without entirely relinquishing control over it.

In 2013, the Uniform Law Commission created the Uniform Powers of Appointment Act (UPAA) in an effort to establish a national standard of comparable statutes. The UPAA defines the power of appointment as, "the authority... to designate recipients of beneficial ownership interests in, or powers of appointment over, the appointive property." The UPAA is, Mr. Reilly explained, predicated on the Third Restatement of Property, Wills and other Donative Transfers.

The UPAA has been enacted in eight states and introduced in two more in 2018. Commissioner Bunn asked whether Florida was one of the States that has either introduced or enacted the UPAA. Mr. Reilly said that Florida is not among the states that has introduced or enacted the UPAA.

In New Jersey, there is a patchwork of statutes and common law that govern the powers of appointment; most of this governing case law dates from the first half of the Twentieth Century. Although there has not been a major issue with the existing law in this area, the goal of the UPAA is to establish a national standard of comparable statutes on this topic.

Commissioner Hartnett expressed some skepticism, while conceding that it was worthy of review. John Cannel stated that the uniformity of the powers of appointment across the nation would be worthwhile. Laura Tharney noted that Staff looks forward to the opportunity to discuss this issue with Commissioner Bertone, who practices extensively in this area of law.

Ms. Tharney stated that it is traditionally the practice of the Commission to move forward with projects issued by the Uniform Law Commission in light of the NJLRC's statutory mandate and asked if the Commission had any objection to proceeding with this project. No objection was raised to Staff conducting additional research and outreach relative to this project.

Miscellaneous

Laura Tharney advised that, on June 14, 2018, she appeared before the Assembly Women and Children Committee and testified in favor of A2767 (which amends certain provisions of the sexual assault statute). The bill was unanimously reported out of committee, but, at this time, there is no companion bill pending in the Senate.

A1050, which revises the equine animal activities law in accordance with the recommendations of the Commission to clarify responsibility and liability issues, was unanimously reported out of the Assembly Agriculture and Natural Resources Committee on May 10, 2018, and on May 31, 2018, the identical bill, S2037, was transferred to the Senate Environment and Energy Committee.

Adjournment

The meeting was adjourned on the motion of Commissioner Hartnett, which was seconded by Commissioner Bell. The next Commission meeting is scheduled to be held on July 19, 2018, at 4:30p.m.